

Mwambia v Republic

Court of Appeal, at Kisumu March 18, 1986

Kneller, Hancox & Nyarangi JJA

Criminal Appeal No 38 of 1985

(Appeal from the High Court at Kisii, Masime J) Cases

No cases referred to.

Statutes

Penal Code (cap 63) sections 129(a),281,294

March 18, 1986, Kneller, Hancox & Nyarangi JJA delivered the following Judgement.

The appellant was at the material time employed as a driver by the complainant who carried on a wholesale business in foodstuffs at Nyakina Street in Kisii. On March 26, 1984, he gave the appellant a sum in cash that was certainly in excess of Kshs 21,000 with instructions to take the Peugeot 504, KLZ 690, and bank the money at Barclays Bank in Kisii. The paying in-slip had been filled in. When the appellant did not return after an hour or so the complainant became worried, not unnaturally one might think and after reporting to the police, conducted a search, together with his brother and another employee all over the district. Neither the appellant's wife nor his father had seen him that day, but they eventually ran the vehicle to earth at about 2 pm on a murram road not far from Ogembo market in the Kilgoris District. Shortly afterwards they saw the appellant, his wife and an administration policeman coming towards them with the keys of the vehicle. The appellant had made a report to the chief at Sameta at about 10.30 am that day, which he later repeated in his defence that two men had stopped him at the junction of the Kericho and Kilgoris roads and, at gun point, ordered him to drive to Nyatero school where he was forced into the boot of the vehicle which the men drove to Etara before stopping and abandoning the car. Needless to say the two men decamped with the money. The appellant did not attempt to deny any of the foregoing, and maintained throughout that he had been hijacked and robbed of the money. He was charged with stealing by servant, unlawful use of a motor vehicle and giving false information about alleged robbery to the chief contrary to sections 281, 294 and 129 (a) respectively of the Penal Code. The matter therefore became a straight conflict of fact on the evidence which the trial magistrate resolved by convicting the appellant upon all three counts and sentencing him to a total of two years' imprisonment. As he rightly observed, this was a case of really where all the charges stood or fell together. The appellant's appeal to the High Court was summarily rejected, and he now appeals to this court, maintaining his previous story and alleging that his Asian employers might be conspiring to destroy him so as to avoid the three months salary that was due to him. This was never suggested at the trial.

The magistrate gave very elaborate reasons for disbelieving the appellant's story and finding him guilty of all three charges beyond reasonable doubt, relying first on his own knowledge of the geography of the area and the incidence of traffic, and therefore of the number of witnesses in the vicinity of the alleged hijacking. He also concluded that the appellant had himself unlocked the boot of the vehicle (which the appellant said he had done from the inside), but that this was done from the outside. All that was really necessary for the magistrate to do was to analyse the evidence and reach a conclusion, one way or the other as to whether the charges were proved beyond all reasonable doubt. Instead he trespassed into the fields of imaginations and conjecture which were not necessary for this purpose. Moreover the learned first appellate judge saw fit summarily to dismiss the appeal from this difficult case, so we do not have the benefit of concurrent findings of fact on the disputed evidence. There were, however, two material witnesses who saw the grey Peugeot car, which they recognised, during the course of March 26. The first of these witnesses was Zacharia Omindi whose father also worked for the appellant's employer. He was familiar with the Peugeot car. On his way to work at about 9 am, walking from Mwembe market, he saw

the 504 being driven very fast towards Mwembe, and the appellant was driving it. He appeared, though the witness did not see it properly, to be wearing a white T-shirt, and there appeared to be only one other person in the car in the front seat. Under cross-examination by Mr Balongo, who then appeared for the appellant, Omindu said that he did not see anybody in the back seat, but he went on to say:-

“if anybody was at the back seat I would not have known because the vehicle was being driven very fast.” The number of people in the vehicle was, of course, of some materiality because it will be remembered the appellant’s case was that he had been hijacked by two robbers, and that he was in the main body of the car with them until they forced him into the boot on the murram road after they had reached Etaro, which the chief (PW 8) stated was about one kilometer from Sameta chief’s camp, though he did not say where it was in relation to Mwembe market.

The report to the chief was made at 10.30 am but the appellant was silent in his unsworn statement as the precise, or even approximate time when the hijacking took place. Neither have we been able to obtain any elucidation on this point from either of the memorandum of appeal. The appellant gave an unsworn statement which, of course, he was entitled to do. Had the appellant given evidence on oath and then subjected himself to cross-examination, (as might be expected in the circumstances) then this important aspect of the time might have been dealt with. The second witness who saw the grey 504 that day was the assistant chief of Bogetaorio, 2, sub-location, James Nyarangi, PW 7 to whom the appellant had also reported the hijacking and robbery at 12.30. However, at 9 am or shortly after, this witness was on a murram road which leads to the main tarmac going to Kisii and he saw what was obviously the same car going at a moderate speed with two persons only in it. The driver was wearing a white T shirt and the other was dressed in black. The witness did not recognize the faces of the occupants of the car, though he described the behaviour of the vehicle as “strange” and said that he became suspicious. However when the appellant came to report at Sameta chief’s camp he recognized the T shirt as the same as that which the driver had earlier been wearing. This was corroboration by AP Mogaka, PW 9, who testified that the appellant had no injuries, despite his saying that he was hit by the robbers. According to the prosecution witnesses the appellant’s appearance, also was immaculate. When the appellant made his unsworn statement he said that the two men by whom he was robbed were wearing a white T shirt and a black coat respectively. Now the assistant chief was not challenged in cross-examination regarding his statement that the appellant was wearing the white T shirt when he saw him at 12.30. His evidence was accepted by the magistrate. Unless it was being suggested that the robber divested himself of the T shirt and transferred it to the appellant before locking him in the boot of the car, it is clearly not credible that someone other than the appellant, wearing the same T shirt, was driving the 504 when the assistant chief saw it at 9 am. This was only half an hour or so after the complainant gave the money to the appellant to take to the bank, and yet he was seen outside Kisii town, in which the bank was situated, driving the 504 away from the direction of the town with only one, not two, other persons in the car. Moreover, if the appellant is right he has been coincidentally the victim of two misfortunes in a short space of time, the first being the robbery and the second this alleged conspiracy by his employers. We consider the appellant’s version was palpably unworthy of credit.

We have considered the grounds now advanced in the appellant’s memorandum of appeal, and his submission to us, but on our own evaluation of the evidence we are satisfied that, despite the somewhat fanciful reasons which the magistrate gave for rejecting the appellant’s story about alleged robbery, if he had concentrated solely on the evidence before him, and the inferences to be drawn therefrom, he must inevitably have reached the conclusion that he did, namely that the appellant was proved guilty beyond all reasonable doubt on all the three charges. In the circumstances therefore, despite the wrongful summary rejection of the first appeal we consider that the original conviction was just and safe. We have no hesitation therefore in dismissing the second appeal now before us. Orders accordingly.