



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: BOSIRE, WAKI & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 56 OF 2010

BETWEEN

1. MOSES NDERITU KAGUNYA
2. CHARLES MAINA KANUMBIAPPELLANTS

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Emukule & Ouko, JJ.) dated 5th March, 2010

in

H.C.Cr.A. Nos. 28 & 29 of 2008)

JUDGMENT OF THE COURT

The State Counsel who represented the Director of Public Prosecutions in this appeal, **Mr. V. O. Nyakundi** conceded it, and we think he was right to do so.

The appeal arose from the judgment of the High Court (*Emukule & Ouko, JJ.*) delivered on 5th March, 2010 dismissing the appeal by the two appellants herein against their conviction for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The facts leading to their conviction were fairly straightforward and may be summarized:

Festo Amaji Litunda (PW1)(*Litunda*) was a taxi driver based in Nakuru town. He was employed by **Rodex Samson Andari** (PW2) (*Andari*) who owned motor vehicle KAL 824K, Toyota Corolla. On 24th May, 2005 at about 2.00 p.m. a lady approached him and sought transport to Mweiga in Nyeri to buy vegetables. They negotiated the price and agreed on Kshs.4,500/= for the return trip. They drove all the way to Solio Ranch where he was asked by the lady to branch off the main road. After some distance the lady said she wanted to relieve herself and Litunda stopped the car. After the lady alighted, another vehicle came along and stopped. Four people came out and grabbed Litunda. The lady then reappeared with some tablets which the men forced down his throat with some water. He was thrown at the back seat of his car and the thugs drove away in it. Shortly thereafter, he drifted into unconsciousness. He came to his senses at Nyeri Hospital at 10.00 a.m. the following day and was informed by the nurses and policemen who were at his bedside that he was found by a bread-van abandoned on the road side and was taken to Nairuta Police Station from where **Pc. Andrew Musee** (PW4) took him to hospital. He reported

his ordeal to his employer and later recorded a statement at Nakuru Police Station.

Six weeks later, on 9th July, 2005 he was summoned to Parklands Police Station Nairobi where he was shown a Toyota Corolla Registration No. KAJ 397Z. It was proved by production of the authentic log book by PW2, that those registration numbers were fake and the car was in fact the taxi stolen from him on 24th May, 2005.

The recovery of the car was made on 5th July, 2005 by **Cpl. David Chebii** (PW3) of the Special Crime Prevention Unit, Nairobi, who was accompanied by **Cpl. Jacob Kathurima** (PW5) and **Pc. Driver Rimita** on patrol duties. They received information that a robbery had been committed in the City Centre and they proceeded to arrest two people at the City Centre. The relevant evidence of the officer may be reproduced verbatim:

“It is an informer who tipped us. That informer pointed out the two people to us. He told us that the two had hijacked car. So we arrested the two. The persons we arrested are accused 1 and 2 in the dock. We arrested them at the City Centre. The vehicle KAJ 397Z was parked near where they were standing. They told us that the motor vehicle has been there for almost two hours and was driven by a lady. The accused on the dock told us that they even directed the owner to park there because they are always there waiting for passengers to board the matatus. We arrested the two accused and escorted the car to Parklands police station.”

Cpl. Kathurima also confirmed that account of recovery of the vehicle stating in part:

“We found motor vehicle No. KAJ 397Z Toyota corolla white in colour next to where they were standing. It was parked near T/room in the city centre. They told us it belongs to a lady who came and parked it there. The car was towed to Kasarani Police Station. Then we handed over the 2 accused persons and the vehicle. The number plates are here MFI 2 and b. One of the number plates was found inside the car after the owner came and open it.”

The two persons arrested were the appellants herein.

The informer did not testify and nothing was found in the possession of the appellants. The appellants insisted that the vehicle had been parked there by a woman and they had nothing to do with it since they were mere *manambas* (*matatu* loading agents) in the area. They were locked up in Parklands Police Station.

When Litunda and Andari were summoned to Nairobi to identify the car on 9th July, 2005 they were also taken to the cells at Parklands Police Station to see the two appellants and did in fact see them.

Subsequently on 21st July, 2005 two identification parades were organized in Nakuru by **IP. Cheptio Chemsat** of C.I.D. Nairobi and Litunda picked out the two appellants. The appellants protested that Litunda had already seen them at Parklands Police Station and their objections were recorded.

In their defence, the appellants said they were *manambas* at T/room in the City Centre working for “*NK Matatus*” plying the Dandora/Mwiki route. They were at work on 24th May, 2005 when at about 10.00 a.m. a lady came driving motor vehicle KAJ 397Z and parked it near their *matatu* stage. As they stood near that parking lot waiting for passengers for their *matatus*, some policemen came and told them they were under arrest. When they asked why they were being arrested they were told it was because they were standing near the car. They said it was not theirs and explained that a lady had parked it there and left but the officers did not believe their story. They were taken to Parklands Police Station where, after some days they were called out of the cells and met PW1 and PW2. Later on, identification parades were organized and PW1 purported to pick them out although he had earlier seen them at the Police Station. Their complaints on that parade fell on deaf ears and they were told to complain in court.

In re-evaluating the evidence on identification the High Court found that the identification parade in which the two appellants were identified by Litunda were properly organized. It also found that the two

appellants were properly identified at the scene of the robbery and were picked out in properly organized parades. The reasoning of the court was as follows:

“Section II of PW 1’s evidence relates to the identification parade. In his evidence in this aspect, PW 1 says at p. 20 line 11:

“I never saw the suspects before going on the parade.”

However in the same page 20, lines 20-22 PW 1 says:

“It was easy for me to identify both accused on the parade since I had known their faces. I saw them at the police station for the first time. The second time I saw both accused was on the parade.”

PW 1 reiterated this evidence in cross-examination by both Appellants (Accused 1 and Accused II). At p. 36, lines 4 & 5:

“I saw you at the station for the first time. I also saw you when identification parade was conducted.”

PW 1 at line 9 when cross-examined by the 2nd Appellant:

“I first met you on 28th July, 2004. I saw you at the Police Station for the first time. I also identified you on the parade. That was the second time. I say I saw you at the Police Station after you were called by the Police Officer(s) ... I do not know his name. He was uniformed police officer.”

There is no question that the Appellants were properly identified and that it was easy for PW 1 to identify the Appellants. They had spent over 2¹/₂ hours with him in his taxi before robbing him of his taxi.

In respect of the protests raised by one of the appellants, the court stated:

“The 2nd Appellant, Moses Nderitu, was not satisfied. In answer to the question by PW 6 whether he was satisfied with the conduct of the parade, he answered:

“Aliniona kituo cha Police nikiwa Seli” (he saw me while I was in the Police Cell). Sijaridhika kwa sababu huyu mtu aliniona Nairobi police station (I am not satisfied because that man had seen me at Nairobi Police Station).”

Whether PW 1 had seen or not seen the 2nd Appellant at a Police Station in Nairobi does not negate the proper conduct of the identification parade. PW 1 did not see and was not shown to any of the Appellants before the parade.”

Those findings were challenged by the appellants who, through learned counsel **Mr. Maragia Ogaro**, submitted that there was no basis for the finding that Litunda identified the two appellants at the scene of robbery, which submission was supported by Mr. Nyakundi. We have examined the record carefully and we agree with both counsel that there was no basis for such finding of fact. The evidence of Litunda was that he was with a lady in the vehicle until he was attacked by four men. No one else was in the taxi as they drove from Nakuru to Mweiga. Furthermore, Litunda never said he identified any of his assailants at the scene, and in respect of the two appellants he stated upon cross-examination by the 1st appellant:

“I saw you at the police station for the first time.”

and by the 2nd appellant:

“I first met you on 24/7/2005. I saw you at the police station for the first time. ... I have never seen you before.” It was further submitted by Mr. Maragia that the identification parade was of no probative value since the identifying witness, Litunda, had been shown to the appellants before the parade. It did not matter that the parade was properly organized on 21st July, 2005 at Nakuru and that Litunda did not see the appellants at that station. There was evidence that the two appellants had earlier been shown to the witness in Parklands Police Station and the witness together with PW2 confirmed that was indeed so. He submitted that the High Court erroneously found that PW2 did not so confirm and hence arrived at the wrong conclusion. That observation too was supported by Mr. Nyakundi and is borne out by the record.

The High Court in its judgment posed the following question:

“It is curious that neither Appellant asked PW 2 whether they had seen them at the Parklands Police Station.

How does the court reconcile the evidence of PW 1, that he saw the Appellants at Parklands Police Station, with that of PW 2 that the Appellants were in cells, and that they (PW 1 and PW 2) did not see them, and that of PW 1 that he saw the Appellants, at the Police Station, and at the identification parade?

That question, in our view was irrelevant since there was confirmation from PW2 that both had previously been shown to the appellants by police, thus:-

“The police officers told us some people had been arrested and were in the cells. I requested the police to see them. They were called and I saw them. They were strangers to me.”

It is clear therefore that the findings of fact made with respect to identification of the appellants had no basis or were based on a perversion of the evidence on record. The evidence of identification is accordingly discounted.

The other basis for upholding the conviction of the appellants was that the two appellants were found in possession of the stolen car. The court stated:

“The Appellants gave no plausible explanation for being found standing by a hijacked motor vehicle. The Appellants were the custodians of a motor vehicle which had been recently stolen and for which custody and possession the Appellants gave no satisfactory explanation, or account.”

On this Mr. Maragia submitted, and was supported by Mr. Nyakundi, that the appellants were not in possession of the car but explained that they were merely standing near it as they waited to perform their *manamba* business in a public place. The police officers who arrested them did not wait to see if the appellants or any of them would enter the vehicle or do anything to it that would betray their possession of it. In support of that submission Mr. Maragia cited the decision of this Court in ***Dennis Saina Ndiema & Another v Republic Criminal Appeal No. 297 of 2009 (UR)*** where the issue was possession of a stolen cell phone. The Court stated:

“We will first consider the issue of possession. Dennis was arrested as soon as he entered the salon. The salon owner Danson Sonit (PW 2) was not positively so sure of the person who actually took the cell phone to him. Had the police been a bit patient and not hasty, they would have waited for Dennis to collect the cell phone and this would have squarely connected him with the cell phone in that he would have been found in actual physical possession of it. Serut cannot at the stage in which he was arrested deemed to have had any actual connection at all with the cell phone. In short there is no evidence to connect Serut with the possession of cell phone.”

We have examined the issue of possession and again agree with both counsel that the arresting officers were hasty in their duty. The explanation by the appellants that they were innocently standing near the stolen car in the course of their usual duties in the area was equally consistent with their innocence as with their connection with the stolen car. It would have been prudent to confirm their intentions or any connection with the stolen car if the officers only took time on the matter. But they did not. The information given by the informer did not avail them. It would not on its own support the conviction of the appellants. In our finding, there was no possession of the stolen car by the appellants or any of them.

The upshot is that the High Court erred in upholding the conviction of the appellants on the basis of their identification at the scene which never was, identification at an identification parade which was worthless, and on reliance on the doctrine of recent possession which had no factual basis. The appeal is allowed, the convictions are quashed and the sentences set aside. The appellants and each of them shall be set at liberty unless they are otherwise lawfully held.

We so order.

Dated and delivered at Nakuru this 23rd day of February, 2012.

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR