



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU

(CORAM: AKIWUMI, PALL, J.J.A. & BOSIRE, AG.J.A.)
CRIMINAL APPEAL NO. 100 OF 1996

BETWEEN

PAUL KARANJA NJOROGE APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the Judgment of the High Court of Kenya at
Nakuru (Justice Rimita and Lady Justice Ondeyo)
dated 22nd November, 1996
in
H.C.CR.C. NO. 276 OF 1993)

JUDGMENT OF THE COURT

This is a second appeal from the judgment of the Senior Resident Magistrate at Nakuru, C. M. Rinjeu, in which he convicted the appellant, Paul Karanja Njoroge, after a trial, of seven counts of robbery with violence contrary to S.296(2) of the Penal Code. his first appeal to the High Court was dismissed in its entirety on 22nd November, 1996, by a bench of two Judges comprising of D. M. Rimita and S. C. Ondeyo. In both his first appeal and this appeal, the appellant has raised the question of the correctness of his identification as one of the people who committed the seven robberies complained about. Before we deal with that issue we propose to set out, in summary, the background facts.

On 15th May, 1991 at about 7.30 p.m. Fredrick Maina Mbogo (P.W.7), a Nakuru businessman, was in a place called Free Area, in Nakuru, with his driver, one Paul Kimani Mutitu (P.W.9). They travelled there in motor vehicle registration No. KYR 365, a Mitsubishi pick up which was owned by P.W.7. As they drove along they unfortunately got stuck in a muddy section of the road. Before they could come out of it they were surprised by a gang of six people, one of whom went and stood in front of the motor vehicle with his back facing P.W.7 and his driver, presumably to block their way. The second one pointed into the motor vehicle what appeared to P.W.7 and a pistol, and shouted a command to P.W.7 to move to create room for him in the driver's cabin. There was a third person who also ordered the driver to move to the centre. The two men squeezed themselves into the driver's cabin and thereby sandwiched P.W.7 and his driver, P.W.9 One of the men took charge of the motor vehicle. He drove it in the direction of Ndondori forest. There they dropped P.W.7 and his driver after tying their hands and legs together, and they drove off.

In his evidence before the trial court P.W.7 stated that he was able to identify the appellant at the

time he forced himself into the motor vehicle using the courtesy light. It was that light which aided his identification of the appellant, he said.

It was also P.W.7's evidence that before the gang members left, they rummaged his pockets and took Kshs.2,500/= in cash which he had, together with his wrist watch, identity card and other items.

P.W.7 and his driver remained in the Ndongori forest for some time before they could free themselves. When they finally did, they walked to Ndongori trading centre from where they contacted the police at Nakuru by telephone and made a report of the robbery. The police circulated information about the robbery to nearby police stations and police officers who were on mobile duties. Among those who were notified was Inspector of Police Eunice Muthoni (P.W.6). She was then the car commander of police motor vehicle registration No. G.K. 164, and with her were other police officers among them No.51678 PC. John Nzau (P.W.8). They were informed about the robbery, for the first time, at about 11.37 p.m. There was a second report to them which gave the number of occupants in P.W. 8's pick up which had been stolen and that they were armed with dangerous weapons, among them firearms. P.W.6 and her companions started looking out for the pick up.

In the meantime at about 2.30 a.m. on 16th May, 1991, a gang of robbers, who arrived in a motor vehicle, surprised pump attendants at the Hyrax Hill Petrol Station in Nakuru town. They ordered the pump attendants to surrender all the money they had or else they would be dealt with harshly. The attendants were robbed of varying sums of money. The attendants were Gerald Murimi Wango (P.W.1), Patrick Kariuki (P.W.2), and Allan Kingori Kago (P.W.3). Both P.W.2 and P.W.3 testified that they were unable to identify any of their assailants. P.W.2, however testified that the motor vehicle they arrived in was a pick-up, had two occupants in the driver's cabin and four others at the back. He was sure that at least one of the men was armed with a firearm which he pointed at him to force compliance with his demands. P.W.3 testified as much.

P.W. 1, on the other hand, testified that he was able to identify at least two of their attackers by the electric light which was on at the petrol station. He testified that the appellant was one of the two people he saw on that night. He further testified that as soon as the robbers had left he saw a police car which he stopped and informed the police officers in it of the robbery at the petrol station. Coincidentally the car was the same one P.W.6 was in charge of. As we stated earlier P.W.6 had already been notified that P.W.7 had been robbed of his pick up.

The robbery at Hyrax Service Station was preceded by a similar one at Kihara Service Station. In that robbery two pump attendants and a watchman who were on duty there were surprised by gangsters who were armed with pistol and an axe, among other objects. They ordered the attendants to lie down, which they did. The gangsters rummaged through their pockets and took varying amounts of money from them. They were however, unable to identify any of their assailants even though electric lights were on at that petrol station.

It would appear to us that after the robbers left Hyrax Petrol Station they headed towards Bahati. P.W. 6 got information to that effect and she decided to pursue them with her crew members. They caught up with a motor vehicle reasonably answering the description of P.W.7's pick up. It had two occupants at the back and others in the cabin. The motor vehicle was driven off at high speed in an attempt to escape from the police officers. However, the police opened fire, initially with a view to warning the occupants of that pick-up to stop, but when they had refused to do so the policemen aimed and fired several shots direct at the pick-up which moved a short distance ahead and overturned. The person who was driving the motor vehicle died instantly inside it. There was a second person who was trapped underneath the motor vehicle after it overturned but he was still alive. He had three bullet wounds on his left arm. He was the appellant. Both P.W.6 and P.W. 8 testified that other people who were in the same motor vehicle escaped. The appellant was arrested and was later charged, tried and convicted of the seven counts of robbery with violence as we stated earlier.

It was the prosecution case at the trial that the appellant was involved in robbing P.W.6, P.W.7 and the pump attendants at both Kihara and Hyrax Petrol Stations, a fact which the appellant denied. His case

which both the trial and the first appellate courts rejected, was that at the time of the alleged robberies he was at Bahati and could not, therefore, have been present at the various locus in quo of the robberies. In an unsworn statement, he stated that he was not in the pick up which overturned, but only happened to be along the Bahati road when the pick up overturned and accidentally fell on him.

As we stated earlier the main issue raised by this appeal is identification. Counsel for the appellant Mr. Konosi, submitted before us, inter alia, that evidence is lacking to show the appellant's involvement in the robberies. He further submitted that the testimony of P.W.7 and P.W.1, who said that they identified the appellant, was merely dock identification considering that no identification parade prior to the trial was held to test their identification of the appellant. We respectfully agree. The police having not held identification parades respecting the identification of the appellant by the two prosecution witnesses prior to him being charged, their evidence in that respect is worthless. The appellant was not recognized by the witnesses. They clearly stated in their respective testimony that they did not know the appellant before the robberies complained of. An identification parade was therefore necessary before their testimony could carry any weight. (See Gabriel Njoroge V. R. [1982-88] 1 KAR 1034).

The foregoing notwithstanding there is clear and acceptable evidence which both courts below accepted, which shows that the appellant committed the series of robberies he was charged with. P.W.7 and his driver were robbed by a gang of 6 people. Six people were involved in the robberies at the Hyrax Petrol Station shortly thereafter. The six were in a pick up which resembled that of P.W.7. A pick up was involved during the robbery at Kihara Petrol Station. The appellant was found shot underneath the pick up which P.W.7 positively identified as his.

That was five or so hours after the pick up was stolen. Clearly the chain of events from the time the motor vehicle was stolen to the time the appellant was arrested is unbroken. The appellant having been found in the pick up immediately it overturned, a rebuttable presumption is raised that he was one of the people who robbed P.W.7 and his driver of the pick up and, subsequently, who was involved in the other robberies charged. His explanation as to how he came to be in the pick up was rejected by the both courts below, properly so in our view, because the circumstances clearly show he was in the pick up. He was obliged to but did not offer a reasonable explanation to show that his presence in the pick up was innocent. The time he was found in the pick up was such that his explanation is rendered untenable.

Moreover, he had three bullet wounds on his left hand which, according to P.W.6, must have been inflicted while the appellant was in the pick up. She testified that her officers fired several shots at the motor vehicle, and some of those, we think, must have met the appellant.

In the above circumstances, we do not have a basis for interfering with the appellant's conviction on all the seven counts.

We affirm his conviction and accordingly dismiss his appeal in its entirety.

Dated and delivered at Nakuru this 20th day of February, 1997.

A. M. AKIWUMI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.