REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, OUKO & J. MOHAMMED JJ.A)

CRIMINAL APPEAL NO. 93 OF 2013

BETWEEN

PETER KARIUKI MATHI ……..…….. APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Being an appeal from a Judgment of the High Court of Kenya at Nairobi (Justice Ochieng & Achode, JJ) dated 24th September, 2012

in

HC. CR. A. 53 OF 2008)

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JUDGMENT OF THE COURT

The appellant's first appeal against the conviction and sentence for the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code was dismissed giving rise to this appeal. Being a second appeal, we can only consider matters of law as it is now firmly settled on the authority of **Chemagong V. R** [1984] KLR 611 and a long line of others, that this Court sitting as a second appellate court will not normally interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the two courts are shown to have acted on wrong principles in reaching their decisions.

According to evidence presented at the trial, Dominic Kihuri Muriuki who was employed to drive one of the *taxis* (KAP 903K) in the firm of Joseph Kimashia was hired to take two men from Upper Hill area of Nairobi to Ngong. Upon getting to Ngong, the two men ordered Dominic, at gun point to drive them to a forest within Ngong. At the forest, he was roughed-up before being robbed of cash in the sum of Kshs. 700/=, a mobile phone and a diary. He managed to escape leaving the *taxi* with the robbers. He went straight to the police station where he reported the robbery. The car was subsequently recovered over 300 kilometers away parked at the Kisii District Hospital, five days after the robbery.

The prosecution led evidence that, acting on a tip-off from an informer, the police laid an ambush at the said hospital and arrested the appellant as soon as he got to where the car was parked and began to open it. Upon finding out that it had been stolen from Nairobi, the appellant and the car were transferred to Gigiri Police Station Nairobi. In the course of investigations, Dominic was arrested as a suspect and spent considerable period of time in the police cells. On the day Dominic was placed in the cells, he noticed the appellant who was also being detained there as one of the people who robbed him of the vehicle and he (Dominic), fearing for his life, asked the police to separate them. Dominic was released after 28 days and the appellant charged.

The learned trial magistrate was satisfied, on the foregoing summarized evidence, that the appellant was positively identified by Dominic and further that the the appellant having failed to satisfactorily explain how he came by the *taxi*, the doctrine of recent possession applied. The appellant's appeal to the High Court, as we have stated, was dismissed by Ochieng and Achode, JJ, and he now brings this appeal on the grounds which were condensed and argued by Mrs. Rashid, learned counsel, as follows:-

i. That the learned Judges of the High Court failed to re-evaluate the evidence before them thereby failing to notice that the appellant's right to a speedy trial was violated;
ii. That the two courts below failed to find that Dominic was not a credible witness and was an accomplice;
iii. That there was no evidence of identification of the appellant; and finally
iv. That the learned Judges misdirected themselves in holding, in the absence of evidence, that the appellant had arrived from Nairobi with the stolen *taxi.*

Dominic gave an account of how he was approached by the two men at Upper Hill area in Nairobi at 3.00pm. They negotiated and agreed on Kshs. 1,000 as his charges, which the two men promptly paid. One man sat in the front passenger seat while the second man was on the back seat. They first drove to a petrol station to fuel before proceeding to Ngong. When they got to Ngong, an argument arose when Dominic showed reluctance to go beyond Ngong Town. It is at this stage that he was threatened with a gun and ordered to drive to Wakipigo Forest within Ngong area. Once in the forest, the two ordered Dominic to switch off the engine of the car and get out. They tried, to no avail, to open the boot of the car. It is while they were struggling to open the boot that Dominic got a chance to escape.

We have given this background to demonstrate that in view of the time Dominic spent with the two men and their interaction in broad day light, we have no doubt that he was able to identify the appellant as one of the two robbers. At the earliest opportunity, Dominic told the police and his employer that he could identify the robbers if he saw either of them. Indeed, upon being placed in the police cells at Gigiri Police Station, he had no difficulty recognizing the appellant who was also being held in the same cells. Secondly, both courts below made concurrent factual finding that the appellant was found in possession of a motor vehicle recently stolen from Dominic.

Acting on unrelated information from an informer that a suspicious person had arrived in town that night in a Toyota motor vehicle, P.C. Bomet and his colleagues laid an ambush at the hospital where the car was parked. From the testimony of PW6, PC George Bomet, we are persuaded that indeed the appellant had possession of the car at the time of his arrest at Kisii District Hospital five days after the robbery. He explained in the following words how they arrested the appellant:-

> **"There was no one inside. Since we did not know the person who had that vehicle, we laid ambush nearby. At about 9.00 am, a man came. He removed a key from his pocket. He started opening the car door. We arrested him….."**

On the resumed hearing and in answer to the appellant's cross-examination, the witness explained;

> **"You were opening the vehicle. You had a key in your hands. OB 44 of 14/4/2004 books you for the offence of being in possession of a suspected stolen motor vehicle No. KAP 903K Toyota Corolla."**

Clearly, at the point of arrest, P.C. Bomet did not know that the motor vehicle had infact been stolen. It was not until they circulated the details of the motor vehicle that officers from Nairobi Crime Prevention Unit confirmed that it had indeed been stolen in a robbery.

One is said to be in possession of a stolen thing, in terms of the provisions of **Section 4** of the Penal Code, if one is found to have in one's own actual personal possession or if one knowingly has the stolen thing in any place for one's use or benefit.

By having the key to the car and by preparing to open the car, the appellant was clearly in possession of it in the strict sense of the term. This evidence coupled with the evidence of identification, leads us to the conclusion that the appellant committed the offence of robbery with violence as charged and that the two courts below correctly so found. The submissions by Mrs. Rashid and the concession by Mr. Kivihya for the respondent that merely because Dominic behaved in a questionable manner by visiting the appellant at Kamiti Prison, after he himself had been released, the appeal ought to succeed, cannot be correct in view of the decision we have reached that there was overwhelming evidence implicating the appellant with the robbery.

Although it is strange for a prospective prosecution witness to be in contact with the accused person, that alone, it is our view, does diminish the weight of his evidence. Dominic explained that it was the appellant who called him to Kamiti to persuade him not to testify against him; that due to the persistence of the appellant, he had to change his phone number. But it is also in evidence that Dominic was arrested and detained by the police for 28 days as a suspect before he was released. His testimony was therefore that of an accomplice, who in terms of **Section 141** of Evidence Act is a competent witness. Such evidence, however, must be treated with caution. The Court should first establish whether the witness is a credible witness and then look for some independent evidence as corroboration connecting the accused person with the offence. See **Nguku V. R** [1985] KLR 412. Whether or not a witness is credible is a question of fact which both courts below adequately dealt with, the trial court having had the advantage of seeing the demeanor of the witness. Both courts also found, in our view, correctly so, that Dominic's evidence was corroborated by the recovery of the stolen car in the possession of the appellant a few days after it was robbed from Dominic.

It was submitted also that the appellant's constitutional right to a speedy trial was violated. The trial before the magistrate's court commenced on 19th May 2004 and judgment by that court was rendered on 20th February 2008 – nearly four years later. **Section 72 (5)** of the former Constitution, which was applicable at the time of the trial, directed that an accused person be tried within a reasonable time; that failure to be tried within a reasonable time would entitle the accused person, if not charged with a capital offence, to be released.

It is clear from our own perusal of the record that while the State sought and obtained adjournments on several occasions, the appellant himself significantly contributed to the delay in his trial. We have counted no less than eleven occasions when he sought adjournments on account of illness or to demand fresh trial or the transfer of the case. At any rate, the issue of violation of **Section 72 (5)** of the former Constitution ought to have been raised in the High Court, the constitutional court.

In the result, and for the reasons given in this judgment, this appeal fails and is hereby accordingly dismissed.

Dated at Nairobi this 24th day of January 2014.

D. K. MARAGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/mgkm