



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 314 OF 2009

BETWEEN

VICTOR NDANYI SAMUJI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu

(Mwera & Warsame, JJ.) dated 21st September, 2006

in

HCCR.A NO. 78 OF 2004)

JUDGMENT OF THE COURT

1. The appellant was convicted of the offence of robbery with violence and sentenced to death as by law provided. Being aggrieved by that conviction and sentence, the appellant preferred an appeal to the High Court.
2. The particulars of the charge before the Chief Magistrate's Court at Kisumu were that on the 7th day of November, 2003 at about 10.00a.m. at Pemugi Estate in Eldoret Township, the appellant, jointly with others not before court, while armed with a pistol, robbed **Titus Kiarie Macharia** of a motor vehicle registration number **KZY 025** and one Siemen A. 35 mobile phone.
3. The complainant, Titus Kiarie Macharia, testified as to how he was robbed of the said motor vehicle on the material night. He however said that he could not identify any of the robbers. A few days after the robbery the motor vehicle was recovered at Kondele Estate in Kisumu, having been used to commit another robbery.
4. On the night of 8th November, 2003, **Tobias Ouma Achieng, PW 4**, was driving motor vehicle registration number **KAG 784 B**. He was together with one **Florence Akinyi**. At about 11.00p.m. or thereabouts, PW 4 was blocked by another motor vehicle, which he was only able to identify by its first registration number, KZY. There were four people in the said motor vehicle. They got out of the vehicle

and robbed PW 4 of his vehicle at gun point. PW 4 and Florence Akinyi were ordered to sit at the back seat. The motor vehicle was driven towards an area known as Kiboswa but after a short while it stalled in the middle of the road.

5. PW 4 was ordered to get out and repair the vehicle. He told the robbers that the vehicle had suffered an engine knock. PW 4 and his companion were forced into a bush where they were tied and robbed of cash and a mobile phone, after which the robbers left. It is not clear whether the robbers managed to repair the vehicle.

6. After about 10 minutes or so PW 4 untied himself and then helped Florence. They walked to the road and managed to get a lift from a good Samaritan. When they reached a petrol station at Kiboswa, PW 4 saw the vehicle that he had just been robbed of, KAG 784 B parked at the petrol station. He asked the good Samaritan to drop them at the petrol station.

7. Upon alighting, PW 4 found Police Officers at the petrol station. They had arrested someone, (the appellant), who was at the back of the police vehicle. PW 4 narrated to the police how he had just been robbed. He was asked if he could identify the person who had been arrested. PW 4 looked at the person who was seated in the police vehicle and told the police that he was one of the four people who had robbed him of his motor vehicle. PW 4 said that the appellant was the one who drove the vehicle upto the place where it had stalled. PW 4 added that when he was ordered to come out and repair the stalled motor vehicle its head lights were on and so he was able to see the appellant.

8. In his cross examination by the appellant, PW 4 said that the motor vehicle stalled at about 11.30 p.m. They got to the petrol station at Kiboswa at about midnight and found the appellant under arrest.

9. **Police Constable Joel Kilel, PW 5**, is the only witness who testified as to how the appellant was arrested. He told the trial court that on 8th November, 2012 he was at Riat Patrol Base together with one P. C. Ali when at about 11.00 p.m. they received information through police radio communication system about a stolen motor vehicle registration number KAG 784 B that was being driven from Kisumu towards Kakamega. They went to the main road at Riat and found the vehicle parked at a petrol station. There were two people inside the vehicle. As they approached it one of them got out and disappeared, but the appellant remained at the driver's seat.

10. They arrested the appellant at about 11.30 p.m. and while they were questioning him PW 4 alighted from a lorry and told the police that he had been robbed of that motor vehicle. PW 5 said that PW 4 identified the appellant as one of the people that had robbed him of the motor vehicle.

11. In cross examination, PW 5 said that he was testifying about robbery of motor vehicle registration number KZY 025, although he had found the appellant inside motor vehicle registration No. KAG 784 B. The link between the two vehicles was that the robbers who were in motor vehicle registration number KZY 025 blocked motor vehicle registration number KAG 784 B and it was the appellant who drove the latter until it stalled.

PW 5 added that he found the appellant in PW 4's vehicle *"at a petrol station at Riat and not Kiboswa."*

12. In his statement of defence under oath, then appellant stated that on the night of 8th November, 2003 at about 10.20p.m. he alighted from a vehicle near Lake Filing Station, which is about 100 metres from his residence. On his way home he met two police officers who stopped and interrogated him. They asked for his identification and the appellant produced his identity card. However, the police were not satisfied and they handcuffed him.

13. He was transported by a police vehicle to Kiboswa petrol station where there was a crowd of people. After about 30 minutes PW 4 and a woman arrived. PW 4 purported to identify him as one of the people who had robbed him of motor vehicle registration number KAG 784 B but the woman who was with PW 4 had denied that he was one of the robbers.

14. In his memorandum of appeal through **James Abande**, the appellant's learned counsel, the appellant faulted the first appellate court for failing to subject the entire evidence tendered before the trial court to a fresh and independent re-evaluation. He also contended that there was insufficient evidence of identification and that his defence had not been considered.

15. The appellant's counsel made brief submissions in line with the aforesaid grounds of appeal.

16. **Mr. Ketoo**, learned prosecution counsel, conceded the appeal. He submitted that the basis of the appellant's conviction was recent possession of motor vehicle registration number KZY 025. However, the vehicle of which the appellant was allegedly found in possession was registration number KAG 784 B. Although PW 4 testified that the appellant was one of the four people that jumped out of motor vehicle registration number KZY 025, PW 4's evidence regarding identification of the appellant was not watertight, Mr. Ketoo added.

17. We have carefully considered the entire record of appeal as well as counsel's submissions. It appears to us that in its re-evaluation of the evidence tendered before the trial court, the High Court failed to give due regard to some critical details in the prosecution evidence, which, in our view, had it considered, it would have arrived at a different conclusion.

18. Although the appellant has two appeals before this Court, both relating to the robberies of the two motor vehicles already cited, this appeal is against the appellant's conviction for the robbery involving motor vehicle KZY 025 only.

19. The identification of the appellant was based on the evidence of a single identifying witness, PW 4. In **KIILU & ANOTHER V REPUBLIC [2005] 1 KLR 174**, this Court held:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

20. We must therefore consider whether the evidence of PW 4 was watertight, bearing in mind that even when a witness is purporting to recognize someone whom he knows, mistakes in recognition are sometimes made, see **WANJOHI & 2 OTHERS V REPUBLIC [1989] KLR 415**

21. PW 4 allegedly saw the appellant very briefly when the motor vehicle that had been stolen from him broke down and he was ordered to repair it. PW 4 did not state for how long he had the appellant in his observation. He was obviously in a state of shock. It is doubtful whether in the circumstances the witness was able to positively identify his assailant. PW 4 had not given any description of the people that had robbed him, neither did he state why he believed that the appellant was one of the robbers.

22. But the issue that creates the gravest doubt about the appellant's identification by PW 4 is the time and place of his arrest. In cross examination, PW 4 was emphatic that the motor vehicle stalled at about 11.30 p.m. and together with Florence they were in the bush for about one hour, although in his examination in chief he had stated that they were in the bush for about 10 minutes. What is not in doubt is that PW 4 found the appellant at Kiboswa police station, having been arrested by the police at about midnight.

23. On the other hand, PW 5 said that they arrested the appellant at about 11.30 p.m. The witness said that the appellant was at the driver's seat inside motor vehicle registration number KAG 784 B that was parked at a petrol station at Riat, not at Kiboswa.

According to PW 5, the report about the robbery of PW 5's motor vehicle was circulated at about 11.00p.m. That does not accord with the evidence of PW 4. However, there was no evidence that by 11.00 p.m. PW 5's motor vehicle had been stolen, leave alone a report being circulated by the police about the robbery.

24. The discrepancy between the evidence of PW 4 and PW 5 gives credence to the appellant's testimony that he was arrested at about 10.20 p.m. near Lake Filing Station and thereafter taken to Kiboswa petrol station and that PW 4 found him having been arrested. PW 5's evidence regarding time and place of arrest of the appellant was not corroborated at all. We think P. C. Ali ought to have been called as a prosecution witness.

25. In view of the foregoing, we are satisfied that the appellant's conviction was not safe and Mr. Ketoo's concession of the appeal was well founded.

26. Consequently, we allow this appeal, set aside the appellant's conviction and quash the death sentence that had been pronounced by the trial court and affirmed by the High Court on account of robbery of motor vehicle registration number KZY 025.

DATED and Delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.