



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, PLATT & GACHUHI, JJ A)

CRIMINAL APPEAL NO 63 OF 1985

BETWEEN

MOSES KHENYA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mbaya J) dated

March 4, 1985

in

High Court Criminal Appeal No 1398 of 1984)

JUDGMENT OF THE COURT

The appellant was charged and convicted on two counts of robbery contrary to section 296(2) of the Penal Code (cap 63) and sentenced to the statutory death penalty. His appeal to the High Court (Mbaya and Gicheru JJ) was dismissed. He now appeals to this court on the point of law.

The facts leading to the charge are that on the evening of February 10, 1984 double robbery occurred at Midland Hotel within Nakuru Township. The first count is that he (the appellant) with others not before the court, being armed with pistols robbed Patrick Yann Dartout of one key for motor vehicle registration No KVN 995 and other items all worth Kshs 2,000 and that at or immediately before or immediately after the time of such robbery they threatened to use actual violence to Patrick Yann Dartout.

The second count is that on the same day and at the same place the appellant jointly with others not before the court being armed with pistols robbed Niels Forsberg of his car registration No KTZ 644 make Subaru valued at Kshs 180,000 and at or immediately before or immediately after the time of such robbery they threatened to use actual violence to Niels Forsberg.

The evidence was led that showed that at the material time of the first robbery Patrick Yann Dartout was parking his car at the back of the hotel and was preparing to leave the car when he was confronted by a person armed with a pistol. There was a struggle between the thug and Dartout while the thug was looking for the car key in the car. Dartout held the arm that held the pistol and in the course of that struggle the pistol fired. All became scared and ran within the hotel compound.

At the same time Niels Forsberg who was coming into the hotel accompanied by his wife and mother in

law was at the entrance in the place being well illuminated. The wife saw a person running towards them. She noticed the man's trouser was soaked by blood and warned her husband to watch out. Four other people ran behind the injured person. The injured person had leaned on the bonnet without saying anything. One of the four people demanded the car key at gun point from Forsberg. The man with the pistol got into the driver's seat and the other three got into the car from the passengers' side. The injured person tried to get in the car but the door behind the driver was locked. The car drove off. The injured person was left behind. On the evidence the injured man ran fast across the road.

Police were called into the hotel. Police Inspector Zablon Otundo PW 9 arrived and started investigation and said that he was told by Dartout that one of the robbers was shot on both knees. He noticed blood stains on the road four to six feet from the car. He followed the blood stain which led him and his party to a near kiosk outside the Standard Bank where they found the appellant bleeding profusely. Noticing that he was in danger, they took him to hospital. PW 9 said that on searching the person at the hospital he found a hotel key in his pocket.

The scene of crime personnel were contacted who visited the scene where the appellant was picked in a pool of blood. PW 9 stated that they found a key which was also photographed. He further said that they used the key to drive the vehicle to police station. The vehicle was later released to Dartout.

The blood sample from the appellant and from the place on the road where the vehicle was and at the kiosk and on his stained trousers were taken for analysis. The result was of Group "O".

On being charged and taken to court, the appellant gave unsworn statement of his version of the story in denying charges. He said that he arrived in Nakuru on his way to Baringo and decided to spend the night at Nakuru. He took dinner at Midlands Hotel but on his way out was confronted by five men who introduced themselves as policemen. He was ordered to stop and was searched by one person holding a gun. They took his money (Kshs 6,000) and the one who had a gun fired at his leg. He started running away from those people and hid near a kiosk. He stopped a 999 car which took him to hospital.

The other vehicle KTZ 644 involved in the other robbery was recovered at Karura Forest near Nairobi by a Forest Guard PW 8 on February 11, 1984. Both cars were dusted for finger print marks. There was an identification parade which the appellant submit was improper because Dartout was looking for the injured person which fact made it obvious that he would be picked out. It was conducted in the police cells. During the trial, Inspector Zablon Otundo PW 9 featured prominently as the key witness. He carried out the investigations but in the course of his investigation forged some entries in the Occurrence Book and created other stories which led the learned trial magistrate to discredit him. In particular, an entry No 87 of February 10, 1984 where the name of Mulili was altered to Mutua. The evidence was led to that effect as a result of which the whole book was put in exhibit. The trial magistrate looked at other entries for which no evidence had been called. In spite of that there was evidence that contradicted PW 9's evidence. There was an entry that vehicle KVN 995 was towed to police station at night by Flamingo Motors while in his evidence the vehicle was driven to the police station the following day by using the key that was recovered from the place where the appellant was hiding. The trial magistrate misdirected himself in relying on the OB entry without calling Flamingo Motors.

This evidence casts doubts as to whether there was a key which was said to have been found and photographed or there was not. The photographs are not on record. It is also in evidence that photographs were produced as exhibit. The person alleged to have been robbed did not give evidence. The vehicle was said to have been hired from Nairobi but neither the vehicle nor the key was produced at the hearing by the owners. It is disputed that there was such key. It is only the evidence of PW 9 that connects the appellant with these offences. There was further evidence of PW 1 Niels Forsberg who could not say whether or not the person who was leaning on his bonnet was the one who tried to enter his car before it was driven away. It was a misdirection on the part of the trial magistrate to hold that it was the appellant who was actually left behind by the fleeing car without evidence to that fact. If the finger prints results were produced perhaps some further connection could have been found. To draw inference that because he did not seek assistance from PW 1, he must be one of the robbers is not right.

There were many contradictions in the evidence before the trial magistrate as has been pointed out. There were also misrepresentations that led PW 9 to go to the extent of altering the OB in order to cover up the mistake in identification which led the trial magistrate to comment that he would refer the matter to PW 9's superior officers. For those reasons the trial magistrate ought to have considered the defence seriously and ought to have disbelieved PW 9's evidence entirely and he should not have considered His evidence at all. See *Ndungu Kimani v R* 1979 KLR 282. Once the evidence of PW 9 is expunged there will be nothing else to connect the appellant with the offences charged.

The High Court did not consider the contradictions and mis-directions in particular of the evidence of PW 9 but upheld the learned trial magistrate's finding of guilt.

The learned state counsel submitted that he could not support the conviction on both counts especially where the trial magistrate relied on the evidence of PW 9 who was not a credible witness and who went as far as forging entries in the OB. The evidence is also vitiated by contradiction. PW 9, he said, had lied on all essential parts of the evidence. We agree.

We are satisfied that after discrediting PW 9's evidence there is no evidence left to support the conviction. We allow this appeal in its entirety. The appellant shall be set free unless there is anything else to hold him in custody.

Dated at Nairobi the 28th day of November, 1986.

J O NYARARANGI

JUDGE OF APPEAL

H G PLATT

JUDGE OF APPEAL

J M GACHUHI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR