



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 335 OF 2012

BETWEEN

GODFREY MUNGAI KAMAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Meru (Lesiit & Makau, JJ.) delivered on 12th July, 2012

in

H.C.CR. Appeal No. 144 of 2010)

JUDGMENT OF THE COURT

1. Godfrey Mungai Kamau was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal code**. The Information is that on the 18th day of February, 2010, at Kieganguru area within the then Eastern Province, the appellant jointly with others not before court and armed with dangerous weapons namely AK 47 rifle robbed one Joshua Maina motor vehicle lorry Mitsubishi FH registration no. KAV 663K valued at Ksh. 2,100,000/=; 346 assorted gas cylinders valued at Ksh. 1,121,000/-; Nokia 1202 mobile phone valued at Ksh. 2,000/= and cash Ksh. 5,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Joshua Maina.
2. Upon hearing the case, the trial magistrate convicted and sentenced the appellant to death as by law provided. His appeal to the High Court was dismissed and the appellant has lodged this second appeal.
3. The prosecution's case hinged on the testimony of the complainant, PW1, Joshua Maina Gitonga who testified as follows:

“I am the driver of motor vehicle KAV 663K and I am employed by M/s Mountain View Transporter - Nairobi. I recall on 17th February 2010 as I was at work at 9.00 am, I

was sent to Mt. Kenya region to supply gas cylinders i.e Thika and Meru. I was carrying 340 cylinders filled with gas and I was to exchange with empty cylinders. I was with my turnboy one Timothy Kioko. I delivered the same and went and picked 6 empty cylinders from Uchumi and came to Nkubu and supplied more cylinders and embarked on the trip back on 18th February, 2010 at 10.00 am. I had a total of 346 cylinders. On getting to Keria Town, I spotted a small saloon vehicle which hooted and came adjacent to me and one of the passengers who was in the back left pointed an AK 47 rifle and he ordered me to stop. I didn't identify the occupants and I obeyed the orders. Five occupants alighted and opened my door and they put us in the saloon vehicle and they commandeered the lorry. We were left with other accomplices and they gave us 4 tablets and ordered us to take them with whiskey (kane extra). The lorry proceeded with the journey and we were driven into a feeder road and the three accomplices there said that we had arrived home. We had gone about 100 metres off the road. They started interrogating me whether the lorry had been installed with GPRS and car track to which I answered in the positive. We blacked off and they stole my mobile phones, wallet and I lost Ksh. 5,000/= and we were dumped in the bush. I didn't see any weapon except the AK 47 rifle. I woke up at 5.00 pm. My colleague told me he had recovered quickly and he rushed and called the headquarters that started tracking the vehicle. We came to CID Chuka and I recorded my statement. We proceeded to Makuyu police station and found that all my goods were intact.”

4. PW 4, Police Constable Stephen Kimathi , testified as follows on how the appellant was arrested:

“I recall on 17th February, 2010, I was on patrol duties along Nairobi-Nyeri highway with my colleagues Ochieng, Ruto and Njuki and we received information from an informer that there was a lorry that had been hijacked at Chuka area and was headed for Nairobi. We were at Makutano area along the highway and we informed our colleagues on the way and we followed it from behind. On reaching Kakuzi area we spotted it and we ordered them to stop but they refused and we created a jam and the vehicle stopped. Accused one was driving the vehicle and the two other occupants started running away. One of them who had a pistol shot at us and we replied and shot him and we arrested the accused herein while the others managed to escape. We towed the vehicle to Makuyu police and we got the telephone numbers of the company. We called them and they came and opened the van and 346 cylinders were therein.”

5. PW5, Police Sergeant George Ochieng, testified that while on Nyeri-Nairobi highway on patrol together with PC Kimathi they arrested the appellant who was the one driving the hijacked motor vehicle. That at the time of his arrest, the appellant alighted from the vehicle and while trying to cross the road he started running away. PW7, Police Inspector George Otieno, testified that the appellant's accomplice succumbed to the injuries sustained during the shoot out at the time of arrest.

6. Aggrieved by the decision of the High Court to dismiss his appeal, the appellant has raised the following grounds:

- *The learned judges erred in law in failing to make a finding that the identification parades were not properly carried out in accordance with the law.*
- *The learned judges erred in law by failing to consider and evaluate the evidence adduced by the appellant in defence during the trial.*
- *The learned judges erred in law by failing to make a finding that the prevailing conditions were not favourable for visual identification.*

7. In his home made grounds of appeal, the appellant raised the issue that he was not given an opportunity, time and facilities to summon intended defence witnesses contrary to **Article 50 (1)(2) (c)** of the **Constitution** and **Section 150** of the **Criminal Procedure Code**. That the learned Judges erred in law and fact in failing to evaluate and analyze the prosecution evidence and to find that it was full of glaring contradictions and devoid of logical sequence. That the learned Judges erred in law by admitting in

evidence what was in the nature of a confession which was prejudicial to the appellant and the mandatory death sentence is excessive, harsh and arbitrary and the sentence denies the appellant his constitutional right to life.

8. At the hearing of the appeal, learned counsel, **Mr Ken Muriuki**, appeared for the appellant while the State was represented by the Principal Prosecution Counsel, **Mr. Ongige Noah**.

9. Counsel for the appellant emphasised that the key issue in this appeal relates to identification of the appellant as to whether the prevailing conditions were conducive to an identification that was free from error. It was submitted that PW1, Joshua Maina Gitonga, was candid in his testimony that at the time of the robbery, he did not identify any of the hijackers who commandeered the motor vehicle. Counsel submitted that it was a contradiction in evidence for PW1 to be able to identify the appellant; that it was impossible for PW1 to testify in chief that he never recognized any of the hijackers and then later come to an identification parade and identify the appellant as one of the persons who commandeered the motor vehicle.

10. Counsel stated that the identification parade conducted by PW 8, Inspector of Police David Muli, was not in accordance with the laid down procedure because the appellant was exposed to the complainant and other witnesses prior to the parade. It was submitted that PW1, the complainant, admitted seeing the appellant at Makuyu police station; likewise PW 2, Timothy Kioko Mutagi, who was the turn boy admitted seeing the appellant at Makuyu police station. It was submitted that due to the flaw in the conduct of the identification parade, there was no credible evidence on record identifying the appellant as one of the hijackers. Counsel submitted that neither PW1 nor PW2 gave any physical description of the appellant as one of the hijackers. It was also submitted that the arresting officer PW4, PC Stephen Kimathi, did not indicate from what distance he could see that it was the appellant who was driving the stolen motor vehicle. Counsel submitted that the trial magistrate and the learned Judges did not consider and evaluate the defence raised by the appellant.

11. The State opposed the appeal emphasizing that the appellant was properly identified. That the identification parade conducted by PW8 was proper and in accordance with Force Standing Orders. It was submitted that the appellant accepted that the parade was fairly conducted and the officer who conducted the parade was not the investigating officer. The State submitted that the appellant was placed amongst nine (9) persons and he was positively identified. It was submitted that PW1 and PW2 were not exposed to the appellant while at Makuyu Police Station. That these two witness PW1 and PW2 were placed in separate rooms from each other and from the appellant. The State emphasized that the appellant was found in possession of the hijacked motor vehicle and he was the one driving the same. That the appellant could not explain how he came to be in possession of the recovered motor vehicle.

12. This is a second appeal and as was stated in ***David Njoroge Macharia – v- R, [2011]e KLR:***

“Only matters of law fall for consideration and the court will not normally interfere with 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 courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic (1984) KLR 213.”

13. In ***Salim Juma Dimiro –vs – R, Criminal Appeal No.114 of 2004***, this court stated re-evaluation of evidence is a matter of law. In the present case, it is our duty to examine if the two courts below erred in law in dealing with the evidence on identification of the appellant. The appellant submitted that the prevailing conditions for identification were not conducive for an error free identification. We note that the time of the offence as given by PW2 was 10.00 am. PW1 in his testimony indicated that he was not able to identify any of the persons who commandeered the motor vehicle. In ***Abdala Bin Wendo -vs- R, (1953)20 EA CA 166***, it was stated that where the conditions for identification are difficult, there is need for other evidence, circumstantial or direct pointing at the guilt of the accused to be produced. PW1 in his evidence in chief testified that he was not able to identify any of the hijackers; he did not give any description of the hijackers and no description of the appellant was given. Likewise PW2 did not give

description of the appellant. For these reasons we are satisfied that the visual evidence of identification of the appellant by PW1 and PW 2 is not credible.

14. We now consider the whether the identification parade was properly conducted. During the parade, PW8, Inspector of Police David Muli, testified that both PW1 and PW2 positively identified the appellant. The evidence in chief by PW1 wherein he testified that he did not recognize any of the hijackers is critical. Doubt is cast as to how PW1 was able at the identification parade to identify a person he did not properly see at the time of the offence. PW1 and PW2 did not give any physical or other unique features that enabled them identify the appellant as one of the people who commandeered the motor vehicle. We are convinced that both the trial court and the learned Judges erred in law in relying on the visual identification of the appellant as disclosed through the report on the identification parade.

15. We now wish to consider the doctrine of recent possession in light of the testimony of PW4, Stephen Kimathi, as corroborated by the testimony of PW5, Sgt. George Ochieng and PW6, Cpl. Reuben Manyara. PW4, PW5 and PW6 are all police officers who testified that while on patrol along Nyeri-Nairobi highway they spotted the commandeered motor vehicle and it was stopped. They testified that the appellant was the person driving the motor vehicle and he was arrested while trying to run away. From the testimony of PW3, PW4 and PW5, the doctrine of recent possession comes into play.

16. In the case of *Malingi –vs- Republic, [1989] KLR 225*, this Court had this to say about the doctrine of recent possession:

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole or was a guilty receiver.”

17. In the instant case, PW4, PW5 and PW 6 testified that the appellant was the driver of the commandeered and stolen motor vehicle. In his defence, the appellant denied that he was driving the vehicle; he stated that he was arrested after alighting from another vehicle at Kenol Stage; that there was shooting and one of the victims was shot; that he was framed by the police and he was not in the gang that tried to run away. That he was arrested 25 to 30 metres from where the vehicle was blocked.

18. We have examined the record of appeal and there is no doubt that the motor vehicle had been hijacked at around 10.00 am and recovered a few hours later. The issue is whether it was the appellant who was in possession of the stolen motor vehicle. The appellant denied being found with the motor vehicle or having been driving the same. He stated that he was framed by the police.

19. It is our considered view that taking into account the defence by the appellant, it was the duty of the trial magistrate and the learned Judges to evaluate if there was no co-existing circumstances which point to any other person as having been in possession of the recovered motor vehicle other than the appellant. On this question, the trial magistrate expressed himself thus:

“Both PW4 and PW 5 were alerted about the robbery and the van in question. They were clear that at the time of intercepting it, it is the appellant who alighted from the driver’s seat and started running away. Their testimonies are clear and unchallenged and that they never lost track of the appellant. The defence put up by the appellant and his presence at the scene does not add up. He never gave detailed particulars of the same. He confirms he was at the scene and near the vehicle that was stolen.”

20. The learned Judges observed that both PW4 and PW5 were clear in their evidence that they had spotted the vehicle the appellant was driving. The two witnesses were clear that at the moment the appellant stopped the vehicle, he alighted from it and started running away but they arrested him before he went far. Our analysis of the judgment of the High Court leads us to find that the learned Judges did not err in law in their consideration and evaluation of the evidence adduced by the appellant in his defence during the trial.

21. The appellant in his home made grounds of appeal raised the issue that he was not given an opportunity to call his intended witnesses. This ground of appeal has no merit. We have examined the record particularly the proceedings before the trial court on 19th July, 2010. On this day, the appellant requested to be allowed till the following day to call his witness. He stated that he had contacted the witness but he did not know why he was not in court. The trial magistrate acceded to the appellant's request and stood over the case to 20th July, 2010. On the said 20th July, 2010, the appellant informed the trial court that he had dispensed with calling of his witness and he closed the defence case. The appellant made no submissions. From this record, we are satisfied that the appellant was given an opportunity to call his witness and he dispensed with calling witnesses. The trial court did not violate the right to a fair trial as provided for in **Article 50 (1)(2) (c)** of the **Constitution** and **Section 150** of the **Criminal Procedure Code**.

22. On our part, we recognize that the legal burden to prove all ingredients of the offence as charged and the identity of the appellant rests with the prosecution. The appellant in his defence stated that the three police officers PW4, PW5 and PW6 did not know him prior to his arrest. There is no evidence on record to show that the three police officers had a motive or reason to frame the appellant. There are concurrent findings of fact by the two courts below that the appellant was the one driving the motor vehicle. Both the trial court and the learned Judges were persuaded that the motor vehicle was recovered while the appellant was driving it. It is not disputed that the stolen motor vehicle and the cylinders were positively identified by the complainant. We are satisfied with the finding by the two courts below that the stolen motor vehicle was found in possession of the appellant. The doctrine of recent possession properly applies in this case. The doctrine when applied to the facts of this case identifies the appellant as one of the persons who robbed the complainant and commandeered the stolen motor vehicle. Whether the identification parade was conducted fairly and in accordance with the Force Standing Order is neither here nor there as the doctrine of recent possession identifies the appellant as one of the robbers.

23. On the death sentence meted out on the appellant, we find the same is not excessive and arbitrary. The death sentence does not violate the appellant's right to life as it is legal and mandatory. The upshot is that we find this appeal has no merit and is dismissed.

Dated and delivered at Meru this 30th day of April, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA

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JUDGE OF APPEAL

KOOME

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR