



IN THE COURT OF APPEAL OF KENYA PEAL
AT NYERI

Criminal Appeal 17 of 2006

BATHOLOMEW KAGWIRIA NCHEBERE APPELLANT

AND

REPUBLIC RESPONDENT

***(Appeal from a judgment of the High Court of Kenya at Meru (Onyancha & Sitati JJ.)
dated 6th October, 2005***

**in
H.C.CR.A. NO.91 OF 2004)**

JUDGMENT OF THE COURT

The genesis of this appeal is **Meru Chief Magistrate's Criminal Case No.1708 of 2002** in which the appellant herein, **Bartholomew Kagwiria Nchebere** was the first of the six accused persons arraigned before that court on two counts of robbery contrary to **section 296(2)** of the Penal Code. The appellant's co-accused were acquitted on both counts while the appellant was acquitted on the first count but convicted on the second count. Hence this appeal is only concerned with the second count on which the appellant was convicted and sentenced to death as mandatorily provided by the law. The particulars of the offence in respect of that count were as follows:

“On the 18th day of June 2002 at Kariene Location in Meru Central District within the Eastern Province while armed with dangerous or offensive weapons, namely rifles, pangas and axes, robbed Father Linus Kinyua Kiraithe of his motor vehicle registration number KAE 324W, make Mazda Pick-Up, cash Kshs.6,000/=, a Seiko wrist watch, a bunch of keys all valued at Kshs.661,000= and at or immediately before or immediately after the time of such robbery used actual violence to the said Father Linus Kinyua Kiraithe.”

The concurrent findings of fact made by the two courts below upon consideration of evidence tendered by prosecution witnesses and the appellant were that Father **Linus Kinyua Kiraithe (PW1)** a Catholic priest attached to Diocese of Meru, Charia Parish, was on 18th June 2002 at around 8.00 p.m. driving a vehicle registration number **KAE 324W** from Nkubu Hospital to Charia when he decided to take Mujwa –Kirirwa road. He was suddenly confronted by a gang of six people who were all armed. These people were in another vehicle registration number **KUP 252** Landrover. As these people set upon Father Linus the light of both vehicles (**KAE 324 W** and **KUP 252**) were on so that Father Linus was able to identify the appellant who according to Father Linus was the group leader. During the robbery two of the gangsters were pointing guns at Father Linus as the others ransacked his pockets for cash. They robbed him of his Seiko wrist watch, a bunch of keys and shs.6,000/= as they drove him away in his vehicle but

later abandoned him. Father Linus alerted the Parish priest of the incident and the two proceeded to Kariene Police Station where Father Linus recorded a statement in which he gave the description of the appellant.

While investigations were being carried out the appellant was seen on 26th June, 2002 driving a vehicle registration number **KAK 580T** which vehicle was hired by **Alice Kimathi** (PW3) to carry her beans. For that work the appellant was paid shs.300/-. On 2nd July 2002 Daniel Rimberia (**PW10**) the Chief of Kianjai Location saw the appellant driving the vehicle registration No. KAK 580T. The appellant was carrying people and maize in the said vehicle to the home of Kimathi (**PW3**) where he was arrested by Cpl. Dominic Njiru (**PW7**) accompanied by other police officers. As a result of the foregoing the vehicle was impounded by the police for further investigations. It was discovered that the vehicle the appellant had been driving was actually using false registration number plates. Father Savio Kaburu (**PW4**) identified the vehicle as the one which Father Linus had been driving when he (Father Linus) was robbed on 18th June, 2002. According to the log book this recovered vehicle was registration number KAE 324W Mazda pick-up white in colour. It was further confirmed by Jaman Saisi (**PW5**) of Kenya Revenue Authority that this vehicle was owned by and registered in the name of Meru Diocese. As for the car registration number KAK 580T the records at Kenya Revenue Authority showed that it was owned and registered in the name of David Roberts of Nairobi.

It was as a result of the foregoing that the appellant together with five others were charged in court.

When put to his defence the appellant gave a sworn statement in which he stated that on 3rd July, 2002 while he was at his home he received a report that his grandmother was sick and that she needed to see him. He proceeded to his grandmother's home and found her very sick. She sent him to her daughter at Meru and it was while the appellant was at the bus stage that he met Peter Mwani who was the chief of Mituntu Location in the company of Francis Murungi (**PW2**) and Alice Kimathi (**PW3**). These three people were accompanied by three police officers who then arrested the appellant. It was the appellant's story that he was arrested because of a land dispute between him and his cousin Peter Mwani who had tried to inherit the land from the appellant's deceased father. In defence the appellant said nothing about being in possession of the stolen vehicle.

The learned trial magistrate considered the entire evidence before him and in the end was left in no doubt that the appellant was found in possession of a vehicle which had been recently stolen during the robbery in which Father Linus (**PW1**) was the victim. In concluding his judgment the learned trial magistrate expressed himself thus:-

“In the result, I find the prosecutions’ witnesses’ testimonies believable, reliable and truthful. This is a case where the accused was caught red-handed with the robbed vehicle. His denial is against the weight of the prosecution evidence. I find his defence to be a failed attempt to escape punishment for wrong doing. I dismiss that defence as a cooked up story to counter a well proved case. I find the prosecution case proved beyond reasonable doubt. I convict the accused on the main count II because he was in recent possession of the robbed vehicle and it is very probable that he was among the gang that robbed PW1. In any case he must have handled (driven the vehicle knowing that it was stolen property.”

It was pursuant to the foregoing that the appellant filed an appeal in the superior court. In his petition of appeal filed in the superior court on 21st July, 2004 the appellant set out the following home made grounds of appeal:-

“1. That the learned trial magistrate erred in law and fact in convicting the appellant in reliance upon the evidence attributed to PW3, 7 and 10 without the need to observe that at the time of the appellant's arrest he was not found in possession of the motor vehicle in question nor was the appellant arrested near the said motor vehicle neither had the appellant any relationship with the owner of the home where the said motor vehicle was found.

2. *That the learned trial magistrate further erred in both law and fact in convicting the appellant when he knew or ought to have known that the prosecution case was shrouded by contradictions.*
3. *That he learned trial magistrate erred in law and fact by failing to observe that the evidence presented before him was incapable of sustaining a conviction against the appellant.*
4. *That the learned trial magistrate further erred in both law and fact by failing to give due consideration to the appellant's defence."*

During the hearing of his appeal in the superior court the appellant also submitted supplementary grounds of appeal. The superior court considered all that was urged before it and came to the conclusion that the appellant had been properly convicted. In re-evaluating the evidence before it the superior court (*Onyancha and Sitati, JJ*) stated:-

"We have ourselves carefully reconsidered and re-evaluated the evidence on record, and in our humble view each of the above four questions has an affirmative answer. First is the evidence of PW1 who testified that on 18.6.2002, at about 8.00 pm, a gang of six armed men, who were in a land rover KUP 252 intercepted him as he drove to Charia Parish along the Mujwa –Kirirwa road and robbed him of a Mazda pick-up registration number KAE 324W. PW1 testified that he recognized the appellant as the man in command of the gang and as the one who took Kshs.6,000/= from PW1 along with PW1's Seiko watch. Then on the 26.6.2002, the appellant ferried some beans and some goods for PW3 at a cost of Kshs.300/= in a vehicle whose registration number was KAK 580T. The vehicle was a pick-up but without rails or canvass and was white in colour. The description of the vehicle as given by PW3 tallied with that given by PW1 and also PW4, Father Dominic Savio Kaburu.

PW5, Jaman Saisi then working with Commissioner of Motor Vehicles produced records of motor vehicle No.KAE 324W (though the typed record gives the registration number as KAE 024W, which we have no doubts in our minds that it is a typing error) and confirmed that the records held by their office showed that the motor vehicle KAE 324W a Mazda pick-up white cream coloured belonged to the Diocese of Meru. That same vehicle was identified by PW1 during the hearing of the case. The chassis and engine numbers being PRO 29118 and NO. E6-401318 respectively were also confirmed by the computer printout which was produced as exhibit 9.

Corporal Dominic Njiru who testified as PW7 stated that on 3.7.2002, he found motor vehicle registration number KAK 589 T parked outside the home of PW3, and since he was acting on information that the vehicle was the very same motor vehicle Registration Number KAE 324 W stolen at gunpoint from PW1, he fired 3 rounds of ammunitions in the air to ensure that if there were robbers in PW3's house, they would not run away. He arrested the appellant that same day in the house of PW3, and took possession of the motor vehicle. On the 3.7.2002, PW4, Father Dominic Savio Kaburu was able to identify the vehicle bearing registration number KAK 580T to be the Mazda pick-up registration number KAE 324 W that was stolen from PW1 on 18.6.2002. PW4 compared the chassis and engine numbers of motor vehicle registration number KAK 580T with those as per the log book which he had carried with him to Tigania Police Station when he was summoned to go there by the police. According to his testimony PW4 was able to identify the vehicle not only by comparing those details but said he was also able to vaguely see the erased writings on the side of the care namely, "Diocese of Meru". He was also able to identify it by the dents on the front of the driver's door following an earlier accident. He was also able to identify that vehicle by a lock that had been put on the dashboard though the same was now broken. We have no reason to doubt that evidence which we find consistent and uncontroverted.

In our considered view therefore, there is sufficient evidence on record to prove that the motor vehicle found outside the home of PW3 on the afternoon of 3.7.2002 bearing registration numbers KAK 580T was the same motor vehicle whose registration number was, until the robbery on 18.6.2002, KAE 324W.

Having settled the identity of the motor vehicle in question, was the vehicle in fact found in the

possession of the appellant on the 3.7.2002 or at any other time after 18.2.2002? from the record, the evidence that is relevant to this issue is that of PW3, Alice Kamathi M'Lithira and PW10, one Daniel Rimeria, then a chief of Kianjai location. According to PW3, she saw the appellant with the motor vehicle registration number KAK 580T on 26.6.2002 when the appellant transported some beans for her at a cost of Kshs.300/=. Again on the 3.7.2002, while she was seated outside her house at about 1.00 pm, she saw the appellant, from a distance of about 30 metres, park the very same vehicle outside her gate which was not locked. According to her testimony, the appellant left the car engine running when he came out of the car. She also testified that on the 26.6.2002, the appellant had actually driven the car into her compound as he delivered the beans. This witness and PW2 one Francis Murungi M'Itirithia both came to know the appellant through one Murithi who was married to PW2's sister. Murithi was however not called as a witness in the case.

PW10 testified that on 2.7.2002, he saw motor vehicle registration number KAK 580T at Kianjai market operating as a public transport (matatu) vehicle carrying both people and maize. He also testified that on that same day, he saw the appellant driving the said motor vehicle. That on 3.7.2002, while he was accompanying PW4 and police namely PW7, PW8 and PW9 to the appellant's home they found the same vehicle KAK 580T parked outside the home of PW3. In brief therefore, the appellant was seen by both PW3 and PW10 actually driving motor vehicle KAK 580T on 26.6.2002, 2.7.2002 and 3.7.2002. Did this driving of the motor vehicle by the appellant amount to possession? The appellant has argued that he was not found in possession of the motor vehicle”.

The learned Judges of the superior court considered carefully the issue of possession and finally concluded their judgment thus:-

“In the result, we have reached the conclusion that the appellant was properly convicted on the basis of the doctrine of recent possession of the stolen motor vehicle which was produced in court as exhibit 6/8 in photograph form.

For the reasons given above, we find no merit in the appellant's appeal and the same is dismissed in its entirety”.

It is from the foregoing that the appellant comes to this Court by way of second and final appeal. That being so only matters of law fall for consideration as provided under **section 361** of the Criminal Procedure Code (Cap. 75 Laws of Kenya).

When the appeal came up for hearing before us on 30th October, 2006 Mr. S.K. Njuguna appeared for the appellant while Mr. C.O. Orinda the Principal State Counsel appeared for the state.

Mr. Njuguna started his submissions by complaining that it was not clear from the trial court's record what language was used. We have perused the trial court's record and we are satisfied that the language used was Kimeru being interpreted into English. The court clerk was Mr. Kirimania and it is to be observed that the appellant and his co-accused cross-examined prosecution witnesses and when the appellant was put to his defence he made a long sworn statement. It cannot be said that the appellant did not understand the language. There is no merit in that complaint which we hereby reject.

Mr. Njuguna then raised the issue of the appellant's arrest and his being detained for 27 days. This matter was considered and found that the delay was only 12 days hence nothing turns on that.

The main issue in this appeal was whether there was sufficient evidence on which the appellant was convicted. Mr. Njuguna submitted that from the judgment of the trial magistrate it would appear that the trial magistrate was in some doubt as regards the appellant's guilt which doubt ought to have been resolved in favour of the appellant. Then Mr. Njuguna contended that **Alice Kimathi (PW3)** who was the principal witness gave contradictory evidence as to whether she was inside or outside the house when the police officers arrived at her home.

In his submissions Mr. Orinda stated that there was concurrent finding of facts by the two courts below

and that the evidence clearly showed that the appellant was properly convicted on the doctrine of recent possession of stolen property.

We have carefully considered the submissions by both *Mr. Njuguna* and *Mr. Orinda* and it is our view that the only matter that fall for our consideration was whether the doctrine of recent possession was correctly applied to the facts of this case. The concurrent findings of fact made by the two courts below were that the complainant ***Father Linus (PW1)*** was violently robbed of the Diocesan vehicle registration number KAE 324 W on the evening of 18th June, 2002. Then by 26th June, 2002 the appellant was seen driving a vehicle which he was operating as a taxi for hire. He was carrying passengers and also quite willing to be hired to carry maize and beans. He continued driving this vehicle until 3rd July, 2002 when he was arrested in possession of the said vehicle. This vehicle was bearing registration number KAK 580 T but after the appellant's arrest and police investigations it was proved that this was the same vehicle (***KAE 234W***) which *Father Linus* lost during the robbery of 18th June, 2002. Further investigations revealed that the owner of vehicle registration number KAK 580 T was one David Roberts of Nairobi. Clearly the appellant had been using wrong number plates on the stolen vehicle. From the evidence the sequence of events was such that the complainant was violently robbed on 18th June, 2002 and about one week after i.e. 26th June, 2002 the appellant was seen driving the stolen vehicle. He continued using the same vehicle, albeit, with fake number plates until 3rd July, 2002 when he was arrested still driving the same vehicle. Not that the appellant was bound to prove his innocence but it is significant to observe that when put to his defence the appellant chose to say nothing about the vehicle.

Having considered what has been urged before us, we are of the firm view that the appellant was convicted on very clear evidence of recent possession. As this Court has stated on numerous occasions a court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see **CHEMOGONG V. R [1984] KLR 611.**

In view of the foregoing we are satisfied that the appellant was convicted on sound assessment of the evidence on record and we therefore find no merit in this appeal. Accordingly, the appeal is dismissed in its entirety.

DATED and DELIVERED at NYERI this 9th day of February, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR