



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & KIAGE, JJ.A.) CRIMINAL APPEAL NO. 407 OF 2010

BETWEEN

JAMES MWANIKI KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Machakos (Lenaola & Warsame, JJ.) dated 28th May, 2010

in

HC. CR.A. 67 OF 2006)

JUDGMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 15th November, 2004 at Mtito Andei Township in Makueni District, jointly with another not before court, while armed with an offensive weapon namely; a pistol, they robbed **Andrew Otieno Ouma** of a motor vehicle registration number KAR 643P make Mitsubishi Canter and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Andrew Otieno Ouma.

After a full trial, the appellant was found guilty as charged, convicted and sentenced to death as by law prescribed. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to the High Court of Kenya at Machakos. The first appellate court evaluated the evidence that had been tendered before the trial court and came to the conclusion that there was sufficient evidence that the appellant was found in recent possession of the stolen motor vehicle and therefore rejected the appeal. Dissatisfied with that finding, the appellant preferred a second appeal to this Court.

This being a second appeal, our mandate under **Section 361** of the **Criminal Procedure Code** is to consider the appeal on points of law only. The Court must respect concurrent findings of fact by the two lower courts unless those facts were not based on evidence or were based on a misapprehension of the evidence or the courts are shown to have demonstrably erred in principle. See **NJOROGE v REPUBLIC [1982] KLR 388**.

Briefly stated, the evidence that was adduced against the appellant in the trial court was that on 14th

November, 2011, **Andrew Otieno Ouma, PW2**, a turn boy in motor vehicle registration number KAR 643P (hereinafter referred to as “**the stolen motor vehicle**”), together with one **Shadrack Muluje**, the driver of the said motor vehicle owned by Awanat Enterprises, arrived at Mtito Andei at about 9 p.m. They were on their way to Nairobi to deliver some cargo. They decided to rest there until the following day. The driver slept in a room while PW2 slept in the motor vehicle’s cabin. On the following day at about 4 a.m, PW2 woke up and as he was going to call the driver, he was confronted by two men. One of them was armed with a pistol. PW2 was ordered to leave the vehicle or else he would be shot dead. He complied and the two men entered the vehicle and drove off towards Nairobi.

PW2 reported the incident to the driver and subsequently they made a report at Mtito Andei Police Station. Shadrack Muluje boarded another motor vehicle belonging to his employer and headed towards Nairobi in pursuit of the stolen motor vehicle.

On the same day at around 6 a.m., **Richard Kieti, PW3**, who was driving another motor vehicle belonging to Awanat Enterprises towards Nairobi, was overtaken by the stolen motor vehicle. There were two people in the vehicle and it was being driven at a very high speed. However, the driver of the same was not Shadrack, who was known to him, but a stranger. PW3 decided to telephone Shadrack to enquire of his whereabouts. Shadrack told him that the vehicle had been stolen. PW3 made a report to the Highway Police Patrol and a search for the vehicle began.

Police Constable David Wahome, PW4, was one of the police officers manning a road block along Mombasa-Nairobi road. At around 6 a.m. a police report was circulated regarding the stolen motor vehicle. At about 6.30 a.m. PW4 spotted the stolen motor vehicle approaching the road block at a very high speed. He flagged it down but the driver ignored the signal and sped on. There were two occupants in the vehicle. The Police Officers gave chase in a different motor vehicle and caught up with it near Konza. The driver was ordered to stop and he obeyed. The two people who were in it dashed out and suddenly started firing in the air as they ran into nearby bushes. The Police Officers returned fire and killed one of them. The other one (the appellant herein) was apprehended.

The evidence of PW4 was materially corroborated by **Chief Inspector Peter Matu, PW5**, who was at the material time in charge of C.I.D. Kibwezi. He was the one who circulated the report regarding the stolen motor vehicle. He said that the body of the dead robber lay about 3 kilometers from the road block which was being manned by PW4 and other police officers. The stolen motor vehicle was positively identified by PW2 as the one that he had been robbed of at gun point.

In his defence, the appellant stated that he was a hawker at Emali. On the morning of 15th November, 2004 he boarded a matatu heading to Konza to collect milk for sale. Upon arrival at the Mombasa Road-Konza junction, shortly after alighting from the matatu, he saw some people ahead of him. He then heard gunfire and a stampede ensued. He realized that the people he had seen ahead of him were police officers, they ordered him to raise up his hands. The police officers surrounded him and one of them took his mobile phone and Kshs.4,800/= . He was then arrested and taken to Kibwezi Police Station and later charged with the offence of robbery with violence. He denied any knowledge of the said offence.

In his homemade memorandum of appeal, the appellant raised six grounds of appeal. **Mr. Mogikoyo**, the appellant’s learned counsel, chose to pursue just one of them. He submitted that the first appellate court erred in law and in fact in holding that under the doctrine of recent possession, the appellant was rightly convicted. He added that the appellant was not positively proved to have alighted from the stolen motor vehicle as stated by PW4. Mr. Mogikoyo pointed out that according to PW4, the appellant was chased over a distance of about 500 metres from the road before he was apprehended, yet PW5 told the trial court that the body of the person who was shot dead lay about three kilometers from the road block. Counsel’s view was that the evidence of these two witnesses was contradictory and that implied that PW4 must have lost sight of the person they were chasing. Counsel further submitted that the police did not recover the gun which the robbers were alleged to be in possession of, yet they did not see the robbers throwing it away. In his view, the prosecution evidence regarding the chase and arrest of the appellant was not watertight.

Mr. Mogikoyo also faulted both the trial court and the first appellate court for rejecting the appellant's defence which counsel thought was credible.

Ms Oundo, Assistant Director of Public Prosecutions, opposed the appeal. She submitted that the appellant was rightly convicted on the evidence of recent possession of the stolen motor vehicle. She cited the meaning of 'possession' as stated in **Section 4** of the **Penal Code** which is as follows:

“(a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.”

Ms Oundo submitted that when the stolen motor vehicle was first flagged down by the police, the driver refused to stop and when he eventually stopped, the occupants started firing at the police as they ran away. The evidence of PW4 was to the effect that he did not lose sight of the appellant until he apprehended him. There was therefore no doubt that he had been in possession of the stolen motor vehicle.

We agree with the appellant's counsel that the determination of this appeal turns on the question whether the appellant can be said to have been in possession of the stolen motor vehicle shortly before he was apprehended. As stated in the celebrated case of **R v LOUGHLIN 35 Criminal Appeals 69**, the doctrine of recent possession is simply one of circumstantial evidence. Before a person can be convicted under that doctrine, the possession must be positively proved. In other words, there must be positive proof that the property was found with the suspect, that the property is positively the property of the complainant, and that the property was recently stolen from the complainant. See **ISAAC NG'ANG'A KAHIGA alias PETER NG'ANG'A KAHIGA v REPUBLIC, Criminal Appeal No. 272 of 2005**.

In this appeal, there is no dispute that the motor vehicle in question was stolen from PW2. PW3 and PW4 testified as to how the motor vehicle was recovered. PW3 knew the registration number of the motor vehicle and the driver who was supposed to be in control of the same. When he was overtaken by the motor vehicle at Salama at about 6 a.m. he realized that it was being driven by a stranger. He telephoned Shadrack, who was supposed to be driving it, who told him that the vehicle had been stolen. He told Shadrack that he had seen the vehicle with two people inside and it was being driven at a high speed towards Nairobi. PW3 then rang the company's transport manager who advised him to alert the Highway Police.

According to PW4, upon receipt of the report from police controller, he saw the motor vehicle at about 6.30 a.m. and it was being driven at a high speed towards Nairobi. Together with other police officers they flagged it down but the driver refused to stop. There were two occupants in the motor vehicle. The police chased the motor vehicle and caught up with it near Konza. When the driver was forced to stop, both occupants came out of the vehicle and began firing in the air and that is when one of the occupants was shot dead. The police chased and arrested the other occupant, the appellant herein, and combed the area to find the gun but they did not get it. PW4 added that they questioned the appellant but he did not explain how he came to be in occupation of the stolen motor vehicle.

In our view, there is no doubt that the appellant was in possession of the stolen motor vehicle. In **GACHERU v REPUBLIC [2005] 1 KLR 688**, this Court adopted the definition of possession in **Section 4** of the **Penal Code**. The possession of the motor vehicle by the appellant aptly fits that definition.

The contradiction between the evidence of PW4 and PW5 as to the distance from the road to the place where the body of the appellant's accomplice was found lying is not material. In our view, there is

nothing in evidence to show that PW4 lost sight of the appellant from the time the robbers alighted from the motor vehicle until his apprehension. We accept that the appellant had been in the stolen motor vehicle shortly before his arrest and did not give any explanation for that.

We are satisfied that the appellant was rightly convicted on the evidence of recent possession of the stolen motor vehicle. This appeal lacks merit and is accordingly dismissed.

Dated and Delivered at Nairobi this 31st day of July, 2014.

W. KARANJA

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

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

REGISTRAR