



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 20 OF 2010

BETWEEN

JOSEPH NJENGA NGETHE APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (W. Karanja & Makhandia, JJ.) dated 9th February, 2010

in

H.C.CR.App No.172 of 2008)

JUDGMENT OF THE COURT

1. **Joseph Njenga Ngethe** as the 1st accused was jointly charged with others with two counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code, Cap 63** of the **Laws of Kenya**. In count I, the Information was that on the 9th day of June 2007 along Siakago-Embu road within Mbeere District of the Eastern Province, jointly with others not before court while being armed with a pistol and pangas, he robbed Festus Mathegi Njoroge of a motor vehicle registration no. KAR 104U white Toyota Corolla, cash Ksh. 800/= and a Nokia cell phone model 1600 all valued at Ksh. 386,800/= and at or immediately before or immediately after the time of such robbery injured the said Festus Mathegi Njoroge. In count II the Information was that on the same day and place, while jointly armed with a pistol and pangas, he robbed Jemima Muchogo Mathegi of a handbag, cash Ksh. 1,000/= one sweater and personal effects and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Jemima Muchogo Mathegi.
2. The 2nd accused was John Njiru Njeru, the 3rd accused was Ali Musa Kilango, the 4th accused was Thomas Gitau Wangaru, and the 5th accused was Jeremiah Gachohi Ndege while the 6th accused was John Njeru Sammy. At the end of the trial, the honourable magistrate acquitted the 2nd, 3rd, 4th, 5th and 6th accused. The 1st accused, who is the appellant herein, was convicted on both counts 1 and 2 and sentenced to death as by law prescribed. His appeal to the High Court was dismissed. Aggrieved by at decision he has lodged this second appeal.
3. To appreciate the grounds of appeal, we recount the background facts of the case. PW1 Festus

- Mathegi Njoroge testified that on 9th June 2007, at 7.45 pm he was driving his motor vehicle registration no. KAR 104U along Siakago-Embu road in the company of his wife Jemima Mucogo Mathegi (PW3). While driving, another motor vehicle came so fast from behind and wanted to overtake him; this other vehicle had its headlights on; he blocked the vehicle from overtaking him and he sped off; the driver of this other vehicle also increased his speed and PW1 sensed danger. At a place known as Ciany area, PW1 allowed the vehicle to overtake him and this other vehicle stopped immediately in front of him; he also stopped to avoid collision with the vehicle. Two people came out of the other vehicle. One was armed with a panga and the other with a pistol. The one with the panga ordered him to get out of his car; he alighted and received two cuts on the head. The other man with a pistol went to the side where PW3 was seated and ordered her to alight from the vehicle. PW1 testified that he was ordered to surrender the ignition key to his vehicle registration no. KAR 104U and he also parted with his mobile phone Nokia 1600 and a wallet containing Ksh. 800/=. The two men then drove off in his motor vehicle with his wife (PW3) inside. Due to bleeding from the cut on the head he became unconscious.
4. PW2, Patrick Kamau Muriuki, testified that at all material times relevant to this appeal, he was a petrol attendant at Sagana Total Petrol Station. On 13th June 2007, he was selling fuel at the petrol station. At around 8.30 pm, a white Toyota corolla motor vehicle registration no. KAU 165F came to the petrol station for fuel; the vehicle had three occupants and the person seated on the co-driver's side asked him to fuel the car for Ksh. 1,800/=; He fuelled the car but the vehicle sped off without paying; He telephoned Sagana Police Station and gave particulars of the vehicle and informed the police that the vehicle had sped off toward Nyeri-Nairobi road. After about 20 minutes, the police called him that the vehicle had been intercepted at Makutano road block; He was picked by the police and taken to the road block to identify the vehicle; He identified the vehicle and its driver and the person who was sitting on the co-driver's side. At the road block, PW2 identified the appellant as having been the driver of the vehicle when it sped off without paying for the fuel; He identified the 2nd accused as the person who was seated on the co-driver's side.
 5. PW7 police constable Geoffrey Muthiani testified that on 13th June, 2006, his colleagues and he were deployed for duty along Nairobi-Nyeri Highway at Makutano road block. At around 9.00pm, he was raised through police communication controller and informed that motor vehicle KAU 165F, a white Toyota corolla with three occupants, had fuelled at Sagana Petrol Station and failed to pay; They waited for about 10 minutes and the said vehicle came to the road block; They ordered the vehicle to stop and the driver obeyed. Before they could talk to the occupants, the CID personnel arrived at the scene: The CID officers went straight to the vehicle and he raised OCS Sagana Police Station who came with the petrol attendant (PW2).
 6. PW8 police constable Munene Nyaga testified that when they arrived at the Makutano road block after motor vehicle KAU 165F had been intercepted, they found the appellant seated on the driver's seat and the 2nd accused was on the co-driver's seat. PW2, the petrol attendant, was able to positively identify the driver (appellant) as the person who had ordered the vehicle to be fuelled. Later the DCIO Mbeere picked the three persons who were arrested in connection with the present charge of robbery with violence.
 7. PW5 police constable Mwangi Kimani testified that on 13th June 2007 at around 8.00 pm while on patrol along Sagana Makutano road with police constable Munene, they heard through their radio call that there was a motor vehicle KAU 165F Toyota which had fuelled at Sagana Petrol Station and had refused to pay for the petrol worth Ksh. 1,800/=. The motor vehicle was said to be white and headed towards Nairobi. When he arrived at the Makutano road block he found the motor vehicle had been detained and three people were lying by the side. One of the police officers drove the detained motor vehicle KAU 165F to Sagana Police Station. The following day, he was informed that the three persons who were occupants of the vehicle were required by the DCIO Mbeere to answer a charge of robbery with violence. He was informed that the motor vehicle had been photographed and returned to the owner.
 8. PW9 Chief Inspector Jafeth Mateche testified that on 10th June 2007 he received a call from a member of the public that there was a male person who was injured in a van; that he went to the scene and the male person identified himself as Festus Mathegi Njoroge (PW1). Festus told him he had two panga cuts on the head inflicted on him on 9th June, 2007, when his motor vehicle

- KAR 104U white Toyota corolla was robbed. He testified on 13th June 2007, he received information that a white Toyota corolla registration no. KAU 165F had been fuelled at Sagana Total Petrol Station and was driven away without paying; and the vehicle KAU 165F had been intercepted by police. He proceeded to Sagana Police Station and identified the vehicle which appeared to be similar to the one whose description he had been given by Festus Njoroge (PW1). He caused the motor vehicle to be dusted so that the engine and chassis numbers could be visible and be restored. Upon dusting it became apparent that motor vehicle KAU 165F was in fact motor vehicle KAR 104U which had been robbed from PW1 Festus Njoroge. The number plates had been altered to disguise the vehicle. He contacted Blue Shield insurance company who indicated that motor vehicle KAU 165F was insured in the name of John Njoroge; Numerous letters were sent to the said John Njoroge using his last known postal address but no response was received.
9. As already stated, the appellant was convicted of the offence of robbery with violence and sentenced to death; his appeal to the High Court was dismissed. Aggrieved by the decision, he lodged this appeal and in a supplementary memorandum of appeal he raises three grounds *to wit*:
- i. ***That the learned Judges of the High Court erred in law and fact in failing to adequately analyze and re-evaluate the evidence on record and arrive at their own decision.***
 - ii. ***That the learned Judges of the High Court erred in law and fact in upholding the conviction and sentence on circumstantial evidence and mere suspicion.***
 - iii. ***That the learned Judges of the High Court erred in law and fact in upholding the conviction and sentence on faulty identification by a single witness.***
10. During the hearing of the appeal, learned counsel Ms Betty Rashid appeared for the appellant while the Senior Public Prosecution Counsel Edward W. Makunja appeared for the State.
11. Counsel for the appellant expounded on the grounds of appeal submitting that the learned Judges of the High Court did not adequately analyze the evidence on record. It was submitted that the motor vehicle registration no. KAR 104U Toyota Corolla which was allegedly stolen was not physically produced in court as an exhibit. The prosecution produced photographs of the vehicle without producing the physical vehicle as an exhibit. Counsel submitted that the trial court was not able to view the vehicle and the photographs produced were not sufficient to prove that indeed motor vehicle registration no. KAR 104U Toyota corolla had been stolen. It was submitted that in the absence of the physical motor vehicle, the prosecution had not proved its case to the required standard. Counsel further faulted the trial court and the High Court Judges in relying on the doctrine of recent possession. It was submitted that for the doctrine of recent possession to apply, the item stolen must be produced as an exhibit in court. In the instant case, the failure by the prosecution to physically produce the motor vehicle showed that the doctrine of recent possession was not applicable; that the trial court and learned Judges erred in using photographic evidence to arrive at a conclusion that the appellant was found in possession of the motor vehicle; that photographic evidence is inadequate to prove possession.
12. It was further submitted that the learned Judges erred in that the evidence on record was contradictory. It was pointed out that PW 4 Inspector of Police Alfred Mugo testified that the firearm recovered was a pistol which was an American Colt Serial no. 81188 model 1917 while PW 6 Johnston Musyoki Mwongela, the firearms examiner, testified that the firearm was a Smith & Wilson revolver serial no.81188. It was submitted that PW 4 stated the firearm was a pistol while PW6 testified that it was a revolver: Counsel urged that a pistol is different from a revolver and the learned Judges erred in not finding that these contradictions were material and raised doubt as to the guilt of the appellant. Counsel for the appellant also submitted that PW9 Jafeth Mateche testified that he had dusted the motor vehicle KAU 165F and the results were negative: It was submitted that if the results of the dusting were negative, then there was no evidence to connect the appellant to the crime. Counsel further submitted that the testimony of PW2 Patrick Kamau Muriuki who allegedly identified the appellant, was of no evidential value. The contention is that PW2 testified that the appellant was lying with his face down at the Makutano road block and it is impossible to identify a person who is lying with his face down. Counsel further submitted that PW2, the petrol attendant, was irregularly exposed to the appellant at the time of

- the appellant's arrest and the testimony of PW 2 should be disregarded. Counsel for the appellant further contended that the 3rd accused testified that the appellant was the driver of the motor vehicle; that this testimony was from an accomplice and should have been disregarded as the appellant was not given an opportunity to cross-examine the 3rd accused. The appellant contended that the P3 Form that was tendered in evidence was produced by an incompetent person; that the form was produced by a police officer PW9 rather than the medical doctor who filled the form and this was a miscarriage of justice. Finally, the appellant contended that the learned Judges erred in not considering that the motor vehicle which was allegedly stolen was insured in the name of a one John Njenga and the driving licence recovered in the vehicle belonged to John Njenga. That it was an error of law for the learned Judges to fail to consider that the appellant was not John Njenga and the recovered driving licence was not in the appellant's name.
13. The State opposed the appeal and submitted that both the trial court and the High Court properly considered and evaluated the evidence on record. The appellant was found in a vehicle that had been robbed four days earlier. The defence evidence was properly considered and the trial court properly found that the alleged accomplices were fare paying passengers in the motor vehicle who properly testified and identified the appellant as having been the driver of the motor vehicle. The State submitted that as regards the apparent contradiction as to whether the firearm was a pistol or revolver, the serial numbers given was 81188 and this was the same serial number in the testimony of PW4 and PW6; and that any apparent contradiction in the model of the firearm was minor and did not go to the culpability of the appellant. On the issue of accomplice evidence, the state submitted that the appellant was arrested at the steering wheel of the motor vehicle; the registration number of the vehicle had been changed and there was other material and relevant evidence to convict the appellant the accomplice evidence. It was submitted that the 2nd and 3rd accused confirmed that the appellant was the driver of the motor vehicle and he fuelled the vehicle at the petrol station of PW 2 and drove away without paying for the fuel. The State urged this Court not to interfere with the concurrent findings of fact by the two courts below. Counsel for the appellant replied that accomplice evidence cannot corroborate each other and it is a misdirection to find that the testimony of the 2nd and 3rd accused corroborated each other.
14. This is a second appeal and we are only concerned with points of law on the authority of a myriad of cases such as David Njoroge Macharia – v- R [2011]eKLR wherein it was stated that under **section 361 of the Criminal Procedure Code**:

“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”.

15. The first point of law raised by the appellant is that the trial court and the learned Judges erred by relying on a single identification witness who was PW2, Patrick Kamau Muriuki. The appellant contends that this was evidence of a single identifying witness and also that PW2 was irregularly exposed to the appellant at the Makutano road block and this was not an identification parade. Counsel submitted that where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. It was submitted that the learned Judges of the High Court erred in not re-evaluating and weighing the testimony of this single identification witnesses.
16. We have considered the submission by the appellant as regards the testimony of a single identifying witness. The law requires that the court must satisfy itself that in all circumstances, it is safe to act on the testimony of a single identifying witness. In the case of Charles O. Maitanyi vs. Republic (1986) KLR 198, this Court held that:-

“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification”.

In Wamunga vs. Republic (1989) KLR 424 it was stated that:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.

17. In the present case, the learned Judges in re-evaluating the testimony of PW2 as well as other evidence that connected the appellant to the offence as charged expressed themselves as follows:

“The appellant was indeed found driving the motor vehicle which had been robbed off the complainant on the night of 9th June 2007. The fact that he was driving was corroborated by PW2, accused 2 and 3 and also by police officers who arrested him behind the steering wheel at the road block on the Nyeri-Nairobi road. The motor vehicle which was robbed from the complainants was recovered from the appellant barely 4 days after the robbery incident. The same was found in his possession...”

18. On our part we have analysed the evidence on record and we are unable to find any misdirection or error on the part of the learned Judges in their analysis of the evidence. The learned Judges considered and evaluated the evidence in totality and did not rely on the testimony of a single identifying witness. The learned Judges took into account the testimony of the arresting police officers who stated that the appellant was stopped while on the steering wheel of the motor vehicle; that the stolen vehicle was recovered in his possession. We are satisfied that the testimony of PW2 was not the only evidence that connected the appellant to the offence and we see no reason to interfere with the findings of the two courts below that the appellant had been positively identified and connected with the crime.

19. The appellant contends that the learned Judges ignored the fact that the 2nd and 3rd accused were accomplices to the appellant and as such their testimony ought not to have been given consideration. In *Rex v Ndara s/o Kariuki and six Others [1945] 12 EACA 84*, the Court at page 86 enunciated the correct approach to accomplice evidence thus:

“A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence; and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief”. (See also *Kinyua v Republic [2002] 1 KLR 256*)”.

20. In the present case, we have examined the record of the proceedings before the trial magistrate. It is evident that the appellant cross-examined the 2nd accused. It is also clear that the trial magistrate evaluated the totality of the evidence adduced by the 2nd and 3rd accused. However, both the trial magistrate and the learned Judges did not address their mind to the issue of accomplice evidence in their respective judgments. The issue for us to consider is whether the appellant was prejudiced or if miscarriage of justice did take place. We have looked at the totality of evidence on record and are satisfied that the accomplice evidence given by the 2nd and 3rd accused was credible; we are satisfied that there is independent evidence which affects the appellant and connects him with the crime: The testimonies of PW2, PW5, PW7 and PW 8 who were at the scene at the time the appellant was arrested at the Makutano roadblock as well as the appellant’s recent possession of the stolen motor vehicle connect him to the crime. We find that no miscarriage of justice or prejudice was occasioned to the appellant through the testimony of the 2nd and 3rd accused.

21. The appellant further submitted that the learned Judges erred in upholding the finding by the trial

magistrate that the doctrine of recent possession was applicable in this case. This court stated in **Erick Otieno Arum – v- R, Kisumu Criminal Appeal No. 85 of 2005** as adopted by the High Court in **Morris Kinyalili – v – R 2012 eKLR** that to invoke the doctrine of recent possession, the prosecution must prove beyond reasonable doubt each of the following four elements:

- (i) ***That the property was stolen,***
- (ii) ***That the stolen property was found in the exclusive possession of the accused,***
- (iii) ***That the property was positively identified as the property of the complainant and***
- (iv) ***Possession was sufficiently recent after the robbery.***

22. The trial magistrate in the judgment observed that the appellant was found in possession of motor vehicle KAU 165F which was in fact KAR 104U. He was arrested while driving the said motor vehicle: PW5, PW7 and PW 8 testified how the vehicle was recovered from the appellant: The vehicle was recovered 4 days after PW1 the complainant was robbed off the vehicle. It is our considered view that all the ingredients required for the doctrine of recent possession to apply were proved in the present case. Both the trial magistrate and the learned Judges did not err in applying the doctrine of recent possession to this case.

23. We now consider the appellant's contention that the prosecution erred in law in failing to physically produce the recovered motor vehicle registration number KAU 165F (KAR 104U) in court as an exhibit and instead relied on photographs of the recovered vehicle. We have considered this submission and find it untenable. The complainant testified that he was robbed of his motor vehicle registration number KAR 104U which had been altered to read motor vehicle registration no. KAU 165F and that the said motor vehicle was recovered. It is not in dispute that the motor vehicle existed and it was recovered in possession of the appellant. It is unreasonable to expect the police to detain a motor vehicle that has been recovered and not hand it back to the owner until conclusion of a criminal trial. We hold that the photographs of the recovered vehicle tendered in court as exhibits were adequate to prove the case against the appellant and sufficient for the doctrine of recent possession to apply.

24. The final issue contended by the appellant is that the insurance cover on the recovered motor vehicle KAU 165F was in the name of John Njoroge and that the appellant was not John Njoroge. It was submitted that the testimony of PW9 shows that John Njoroge was the insured and if any offence was committed, it was by John Njoroge and not the appellant. We have considered this submission and state that the name of the insured is not an essential ingredient for the charge of robbery with violence. We are satisfied that the appellant was found in possession of the motor vehicle and the doctrine of recent possession was properly applied. The totality of the direct and circumstantial evidence on record point to the irresistible conclusion that the appellant was properly identified as the perpetrator of the crime. As was stated in the case of **R –v- Kipkering arap Koske & another (1949) EACA 135**, in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. We find that the inculpatory facts are incompatible with the innocence of the appellant.

25. The upshot of our evaluation of the grounds of appeal, submissions by counsel, the evidence on record and the applicable law leads us to the conclusion that this appeal lacks merit and is hereby dismissed.

Dated and delivered at Nyeri this 18th day of September, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

PATRICK KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR