REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 265 of 2005

1. DAVID GICHURE KANYORO

2. MUCHIRI WAITITU …….....…….....…….. APPELLANTS

AND

REPUBLIC …….....……. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Mwera & Maraga JJ.) dated the 5th day of October, 2004

in

H.C.CR.A. NOS. 228 & 229 OF 2003)

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JUDGMENT OF THE COURT

The appellants, **David Gichure Kanyoro** (*1st appellant*) and **Simon Muchiri Waititu** (*2nd appellant*) were convicted, after a trial by the Senior Resident Magistrate, Mombasa, of the main count of robbery with violence contrary to **section 296(2**) of the Penal Code, and sentenced to the mandatory death sentence stipulated under the penal provision. No finding was made in the alternative count of handling stolen property contrary to **section 322 (2**) of the Penal Code. The particulars of the main count allege that the appellants, on 19th September, 2002 at about 6.45 p.m., at Maji Ya Chumvi in Kilifi District of the Coast Province, while armed with dangerous weapons, namely pistols robbed **Benson Matano Kazungu** (*Kazungu*) of a motor vehicle registration number KAP 546E, a Toyota Corolla Saloon, valued at Kshs.540,000/= and at, or immediately before, or immediately after the time of such robbery threatened to use actual violence to the said Benson Matano Kazungu.

When this appeal came before us for hearing Mr. Were for both appellants submitted, inter alia, that the particulars of the charge as laid do not disclose an offence. Before we set out the background facts to this appeal we propose to deal with that aspect and thereafter deal with other aspects of the appeal if it becomes necessary,

A charge of robbery with violence under **section 296(2)** of the Penal Code is essentially aggravated theft. The aggravating circumstances are set out under the relevant section. **Section 295** of the Penal Code, defines robbery as stealing accompanied by violence or threats of violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being

stolen or retained. **Section 296(2)** of the Penal Code sets out circumstances which if present in the commission of a robbery will attract the death penalty.

The particulars of the charge herein must be looked at in the context not only of the definition of the offence of robbery but also the factors which bring the offence within the ambit of **sub section (2**) of **section 296**, aforesaid. The particulars aforesaid allege a theft, and that there was a threat of violence to a named person, Kazungu, in order to obtain the motor vehicle he had in his possession. A firearm was used in the process, which is a dangerous weapon. Clearly therefore, the particulars disclose the offence charged and Mr. Were's submission is without merit.

The appellants' conviction was based, mainly on the testimony of Kazungu and the evidence of their arrest in possession of motor vehicle registration number KAP 546E, a few hours after it had been reported stolen. The subject motor vehicle was based in Mombasa. It was being operated as a taxi. Kazungu was the driver. The vehicle was however owned by one **Kaingu Shikari Ngumbao** (*Ngumbao*) who testified that he had bought the motor vehicle from Elegant Cars Ltd. It was not in dispute that the appellants telephoned Kazungu with a request that he goes to pick them from Ganjoni area, Mombasa, which he did. It was also not in dispute, and in any case the trial and first appellate courts, found as fact that the appellants asked Kazungu to drive them to Mariakani Weighbridge where according to Kazungu, the 1st appellant said his lorry had broken down. According to Kazungu he was robbed of his motor vehicle in the Mariakani area. The robbery happened this way.

Kazungu testified that the appellants on the pretext that they had hired him to take them to Mariakani area, lured him out of Mombasa and after passing Mariakani Weighbridge along the Mombasa-Nairobi highway the appellants took out a firearm, pointed it at him and ordered him to shift to the backseat where he was ordered to lie down. He complied. He was later abandoned in a thicket, hands and legs separately tied together to the back. He was rescued by a herdsman**, Abdalla Mujuji Mutya Mkumbu** *(Mkumbu*). Kazungu reported the incident at the Mariakani Police Station who circulated the theft of Kazungu's motor vehicle to all police stations in the area. The time the alleged robbery occurred was given as between 6 p.m and 7 p.m.

The appellants were intercepted at Kwanza, at about 11 p.m., on the same day, as they drove Kazungu's motor vehicle towards Nairobi, along the Mombasa-Nairobi Highway. Only the two appellants were in the motor vehicle. Among the police officers who intercepted the said vehicle was police constable **Philemon Ruto** (*Ruto*). The appellants admitted that they were arrested as they drove the said motor vehicle to Nairobi.

The position in law is that a person found in recent possession of property reported as stolen is presumed to be the thief of it unless he gives a reasonable explanation as to how he came to be in possession thereof. This is a presumption of fact arising under **section 119** of the Evidence Act Cap 80 Laws of Kenya and is rebuttable [see **Jethwa V. R. 1969 E.A. 459**]. As we stated earlier both appellants admitted they were arrested in possession of the subject motor vehicle. Their explanation was that Kazungu gave them the vehicle on hire on the understanding that they would deposit with him Kshs.35,000/= as security which would be refunded upon them returning to him the motor vehicle on the next day. It was also agreed that Kazungu would be dropped at his home which they said is in the Mariakani area. So in furtherance of their understanding they dropped Kazungu at Mariakani and drove on intending to go to Nairobi, but were arrested at Kwanza. It was their case that the robbery with violence charge was conjured up by Kazungu in order to avoid refunding the Kshs.35,000 deposit.

Determination of the appellants' case depended on credibility of witnesses, more particularly as to whom between Kazungu on one hand, and both appellants on the other was to be believed. It should be noted that Kazungu was at first treated as a suspect and was held in police custody for sometime because he had acted against his employers instructions not to operate the motor vehicle beyond the town boundary.

The trial magistrate considered the evidence before her and was satisfied the appellants' story was not believable. She accepted Kazungu's account on the matter more so because of the evidence of Mkumbu,

who testified that he found Kazungu inside a thicket tied hands and legs, unable to free himself, and helped to untie him. On first appeal the superior court (*Mwera and Maraga JJ*.) agreed with her and themselves said:

"Turning to the credibility of Kazungu (PW4), again as in the case of Waititu, Kanyoro attacked the taxi driver's evidence on the basis that it was not believable that they rode with him in the subject car all the way from Ganjoni Mombasa only to rob him of it at Mariakani and that the charcoal sellers did not witness the robbery. We have already said (above) that if the appellants chose to rob PW4 after leaving Mombasa and past Mariakani in the safety of a forest, then that is how they planned it. The act itself was a little past the Weighbridge and it was executed in a smooth, quiet manner. Too quiet to attract attention of anybody. We see no substance in this ground."

The superior court then dismissed their appeal and thus provoked a further appeal to this Court.

This is a second appeal and by dint of the provisions of **section 361** of the Criminal Procedure Code, a second appeal can only lie on issues of law. The appellants' main complaint is that the superior court did not analyse and re-evaluate the evidence before the trial court. Their counsel Mr. Were submitted that had that court done so it would have found that Kazungu and Mkumbu conspired to frame the appellants. We do not share the same view. The superior court analysed the evidence and re-evaluated it, and came to the conclusion that the appellants were properly convicted. We have no basis for interfering with the concurrent findings of fact of the two courts below. Besides Kazungu's conduct after the appellants lured him out of Mombasa town excludes the possibility of his complicity in the crime. It was his evidence that as soon as he was untied he went and made a report to the police. It was his prompt action which eventually led to the appellants' arrest. Besides, the questions the appellants put to Ngumbao in cross-examination removed any suspicion that Kazungu was party to the robbery. For instance 1st appellant suggested to him that he had given Kazungu Kshs.5,000/= as a deposit, and yet in their respective defences they gave a figure of Kshs.35,000/=. Besides when Ngumbao first testified neither appellant asked him any questions. Yet when he was recalled to produce the logbook of the stolen motor vehicle and the other related documents the appellants suggested to him that Kazungu had told them that the motor vehicle belonged to Mrs. Kibwana. This clearly shows that the appellants' story was being concocted as the trial proceeded.

On the basis of what we have stated above, it is clear that the two courts below fully appreciated the case against both appellants, analysed and re-assessed the evidence and came to specific conclusions on which we have no basis for interfering. Consequently, Mr. Were's submission that the 1st appellate court failed to re-evaluate the evidence is without basis.

In the result we are satisfied that the appellants' respective appeals have no merit and we order that they be and are hereby dismissed.

Dated and delivered at Mombasa this 28th day of July, 2006

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR