



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK JJA)**

**CRIMINAL APPEAL NOS. 326, 329 & 336 OF 2012**

**BETWEEN**

**JOSEPH WAIHARU WAIYORO ..... 1<sup>ST</sup> APPELLANT**

**JAMES MUGO NJOGU ..... 2<sup>ND</sup> APPELLANT**

**KEVIN MURERWA NJOROGE ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Meru*

*(Lesiit & Makau, JJ.) dated 12<sup>th</sup> July, 2012*

*in*

*H.C. Criminal Appeal No. 5*

*as consolidated with*

*Criminal Appeals No's 3 and 4 of 2011)*

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**JUDGMENT OF THE COURT**

1. The appellants, Joseph Waiharu Waiyoro, James Mugo Njogu and Kevin Murerwa Njoroje together with 4 other persons were jointly charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The three appellants faced an alternative count of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code**.
2. The Information is that on 15<sup>th</sup> May, 2010, at Naro Moru in Nanyuki District within Rift Valley Province jointly with others not before court, while armed with dangerous weapons namely metal bars, robbed George Munyi Wangui motor vehicle registration no. KAS 015F Toyota station wagon valued at Ksh. 400,000/=, his driving licence, identify card, Equity ATM card, driver's PSV license, three passport size photographs and identify card photocopy and at or immediately

before or immediately after the time of such robbery threatened to use actual violence to the said George Munyi Wangui.

3. The Information on the alternative count is that on 11<sup>th</sup> June, 2010, at Chechelesi in Isiolo Township of Isiolo District within Eastern Province, otherwise than in the course of stealing, jointly dishonestly received or retained motor vehicle registration no. KAS 015F Toyota station wagon knowing or having reason to believe it to be stolen goods.
4. The prosecution case was based on the testimony of the complainant PW1 George Munyi Wangui, PW 3 Ismail Ali and PW6 Sergeant Martin Wanjalla.
5. PW1 George Munyi Wangui testified as follows:

***“On 15<sup>th</sup> May 2010 at 8.00 pm I was at Naro Moru waiting for customers. I am a taxi driver. My car is KAS 015F Toyota station wagon. A colleague called me. He told me there were customers who wanted me to take them to Mubichiri. I was talking with my boss a short distance away from where I had parked the car. I went to where I had parked the car. I met two (2) men one of them told me that his wife had delivered. He wanted us to go and transport her to hospital. We negotiated and arrived at Ksh. 350/=. The wife was supposedly at a place called Kambi in Mubichiri. They gave me Ksh. 500/=. I gave them change of Ksh. 150/=. One of them sat in the front seat. The other sat in the back. I fueled the vehicle and we started our journey. On the way to Kambi, we caught up with a man who was walking. They asked me to stop and pick him. They told me that they had sent that person to look for a taxi. The people who hired me are accused 2 and 3. Accused 2 is the one who sat at the front seat. The person we caught up with was accused 1. Accused 1 sat at the back. Accused 1 asked me to divert to the right. The road was rough. I started complaining the road was bad. They promised to pay me an extra Ksh. 50/=. After sometime, they asked me to stop. They showed me a nearby house. They told me that was the destination. They alighted. I started scrolling my mobile. I had rolled my windscreen suddenly a rope was put on my neck. They pulled it. It tightened my neck. They opened the doors. They pulled me out and knocked me down. They tied my hands and legs. They put me inside the vehicle between the two seats. Accused 1 had a metal bar and a knife. I did not see any weapon on accused 2 and 3. I heard one of them talking outside on phone. He was talking in kimeru. I heard him mentioning the word “Soweto”. He told others “Soweto”. Accused 1 took the driver’s seat and the other two sat at the back. I heard the vehicle go over two bumps. I knew that road. I knew we were now in Soweto. Soweto is in Muchibiri. The vehicle stopped. The started going out and coming in.... There was no time I was left alone. ..They enquired from me whether the vehicle could reach Karatina. I said it had no fuel. We started driving. I did not know where the car was heading. The car stopped. Accused 1 told his colleagues to tie me properly. I was removed outside and made to sit in the boot. My legs were tightened. My hands were now tied on the back. They tied my mouth with a rope. I was carried to the sand. I saw a person with a spotlight approaching. Those people abandoned me. They ran to the vehicle and drove of. I screamed. The person who was approaching came and untied me. The robbers had taken my phone Nokia; leather wallet which had my passport, my child’s passport and my wife’s passport. The wallet also contained Equity ATM card. The also took cash Ksh. 1,700/=. My driver’s license was in the car.I borrowed a mobile phone from the Good Samaritan. I telephoned the owner of the vehicle. I informed him and called a fellow taxi driver one Kariuki. Kariuki went to report to the police. On 11th June 2010, I received a telephone call from CID Isiolo. The officer who called told me they had recovered my car. They got my mobile phone and my license. On the following day, I went to Isiolo. I found the shell of my motor vehicle. The engine had been removed. Everything in the bonnet had been removed. The front left tyre and spare wheel were missing. The other tyres had been changed. My driving licence, elector’s card, national identity card, driver’s badge, Equity ATM card and the three passports were all recovered. I was called to the police station for an identification parade. I identified the accused persons. I had set my car so that when you open any door, the bulb in the vehicle lights up. That light enabled me to identify the accused persons”.***

6. PW 3 Ismail Ali testified as follows:

***“I am a councilor of Wabera Ward in Isiolo. I recall on 11<sup>th</sup> June, 2010, at about 11.30 am I was at Cheselesi. I was with assistant chief Mr. Mungathia. We were viewing development projects in that area. We were walking when we saw a Toyota Corolla which was stationary. It was no. KAS 015F. It was white in colour. The left front tyre was missing. There were three people sleeping in the vehicle. They were fast asleep. We knocked at the car. Those people woke up. Within a few minutes many people had come from nearby houses. I interrogated those people. One of them said the vehicle belonged to his father. The three people who were sleeping in the vehicle are accused 1, 2 and 3. It is accused 1 who told us the vehicle belonged to his father and he had been sent to go and do taxi business in Isiolo and it had developed mechanical problems. Accused 2 looked suspicious. I checked the bonnet. The engine was missing. I telephoned Sergeant Wanjalla of CID Isiolo and informed him. After a few minutes, police officers came and searched them. From accused 1, the following items were recovered: a driving license, ATM card, somebody’s identify card and 3 passports were recovered. They did not belong to him”.***

7. PW6 Sergeant Martin Wanjalla gave evidence on the recovery of motor vehicle KAS 015F Toyota Station wagon. He testified as follows:

***“I am a CID officer formerly based at Isiolo. On 11<sup>th</sup> June 2010 at around 11.30 am, I was in my office. I received a telephone call from Councilor Galma. He informed me that he was at Cheselesi with assistant chief one Simon Mungathia when they came across motor vehicle KAS 015F Toyota station wagon white in colour which had a missing front left wheel. Three people were sleeping inside the said vehicle. I mobilized officers namely PC Kirui, PC Munavi and PC Kyalu and rushed to Cheselesi. We met three persons lying down. There was a group of people surrounding them among them Councilor Galma and assistant chief Mungathia. The three people who were lying down are accused 1-3. They are the ones found sleeping in the car. I searched accused one Joseph Waiharu Waiyoro and from his jacket pocket I recovered a driving licence belonging to the complainant George Munyi Wangui. Inside the licence there was George Munyi Wangui’s identity card, elector’s card and Equity Bank card, PSV license and three passports. I also recovered a copy of an agreement for engine purchase dated 4<sup>th</sup> June 2010 between Nicholas Mwirigi Kimakia and George Munyi Wangui. It was for sale of engine and gear box at Ksh. 15,000/=..... Accused 4 led me to his house where I recovered the engine and the gear box and the original sale agreement. In my investigations, I looked at the driving licence of George Munyi and it bore his mobile number. I telephoned him and he told me he was robbed motor vehicle KAS 015 F on the night of 15<sup>th</sup> May 2010 at Naro Moru. I went to Naro Moru Police Station and confirmed a report had been made of the incident”.***

8. Upon considering the foregoing evidence and the defence testimony, the trial magistrate convicted the appellants on the charge of robbery with violence and sentenced them to death. The High Court upheld the conviction and sentence. Aggrieved by the High Court’s decision, the appellants have lodged this second appeal and are represented by learned counsel Mr. G. Kanyi while the State is represented by the Senior Prosecution Counsel Mr. J. Isaboke.

9. Counsel for the appellant relied on the home-made grounds of appeal which raise the following issues:

- i. ***That the learned Judges erred in law and fact in failing to find that the prosecution had not proved the case beyond reasonable doubt. That PW1 George Munyi Wangui was the only single identifying witnesses to the alleged robbery; there was no forensic test conducted on the car; no photographing of the appellants in the motor vehicle while driving or sleeping in it and a document expert did not come to testify to prove the authenticity of the exhibited documents.***
- ii. ***That the identification parade conducted by PW5 IP Christopher Mutahi at Isiolo police station***

***fell short of the standard required in law contrary to the provisions of Cap 46 of the Police Force Standing Orders because the parade members drawn from the cell and those who came to make report could not possibly resemble the appellants in dress, height and age bracket; that the identifier saw the appellant before the identification parade commenced as the appellant(s) were removed from the cell; that the parade officer failed to change the appellants before the parade to dress as he wanted.***

- iii. ***That the learned Judges failed to consider that the appellants constitutional rights to fair trial were infringed contrary to Article 50 (1) and (2) of the Constitution because there was no P3 or medical evidence to prove violence and in its absence the court should have convicted the appellants of the lesser charge in section 296 (1) of the Penal Code; that vital evidence was withheld as the prosecution failed to call essential witnesses mentioned in the case such as the arresting officer, one Kariuki, one Macharia, the so called Good Samaritan and the document expert.***
- iv. ***That the learned Judges erred in confirming the mandatory death sentence contrary to Article 26 of the Constitution on the right to life and Article 50 (2) (p) on denial of benefit of least severe punishment.***

***(v) That the High Court erred in law in disregarding the appellants defence without giving cogent reasons for doing so contrary to Section 169 of the Criminal Procedure Code as enjoined with Section 212 of the Criminal Procedure Code relating to evidence in reply.***

10. Counsel for the appellant elaborated on the grounds of appeal and emphasized that the key issue relates to identification of the appellants. It was submitted that the alleged offence was committed during darkness and the conditions were not favourable for identification that was free from error. That the learned Judges in their re-evaluation of the evidence came to a wrong conclusion. That the complainant stated there was light from the door of the car that enabled him to see and identify the appellants; that the intensity of the light was not interrogated; that the identification parade in respect of the appellants was not proper as the investigating officer was present throughout the parade and gave contradictory evidence. That those persons in the parade were not of the same height, age and complexion as the appellants and this was prejudicial to a proper conduct of the parade. It was submitted that persons mentioned and referred to by the complainant were not called to testify and an opportunity was lost to prove the innocence of the appellants. That the prosecution should have called a document examiner to prove the authenticity of the documents recovered from the 1<sup>st</sup> appellant; that the Good Samaritan mentioned by the complainant should have been called to testify as well as a one Kariuki mentioned by the complainant who made the report at Naro Moru Police Station. It was submitted that some of the items allegedly recovered and mentioned by PW6 were not produced as exhibits in court and this fact should be considered and the benefit of doubt given to the appellants. On the application of the doctrine of recent possession, it was submitted that there was no proof that the recovered vehicle and documents were stolen as the defence case was to the effect that the complainant had given the appellants the motor vehicle to sell. Counsel submitted that the learned Judges erred in shifting the burden of proof and requiring the appellants to explain their possession of the motor vehicle. Counsel urged this Court to note that the appellants were unrepresented during trial and did not appreciate the errors made by the trial court.
11. The State in opposing the appeal submitted that the prosecution case was proved to the required standard. That the question of there being un-favourable conditions for error free identification of the appellants is not an issue in this appeal because the High Court agreed that the conditions for identification were difficult. That the learned Judges upon agreeing that the right identification of the appellants was not proper given the conditions, correctly proceeded to re-examine if there were additional evidence that linked the appellants to the offence as charged. That the learned Judges were satisfied that the appellants were found in possession of the recently stolen motor vehicle registration no. KAS 015F and they did not offer satisfactory explanation of their possession. That the Judges were also satisfied that the complainant's identity card, driver's licence, PSV licence

and passport were recovered from the 1<sup>st</sup> appellant and no satisfactory explanation was offered as to how the 1<sup>st</sup> appellant came to be in possession of these items. The State submitted that through the doctrine of recent possession, the High Court was properly satisfied that the appellants were guilty as charged. It was submitted that the learned Judges considered and evaluated the defence given by the appellants that the complainant had given them the motor vehicle to sell. It was submitted that accused nos. 4, 5, 6 and 7 did not agree with the defence testimony as given by the appellants. The State submitted that both the trial magistrate and the High Court highly doubted the veracity of the defence. It was submitted that the appellants never complained that the identification parade was not properly conducted; that parade forms were produced in evidence and no complaint was made by the appellants; the appellants never cross-examined PW5 who conducted the parade. It was submitted that the allegation that the parade was improper was an afterthought and there is no law that stipulate that persons who participate in a parade must come from a specific place and cannot be persons from the police cells or anywhere else.

12. We have considered the rival submissions by counsel. We have examined the record of appeal and the judgment of the High Court. We note that this is a second appeal which must be confined to points of law. As was stated in *Kavingo – v – R.* (1982) KLR 214, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in *Chemagong vs. Republic.* (1984) KLR 213 at page 219 where this Court held:

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic, 17 EACA146)”.***

13. The evidence against the appellants is primarily by PW1, PW3 and PW6 as reproduced above. Evidence of visual identification should always be approached with great care and caution (See *Waithaka Chege – v- R.* [1979] KLR 271). Greater care should be exercised where the conditions for a favourable identification are poor and where identification is by single witnesses *Gikonyo Karume & Another – v – R.* [1900] KLR 23. It has been held that before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See *Abdalla bin Wendo & Another – v- R.* [195] 20 EACA 166; *Wamunga – v- R.* [1989] KLR 42; and *Maitanyi – v- R.* 1986 KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.
14. In the instant case, the learned Judges expressed themselves as follows on the issue of night identification of the appellants by PW1:

***“The complainant PW1 had a short period of time to see and identify the assailants given his evidence that it was night when he was hired, around 8pm and the fact he saw them briefly by cabin lights and petrol station lights. It is important and we noted that by the time PW1 saw these people, they had not declared their intentions to robbing him. There was no reason for serious scrutiny of their identity at the time. We find that the circumstances of identification were difficult and in the circumstance what was required was other material evidence to corroborate the evidence of PW1”.***

15. We agree with the High Court Judges that the conditions for correct visual identification of the appellants by PW1 were difficult and not favourable. The Judges were correct in holding that unless there was other material evidence to corroborate the testimony of PW1, the visual identification by PW1 could not be relied upon.
16. From the evidence on record, the Judges found other material evidence linking the appellants to the crime through the doctrine of recent possession and the recovery of the complainant’s property with the 1<sup>st</sup> appellant and the arrest of the three appellants together in the subject motor vehicle. We concur with the learned Judges re-evaluation of the evidence when they stated that the

evidence of PW6 was that the complainant's documents and those of the complainant's wife and child were found with the 1<sup>st</sup> appellant. That the 1<sup>st</sup> appellant did not deny he was found with the complainant's properties. His explanation was that the complainant left them with him in order to facilitate the sale of the vehicle. The Judges found that this explanation was not plausible and posited the question why would the complainant leave his elector's card, ATM card, his passport and that of his wife and child, his driver's license and such other documents. Of what role would his wife's and child's passport play in the sale? The Judges found that the only explanation is that the 1<sup>st</sup> appellant obtained the documents as a result of the robbery. Further, the learned Judges observed that the appellants did not deny being in possession of the stolen vehicle. That their explanation was that PW1 gave it to them to sell. We entirely agree with the findings and conclusions of the learned Judges.

17. On our part, for additional reasons, we concur with the decision and findings of the two courts below. The motor vehicle was not registered in the name of the complainant PW1 and the complainant's identity card, elector's card and even the complainant's signature could not transfer the vehicle to a third party in any sale transaction. It is not plausible for the complainant to give the appellants documents that could not be effective to sell and transfer the motor vehicle. Even if the appellants were authorized to sell the vehicle, their conduct in dismantling the engine is inconsistent with sale of a vehicle. Further, the 1<sup>st</sup> appellant when interrogated by Ismail Ali PW3 at the time they were found sleeping in the vehicle stated that the vehicle belonged to his father. This contradicts the defence testimony that the complainant gave them the vehicle to sell. We are convinced and satisfied that the doctrine of recent possession was properly applied in this case. Under this doctrine, **Section 112** of the **Evidence Act**, places the evidential burden to explain possession of the recovered items on the appellants. It was not an error of law on the part of the two courts below to call upon the appellants to explain their possession of the motor vehicle and all other items belonging to the complainant that were recovered from them.
18. The other grounds of appeal raised by the appellant do not affect their guilty and culpability and do not dent the prosecution evidence in this case. The prosecution is not obliged to call a multitude of witnesses to prove its case. From the complainant's testimony, when the Good Samaritan was approaching, the assailants took off. The testimony of the Good Samaritan would not dent or add weight to the prosecution case. Likewise, it was not necessary to call a document examiner to testify as there was no dispute as to the ownership and genuineness of the complainants' documents that were recovered from the 1<sup>st</sup> appellant. On the submission that no photographs were taken to prove that the appellants were found sleeping in the motor vehicle, we pose the question what better evidence could be tendered than that of an eye witness PW3 who testified that he found the appellants sleeping in the vehicle? The charge facing the appellants is not premised on physical injury caused to the complainant but on threat or use of actual violence against the complainant immediately at, before, during and or at the time of robbery. The complainant testified he was tied with a rope. This per se is use of actual violence at, before and during the robbery. It is our considered view that no prejudice was caused to the appellants for failure to avail any medical evidence in support of the prosecution case. The death sentence meted on the appellants is mandatory and not illegal.
19. The totality of our consideration of the grounds of appeal and the issues of law raised is that we find this appeal has no merit and is dismissed.

***Dated and delivered at Nyeri this 3<sup>rd</sup> day of June, 2014.***

***ALNASHIR VISRAM***

***JUDGE OF APPEAL***

***MARTHA KOOME***

***JUDGE OF APPEAL***

***OTIENO-ODEK***

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**