



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 71 OF 2015

STEPHEN NJAU MBUGUA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

*CONSOLIDATED WITH CRIMINAL APPEAL NO. 71 "A" OF 2015*

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PAUL NGA'ANG'A CHEGE.....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nairobi*

*(Ogolla & Kamau, JJ.) dated 19<sup>th</sup> December, 2013*

*in*

*H.C. Cr. A. NO. 301 OF 2008)*

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JUDGMENT OF THE COURT

[1] The consolidated appeals are against the judgment of the High Court (**Ogolla & Kamau, JJ**) dismissing the appeals from conviction and sentence in respect of two counts of robbery with violence contrary to the provision of section 296 (2) of the Penal Code.

[2] In the first count, the two appellants in the company of another were alleged to have robbed **Peter Wamoto** while armed with pistols, of his car registration No. KAR 998Y Peugeot 406 valued at Shs. 700,000/-, cash, Shs. 5000/- and a cell phone valued at Shs. 7000/-.

In the second count, the appellants in the company of another were alleged to have robbed **Rosemary Wamoto** while armed with pistols of a cell phone valued at Shs. 29,000/-.

In the third count, the appellants were jointly charged with the offence of being in possession of a firearm (pistol) without a firearm certificate contrary to **section 4(1) and (2) of the Firearms Act**.

[3] After trial, the Senior Resident Magistrate convicted the appellants of the three counts and sentenced each to death in each of the two counts of robbery with violence and to 10 years imprisonment in respect of the third count. The sentences in the third count were ordered to be held in abeyance.

On appeal to the High Court against conviction and sentence, the appeals were dismissed, save that the sentences in count II and III were held in abeyance.

[4] The relevant facts are briefly as follows. On 28<sup>th</sup> November, 2006, Peter Maloba Wamoto, (**Peter**), the complainant in the first count and his wife Rosemary Wamoto, (**Rosemary**), the complainant in the second count drove to Ridgeways area in Nairobi to view a property which had been advertised for sale. They arrived there at about 1 p.m. and Peter parked his car reg. No. KAR 998Y by the roadside about 50 metres from a gate to a nearby residence which was guarded by administration police. After viewing the property Peter stood leaning on his car, waiting for his wife. He then saw three people coming towards the car. As they reached the car one person drew a gun and forced him into the car. When Rosemary saw what had happened to her husband she ran towards the gate screaming. She was chased by two men one brandishing a gun which he pointed at her, grabbed her, took her to the car and forced her at the back seat. Both were forced at the back seat and one gunman sat at the left back seat. The other gunmen sat at the front passenger seat and the third robber sat at the driver's seat and drove off at high speed. Shortly thereafter, the complainants were ordered to surrender the money and mobile phones which they did.

**AP Cpl. Titus Kipkoech Limo** (Cpl. Limo) and **APC Zakariah Kamau** (APC Kamau) who were guarding the residence and who had gone to the gate after hearing the screams and witnessing the incident stopped a passing car, boarded it and followed the robbers. After driving for about 300 metres from the scene and on a straight stretch of the road, the hijacked car failed to negotiate a bend and rammed into the concrete wall and a gate of another residence. After the crash, one of the robbers came out of the car and escaped before it overturned and rested on its roof. Cpl. Limo and APC Kamau immediately arrived at the scene of the crash. They found that the car was badly damaged and that all the four occupants had been injured. They removed the two complainants and the two appellants from the vehicle. A pistol and two mobile phones were recovered from the car. The two complainants were rushed to hospital while the two appellants were detained. A crowd gathered from the neighboring coffee estates.

[5] In his sworn evidence, **Stephen Njau Mbogua**, the 1<sup>st</sup> appellant in this appeal who was the 2<sup>nd</sup> accused at the trial testified that after alighting from a vehicle at Kigwa stage at Ridgeways springs from Kiambu, he saw a car coming at a speed which overturned and hit a gate at a T-junction. He rushed there to assist the passengers and he and others removed five people from the vehicle. Many people gathered at the scene and police officers inquired if there were people who had witnessed the accident. He and the first accused volunteered as eye witnesses but they were later taken to police station and charged with the three offences.

[6] On his part, **Paul Ng'ang'a Chege**, the 2<sup>nd</sup> appellant in this appeal and who was the 1<sup>st</sup> accused before the trial court testified that on the material day, he was on his way to Ridgeways shopping centre when a car overturned in front of him. He ran there and assisted the five occupants of the vehicle who had been injured. Later police took him to the police station. He denied that he was inside the vehicle.

[7] The learned Senior Resident Magistrate relying on the evidence of the two complainants, Cpl. Limo and APC Kamau made a finding that the two appellants were identified as robbers and rejected the defence of each appellant. Similarly, the High Court made a finding that the two appellants were identified by the four witnesses and that they were arrested inside the car after it crashed.

[8] **Mr. Mogikoyo**, learned counsel for the appellants, condensed the grounds of appeal into one – identification and submitted, among other things, that the identification of the appellants was not free from error; that this was not a case of chase and arrest; that there was an intervening act – the crash of the

car; that there was no complete chain of circumstances that could have made the court draw the inference of guilt; that the attack on the complainants was fast and sudden and the identification by the complainant at the gate and at the scene of the crash was not possible; that the complainants did not describe the appellants before arrest; that this was a case of dock identification and that the gun was recovered at the scene of the crash.

[9] **Mr. Wanyonyi**, the learned prosecution counsel supported the conviction and sentence. He submitted that the robbery was committed in broad daylight; that the complainants gave the description of the appellants; that Cpl. Limo and APC Kamau corroborated the evidence of the complainants; that the car crash was not an intervening event; that the gun was recovered at the scene of the car crash and that the evidence against the appellants was watertight.

[10] We have considered the grounds of appeal and the oral submissions of respective counsel. There was overwhelming evidence that on the material day three persons who were armed with guns robbed Peter Wamoto and Rosemary Wamoto of a car, Kshs. 5000, mobile phone and a mobile phone respectively.

The appellants' conviction was solely based on the evidence of identification and the circumstances of their arrest.

The two complainants were accosted by the robbers at about 1.30 p.m. in broad daylight. Both complainants testified that they saw the three persons before they were pushed into their own vehicle. Rosemary Wamoto ran towards the gate and was pursued by two robbers, held, taken to the car and pushed inside. The two complainants also travelled in the same car with the robbers for a distance of less than a kilometer before the car crashed.

The learned magistrate made a finding that the conditions for identification were good and thus the two complainants identified the two appellants.

There was also the evidence of Cpl. Limo and APC Kamau that upon hearing the screams they went to the gate and witnessed the robbery after which they stopped a passing car and pursued the robbers and that the car crashed when they were about 50 metres behind it. It was also their evidence that after the car crashed they removed the two complainants and the two appellants who had sustained injuries from inside the car. The car crash was not an intervening event as Cpl. Limo and APC Kamau testified that they did not lose sight of the car they were following. The two witnesses also testified that they recovered a gun and two mobile phones from the car, each of which was identified by the complainants.

[11] The trial magistrate made a finding that Cpl. Limo and APC Kamau and the two complainants were credible witnesses and that the Cpl. Limo and APC Kamau arrived at the scene of the crash before any member of public.

The High Court re-evaluated the evidence and made a finding that the complainants had an opportunity to identify the two appellants and, in fact identified them, and that Cpl. Limo and APC Kamau found them injured inside the crashed car.

[12] Thus, both courts below made concurrent findings of fact that the appellants were identified by the two complainants; that they were rescued by two police officers from the crashed car with injuries; that the gun was found inside the vehicle and, in essence, that, the appellants were not part of the crowd which had gone to the scene of the crash. It is trite law that an appellate court should not interfere with concurrent findings of fact of the two courts below unless the findings were based on no evidence or were based on misdirection or non direction. On our own consideration of the evidence, we are satisfied that the concurrent finding of the two courts below was supported by the overwhelming and credible evidence of four witnesses. The evidence of the appellants that they were part of the crowd which gathered at the scene of the crash and were arrested because they offered to record statements as witnesses was incredible and was properly rejected.

[13] For the foregoing reasons, the appeals have no merit and are hereby dismissed.

Orders accordingly.

*Dated and delivered at Nairobi this 10<sup>th</sup> day of November, 2017.*

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***M. K. KOOME***

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***JUDGE OF APPEAL***

***F. SICHALE***

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***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***