



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIM APP 78 OF 99

FREDRICK GITUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

Fredrick Gituma, the appellant hereinafter, appeals to us a second time from the decision of the superior court (Mwera and Juma, JJ) which dismissed his first appeal from the conviction and sentence of the Senior Resident Magistrate at Meru. In the Magistrate's court, the appellant was tried and convicted on two counts, one of robbery with violence contrary to section 296 (2) of the Penal Code and a second one of unlawful use of a motor vehicle contrary to section 294 of the Penal Code. Upon conviction the magistrate sentenced the appellant to suffer death on count one and to imprisonment for twelve months on count two. The appellant was a driver employed by the Kenya Government and at the time of the alleged offences, he was based at Nanyuki. He normally drove motor vehicle Reg. No. GK U 158. This being a second appeal we are only concerned with issues of law.

There was overwhelming evidence which the trial court accepted and which the superior court also accepted, that three persons who had motor vehicle GK U 158 blocked the way of the late M'Ringera M'Erandu (P.W1) along the Kiirua/Murinya Road; M'Erandu was driving his own vehicle Reg. No. KXG 388 along the said road and GK U 158 suddenly emerged from the side of the road and completely blocked the way for M'Erandu's vehicle. The latter vehicle went out of the road and when it stopped, a person emerged from GK U 158 and fired in the air, obviously to alert M'Erandu and his company that the attackers were armed and were ready to use force. M'Erandu had a briefcase containing some Shs.175,000/- under the seat of the car. He was sitting in front with Stephen M'Ikunyua (P.W6). After firing once in the air, the person doing so took the briefcase containing the money, and together with the other two persons, they got into GK U 158 and drove away very fast. The time was between 8.00 am and 8.30 am. The persons in M'Erandu's vehicle were unable to identify any of the attackers but many of them said the vehicle involved in the robbery was GK U 158. Paul Kirema (P.W3) and Samuel Kirera (P.W4) were not in M'Erandu's vehicle but they had walked past GK U 158 parked by the road side shortly before M'Erandu and his party arrived at the scene. Kirema and Kirera said that they subsequently saw GK U 158 being driven past them in the manner in which rallying cars are driven, i.e. very fast. As we have said there was abundant evidence from which a reasonable tribunal, properly directing itself, could safely conclude that three persons in motor vehicle GK U 158 were, in the morning of 22nd May, 1993 involved in the robbery during which a gun was used and during which M'Erandu had Sh.175,000/- stolen from him. These facts constituted a robbery with violence as defined in section 296 (2) of the Penal Code under which the appellant was charged on count one. There cannot be any basis upon which we can interfere with the concurrent findings of fact by the magistrate and the first appellate court that GK U 158 was used

during the robbery on M'Erandu.

Then there was the evidence given by Administration Police Constables Patrick Karanja (P.W9) Leonard Waithaka (P.W11), Abraham Tanus (P.W12), Isaac Kathurima Materi (P.W13) and Naftali Magati (P.W14). Materi and Magati were on guard duty at the DO's office, Nanyuki. Government vehicles were parked there and according to the two witnesses, the appellant first came to the camp at 8.30 pm on the 22nd May, 1993. The appellant was driving motor vehicle GK U 158 and he was with another person. The appellant again left in the vehicle and returned alone at 9.47 p.m. when he parked the vehicle, entered the police canteen for a short-time, came out again and handed the key of the vehicle to Materi. Materi and Magati said they saw the appellant go into the canteen. Patrick Karanja was in the canteen watching television. He knew the appellant before. The appellant went to him, told him that he (appellant) was tired as he had come from a long safari and that the appellant asked him to wash for him (appellant) the vehicle GK U 158. He washed the vehicle the next morning and the vehicle had caked mud and was dusty. To all these, the appellant's answer was that these witnesses were lying and the learned counsel Mr. Nyaga who argued the appellant's appeal before us added, for good measure, that these being police witnesses cannot be relied on as being "independent". But the magistrate who saw and heard the witnesses believed them and the two judges who heard the appellant's first appeal also agreed that the witnesses told the truth. There is not much we can do about that. We are not aware of any law or practice that police are not independent witnesses whatever that may mean, and ought not to be believed unless their evidence is supported by some other evidence.

We were asked why the appellant was not arrested when he brought in the vehicle. The answer to that must be that Waithaka and Tanus (P.W11 and P.W12) whom the police had instructed to arrest the appellant, were not the same officers on duty when the appellant came in driving the vehicle. Those on duty when he came in were Materi and Magati, and there was no evidence that the latter two witnesses had been instructed to arrest the appellant. We were also asked how it was that no extra mileage was recorded by the vehicle's speedometer if the vehicle was used in the robbery. We do not know the answer to that. All that we know is that the vehicle was seen at the scene of the robbery and witnesses such as Samuel Kirera and Julius Weru Marete saw the vehicle being driven from the scene of the robbery at the speed of a rally car. Why the speedometer was not recording the mileage is a matter which can only be answered by the person who was driving the vehicle. The magistrate and the first appellate court found that it was the appellant who was driving the vehicle. We see no reason which would make us dissent from that conclusion. No question of law was really raised before us in this appeal. The only point of law which we can discern from the record is with regard to the sentence of twelve months imposed on count two. The maximum sentence provided under Section 294 of the Penal Code is imprisonment for six months or a fine of three thousand shillings. Accordingly the sentence of twelve months imposed by the magistrate and confirmed by the superior court was an illegal one and we reduce it to one of six months. Save for that our order in the appeal must be that the appeal be and is hereby dismissed on both counts.

Dated and delivered at Nyeri this 17th day of May, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.