RPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: O'KUBASU, GITHINJI AND NYAMU, JJ.A)
CRIMINAL APPEAL NO. 164 OF 2000
BETWEEN
MICHAEL JIMMY OBUOKA ……………………….……….APPELLANT
AND
REPUBLIC ……………………………………………….RESPONDENT
(An appeal from a judgment of the High Court of Kenya at Mombas a (Waki, J. & Commissioner Tutui) dated 17th January 2000
in
H.C.CR.A. NO. 146 OF 1998)
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JUDGMENT OF THE COURT

The appellant was convicted by the Senior Principal Magistrate, Mombasa of two offences, namely, robbery with violence contrary to ***section 296(2)*** of the Penal Code in Count I and sentenced to death and kidnapping contrary to ***section 262*** of the Penal Code in count II and sentenced to 7 years imprisonment. On appeal to the superior court against conviction and sentence in both counts, the appeal against conviction and sentence for robbery with violence was dismissed in its entirely.

However regarding the appeal against conviction and sentence for the kidnapping the finding was altered by substituting a conviction under ***section 257*** of the Penal Code in place of ***section 262*** and partly allowed in that the sentence of 7 years imprisonment was set aside and the sentence left in abeyance.

The appellant has appealed to this Court against the dismissal of the appeal in both counts and filed a memorandum of appeal in person. This appeal has been pending for a long time because after filing the appeal, the appellant through his counsel Mr. Bryant filed a constitutional application in the superior court – **High Court Civil Suit No. 342(O.S)** of **2002** to challenge the constitutionality of the death sentence imposed for offence of robbery with violence. The appellant however withdrew the constitutional application sometime in late 2009. Thereafter his counsel filed a supplementary memorandum of appeal in December 2010. By the supplementary memorandum of appeal, the appeal is against the dismissal of the appeal against conviction and sentence for robbery with violence and not against conviction for the kidnapping. Indeed Mr Bryant has explicitly stated that the appellant committed the offence of kidnapping and that the appeal has been abandoned.

The evidence relied on by the prosecution at the trial was briefly as follows:-

Sanjay Ambalal Patel (PW3) (Sanjay) and his wife ***Kritika V. Patel*** (PW2) (Kritika) live in Ganjoni in Mombasa. They had a daughter S aged 3 years at the material time. He had a car Nissan Sunny registration no. KAD 250L. On the evening of 1st August 1997 Sanjay gave his car to his cousin ***Rajash Patel*** (PW4) (Rajash) to go for a drive and Rajash drove to Mama Ngina Drive. He was accompanied by his wife ***Alpa Patel*** (PW1) (Alpa) and Sanjah's daughter S. Rajash stopped at the Light House. At about 7 p.m. a person appeared with a knife and placed the knife on Rajash's neck. This person was later identified as the appellant. The appellant entered the car, took the car keys, sat at the rear seat, pointed the

knife at Alpa and the child; gave back the keys to Rajash and ordered him to drive as directed. Rajash drove to a bushy area in Bamburi. At Bamburi the appellant showed Rajash "*bombs*" and threw one outside which exploded. The appellant claimed that he was a Palestinian terrorist and that he wanted money to travel to his country. Thereafter the appellant tied both the hands of Rajash and Alpha with an electric wire, threw Rajash to the back seat and drove away. After sometime the appellant stopped the vehicle, blind folded Rajash with a piece of cloth, threw him and his wife out of the car and drove away with the child. Later the appellant drove back to the scene in the company of another man and tied Rajash again. The appellant again drove away with the child. Rajash and Alpa ultimately managed to untie themselves and reported the incident at Central Police station.

Meanwhile Kritika received a telephone call. Rajash had already given the appellant Sanjay's telephone number at appellant's request. The caller later identified as the appellant said that he had three members of her family and told her to deliver Shs.60,000 at particular spot at the Airport and thereafter he would ask for KShs.3 million. The appellant threatened her that if she did not follow the instructions he would kill the three people one by one. Kritika reported at Central Police station. The

appellant called Kritika severally between 8.00 a.m. and 11.41 p.m. which calls were reported to the police. ***I.P Jay Felix Munyambu*** (PW6), the O.C.S central police station with the help of Kenya Posts and Telecommunications located the calls and organized with the members of public for the ambush of the appellant. The appellant was eventually arrested at the Airport while making calls to Kritika. The appellant led police to his house in Chaani area where the child was found in the custody of Samuel Odhiambo Oloo - the appellants' nephew. The appellant was in possession of car keys and directed police to Kiembeni estate where Sanjay's car was recovered. It had run out of fuel. Upon arrest the appellant made a statement under inquiry to I.P Michael Njoroge (PW5). The appellant's nephew Samuel Odhiambo Oloo was charged in count III with the offence of wrongful confinement of the child contrary to section 261 of the penal code but was acquitted after trial.

The appellant made unsworn statement at the trial thus:-

"I did not kidnap the child. I wanted the man himself because he owed me some money. He did not fulfill his promise. I talked to the man that evening and he told me that he did not know me. We were not strangers with the complainant. I got annoyed. I did not have weapons. I left them at the Kanamai. I took the child on humanitarian grounds because it was cold out there"

The trial magistrate made a finding that the ingredients of the offence of robbery with violence under **section 296(2)** of the **Penal Code** had been proved.

The appellant appealed to the superior court against this finding, amongst others, contending that the charge of robbery was not proved beyond reasonable doubt. Although the appellant was not represented by counsel in the superior court he nevertheless made lengthy submissions. Regarding the charge of robbery with violence the appellant submitted in the superior court, among other things that, he was not armed, that there was no bomb, that the knife was collected from his house, that robbery was not the motive and that the complainant did not make a report of robbery to the police. The superior court considered the submissions and made findings, that, the appellant held a knife against both Rajash and Alpa as he commandeered the vehicle to be driven off to a place of his choice; that Rajash Patel was the special owner of the vehicle; that Rajash and his wife were dumped at a lonely place at night, that the appellant whether alone or with another drove off the vehicle, that the appellant was later found with the keys and led the police to where the vehicle had been abandoned; that the vehicle was towed away and identified in court and that the appellant threatened Rajash and his wife with violence.

It has been submitted that the superior court misdirected itself in failing to find that the prosecution failed to prove that the appellant took the vehicle with the requisite fraudulent intent to permanently deprive the owner as defined in **section 268 (2) (a)** of the **Penal Code**. It has further been submitted that since the car was found abandoned the appellant did not have the fraudulent intent to permanently deprive the owner of the car.

Section 268 referred to states in part:-

268 (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that to say-

(a) an intent permanently to deprive the general or special owner of the thing of it;
(b) …
(c) …
(d) …
(e) …
(3) …
(4) ...
(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

We appreciate that robbery with violence is in essence aggravated theft and thus fraudulent taking is an essential ingredient of the offence. However whether or not there is an intent permanently to deprive the special or general owner of the property alleged to have been stolen is a question of fact to be determined from the evidence. It follows that whether the fraudulent intent has been proved will ultimately depend on the peculiar facts of each case. The fraudulent intent can be established by circumstantial evidence. In addition, the court can presume or infer a fraudulent intent if the facts of a particular case warrant it. (*see section 119 of the Evidence Act*). The offence is constituted upon proof of fraudulent intent at the time of taking. It is not necessary to prove permanent deprivation in fact.

In this case, the offence of robbery with violence and the offence of kidnapping were charged together in one charge. By **section 135** of the Criminal Procedure Code, several counts can be joined in one charge, if among other things, the offences are founded on the same facts. There is no complaint of misjoinder by the appellant. On our part, we are satisfied that the appellant was properly charged with the two counts.

There are concurrent findings of relevant facts by the two courts below relating to how the appellant commandeered the motor vehicle from the Light House up to the time that Jayash and his wife were dumped at a lonely place at Kanamai. The appellant's defence in essence was that he was owed money but in our view was properly rejected. The facts relating to the commandeering of the vehicle to Kanamai, dumping Jayash and his wife at Kanamai and driving off with the vehicle are not contested. The only issue is whether the appellant took the vehicle with a fraudulent intent.

The appellant did not in his defence refer to the theft of the vehicle. He did not claim that he had a claim of right or that he intended to return it to the owner. The vehicle was taken from the special owner under threat of violence and in very frightening circumstances. The appellant was armed with a knife and at one point he threw a device from the car which exploded. He admitted all this in his statement under inquiry which, admittedly was made voluntarily. The appellant was in possession of the car keys in his pockets thereby indicating that the vehicle was still under his control. According to the evidence of Sanjay the appellant led them to Kiembeni estate where the car had been kept. The inference by the superior court that the car had been "abandoned" is not, with respect, entirely correct. Rather, it seems from the evidence that the vehicle had been kept at Kiembeni Estate under the control of the appellant who still had possession of the keys. The car was recovered over 24 hours later and it seems that the appellant was preoccupied for the whole day in trying to obtain ransom money. He was in need of money. It is a reasonable inference that after concluding the ransom demand he could have sold the car. He did not by action at any time evince a contrary intention.

From the circumstances we are satisfied, like the superior court, that the offence of robbery with violence was proved.

The appeal against sentence of death on the grounds among other things, that the sentence constitutes an inhuman and degrading punishment in breach of the retired Constitution is now academic as it has been conceded that the President on the advice of the Committee on Prerogative of Mercy has commuted death sentences of all death roll convicts including the appellant to one of life imprisonment. Thus it is neither expedient nor desirable in this case to adjudicate on the constitutional issue raised, namely, whether the death penalty prescribed by **section 296 (2)** of the Penal Code is an inhuman or degrading punishment.

In the final analysis we dismiss the appeal in its entirety.

Dated and delivered at Mombasa this 6th day of OCTOBER, 2011

E. O. O'KUBASU
…………………………..
JUDGE OF APPEAL

E. M. GITHINJI
………………………….
JUDGE OF APPEAL

J. G. NYAMU
……………………………
JUDGE OF APPEAL

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

DEPUTY REGISTRAR