



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 24 OF 2011**  
**GIBSON MWANGI GITURO.....APPELLANT**  
**VERSUS**  
**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court Kibera in Criminal Case 1258 of 2010 delivered by Hon. Onyang, SRM, dated 21<sup>st</sup> January, 2011)*

**JUDGMENT**

The Appellant Gibson Mwangi Gituro the Appellant herein was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the case were that on 23<sup>rd</sup> day of February, 2010 at Kisserian in Kajiado North District within Rift Valley Province, jointly with another not before court, while armed with an offensive weapon namely a knife robbed Patrick Mwaura Waweru of his motor cycle make Yochi registration number KMCB 040B and a mobile phone make Motorola C113 both valued at Kshs. 82,000 and at or immediately before or immediately after the time of such robbery threatened to assault the said Patrick Mwaura Waweru.

At the end of the trial, the Appellant was found guilty and convicted accordingly. He was sentenced to death. He was dissatisfied with both the conviction and the sentence and he preferred the present appeal. In his Amended Grounds of Appeal dated 14<sup>th</sup> December, 2016, he appealed on grounds that he was not properly identified, that the prosecution relied on hearsay evidence and the prosecution failed to call essential witnesses, that there was no evidence that a motorcycle was stolen, that the investigations conducted were poor, that trial court shifted the burden of prove upon him contrary to Section 107 of Evidence Act, that his mode of arrest was riddled with doubts and that the trial court failed to consider his alibi defence.

**Submissions.**

The Appellant entirely relied on written submissions also dated 14<sup>th</sup> December, 2016. On identification, he submitted that the complainant who testified as PW1 stated that he knew him not only by name but also since they had lived together in the same area for about 20 years. In that respect, his identification was by way of recognition. Unfortunately, PW1 did not inform the police when he first reported the incidence that he knew the person who had attacked him. That omission casts doubt in the evidence of PW1 that he was attacked by a person known to him. Amongst the cases cited in support of this submissions were **Republic vs Tunbull [1977] QB224**, **Abdalla Bin Wendo** and **Another vs Republic [1953] EACA 166** and **Morris Gikundi Kamunde vs Republic CA at Nyeri Cr. Appeal No. 332 of**

**2012.**

The Appellant emphasized that the witnesses whom the prosecution called to corroborate the testimony of PW1 and who allegedly saw him riding the stolen motor cycle did not also inform the police the description of the person(s) riding the said motor cycle. It was thus clear that none of the witnesses had either identified or recognized him.

The Appellant submitted that the prosecution failed to call crucial witnesses who would have otherwise strengthened the prosecution case. He cited a pastor who informed the arresting officer about the theft of the motor cycle. This is a witness who would have given an account of how he knew that a motor cycle had been stolen. His failure to testify not only broke the chain of events but gave the inference that had his evidence been called, the same would have been adverse to the prosecution. He also faulted the production of the photographs of the motor cycle by the investigating officer who was not a competent witness as he did not take the photographs.

Finally, he submitted that his alibi defence was not considered by the learned trial magistrate. His view was that the same was strong and sufficient to dislodge the prosecution case. Further that had the same been considered, it would have created doubt as to the strength of the prosecution case. The case of **Uganda vs Sebyala [1969] EA 204** was cited to buttress this submission. He also submitted that once he gave an alibi defence, the onus lay with the prosecution to disprove it. He was of the view that the prosecution did not discharge this burden. He urged the court to allow the appeal.

Learned State Counsel Miss Sigei opposed the appeal. She made oral submissions in which she emphasized that the prosecution had proved their case beyond a reasonable doubt. She submitted that the robbery took place in broad daylight when the conditions for identification were favorable. That on the material day, PW1 was approached by one Saidimu to ferry him to a particular destination. On their way on the road, he was approached by a man brandishing a knife whom he recognized as Mwangi as they went to school together and his father was his teacher. Besides, they had lived together in Loitoktok for over 20 years. The two, Saidimu and Mwangi then took control of the motor cycle with Mwangi riding it after Saidimu had stolen his mobile phone. PW1 raised alarm to which the members of the public responded. They separately followed the motor cycle to Isinya, Emali, Loitoktok and Kajiado but he same was not immediately found. In the meantime, the theft of the motorcycle was reported to Kiserian Police Station by one Peter Njoroge who was the then Secretary of the area Boda Boda motor cycle) riders.

On 23<sup>rd</sup> February, 2010, PW2 John Muturi Muriithi was at Gategi, 3 Km from Kiserian. He noticed a motorcycle Reg. No. KMCB O40B with two people on board. He thereafter met one Kamundi who asked him whether he had seen his motor cycle. They teamed up to look for it and the same was located in Loitoktok. After sometime, a pastor went and informed PW4, an AP officer that the stolen motorcycle had been recovered. The same pastor with a friend also informed the AP officer that the suspect (Appellant) had been spotted in Emali. That is how the Appellant was arrested. Miss Sigei accordingly submitted that the identification of the Appellant was without error as he was previously known to PW1. Furthermore, the stolen motorcycle was positively identified by its owner, PW3. She also submitted that the investigations were proper and that the elements of the offence of robbery with violence were proved to the required standard. She urged that the appeal be dismissed.

### **Evidence**

It is now settled law that the duty of the first appellate court is to reevaluate the evidence on record and come up with its independent conclusions. The court must however bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See the case of **Kariuki Karanja vs Republic [1986] KLR 190** and **Pandya vs Republic [1957] EA 336**.

The prosecution called a total of 5 witnesses whose evidence was brief. On the material date on 23<sup>rd</sup> February, 2010 PW1 Patrick Mwangi Waweru, a Boda Boda rider in Kiserian was on his routine duty. He was approached by a man he named as Saidimu who requested him to ferry him to Thome Road which was on a rough terrain. On arrival at the destination, another man who was holding a knife

emerged. He placed the knife on his neck and this man and Saidimu took control of the motorcycle. PW1 knew the second person as Mwangi with whom he grew up together in Loitoktok and his father was his teacher. In addition to the motorcycle, he was robbed of his mobile phone. He raised alarm and his fellow boda boda riders began to look for the stolen motorcycle from the surrounding areas. The same was later recovered in Kiserian. He gave the Reg. No. as KMCB 040B.

**PW2, John Mururi Muriithi** who was also a boda boda rider recalled seeing the stolen motorcycle on the same day with two persons on board at the Magadi - Isinya Junction. He recalled meeting a man by the name Kamundi who enquired from him if he had seen the motorcycle to which he answered affirmatively. He however did not recognize the persons who were riding it.

**PW3, Mwaniki Muturi** was the owner of the motorcycle and had employed PW1 as the rider. On the material date at around 11.15, PW1 informed him about the theft of the motorcycle. He mobilized people to look for it and the same was later recovered within Birikani area near Kenya Tanzania boarder. He then took it to Kiserian. He gave its value as Kshs. 80,000/= and adduced the log book in court as an exhibit.

**PW4, APC Cheruiyot Welsley** worked at Maisha DO's office in Kajiado Central. His testimony was that he was approached by a pastor on the material date between 12.30 and 1.00 p.m. and informed that a motorcycle that had been stolen in Kiserian had been located. The pastor also told PW4 that the suspect had also been located within the area. As the two spoke, the Appellant approached them while running and carrying about two and a half litres of petrol. An alarm was raised. The Appellant was chased and arrested. He was taken to Kajiado Police Station and later to Kiserian.

**PW5, PC Joseph Kamau** was the Investigating Officer. He took over the investigations on 24<sup>th</sup> February, 2010. He was accompanied by the O.C.S. Kiserian Police Station to Kajiado to collect the Appellant who had been arrested in possession of some petrol. He was informed by PW3 that the motorcycle had been recovered within Loitoktok without fuel and punctured tyres. The same had been taken to Kiserian Police Station where photographs were taken. He identified and produced in court a receipt issued to PW3 upon purchase of the motorcycle. He also produced the photographs of the said motorcycle.

At the close of the prosecution's case, the trial court ruled that a *prima facie* case had been made out warranting the Appellant to give a defence. He was the only witness in his defence. He gave an unsworn statement. He stated that he was a taxi driver to motor vehicle Reg. No. KAL 687V. He stated that on 23<sup>rd</sup> February, 2010, he was on his routine duty and at about 10.00 a.m. went to Mashuru in Kajiado. On his way back to Kajiado where he operated from, his vehicle ran out of fuel. He boarded a motorcycle which would ferry him from Mashuru to a place he would buy fuel. There he bought five litres of petrol and as he rode on the motorcycle back to where his vehicle had stalled, he saw three people. They asked him about the motorcycle he was riding on. They then introduced themselves as police officers and beat him up. They informed him that he had stolen the motorcycle following which he was charged for an offence he did not commit.

### **Determination.**

Having carefully considered the evidence on record and respective rival submissions, it is my view that the issues for determination are ; whether the Appellant was properly identified, whether the prosecution failed to call crucial witnesses and whether the case was proved beyond a reasonable doubt.

On identification, I need not belabor to emphasize that the robbery took place during the day when the conditions for identification were favourable. However, this is a case of a single identifying witness which must be treated with due care and consideration. At the time of the robbery, the Appellant was alone and therefore no other witness corroborated his evidence on how the robbery took place. The learned trial magistrate was therefore enjoined to warn herself of the dangers of convicting solely of the strength of a single identifying witness. See the case of **John MureithiNyaga –Vs- Republic 2014 @ KLR.** Also in the case of **Kiilu and Another –Vs- Republic (1995) 1 KLR 174** the Court of Appeal observed as follows:-

***“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to the guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the probability of error.”***

Again, in **Wamunga –Vs- Republic (1989) KLR, 424**, the Court of Appeal held as follows:-

***“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”***

The case of **John Muriithi Nyaga vs Republic** (Supra) emphasized the need to treat the evidence of a single identifying witness with care more particularly where conditions for positive identification are difficult and the life of the accused person is at stake. In the present case, the conditions for positive identification were not difficult as it was during daylight. Further, the evidence adduced identifying the Appellant was not circumstantial but direct. This however did not lessen the need for the learned trial magistrate to warn herself of the danger of convicting based solely on the evidence of a single identifying witness.

PW1 clearly testified that he knew the Appellant because they had lived together for over 20 years and that his father was his teacher. It was expected then that he would have reported that he knew the person who robbed him. The evidence of the prosecution is that the report of the theft of the motorcycle was made by the secretary of the boda boda riders within Kiserian, one Peter Njoroge. During the trial the Appellant was provided with the first report as recorded in the Occurrence Book where the theft of the motorcycle was reported. The report read as follows:

***“To the Station is M/A namely Peter Njoroge, resident of Kiserian Dam area of Phone No. 07237881118 and he do report that today at around 11.45 am a m/cycle by the name..... was riding a motorcycle reg. No. KMCB 040B along Olerai St. Patrick road was asked by a person known to him physically to assist him a bit to ride the motor cycle and the person snatched the motor cycle and he disappeared with the same whereby he proceeded on Isinya route. The reportee referred to the duty officer for the circulation of the same.”***

The above extract clearly shows that Peter Njoroge, the person who first reported the incident was only told that PW1 was known to the robber physically. PW1 did not therefore mention the name of the person who robbed him. Unfortunately, the said Peter Njoroge was not called as a prosecution witness to confirm the specific words PW1 used to him when he told him that he had been robbed. This is in respect to whether he told him that one Mwangi was the culprit. In addition, it is clear that neither PW1 the victim nor PW3 the owner of the motorcycle reported the theft to the police. Had they done so, their evidence would have clearly erased any doubts that PW1 was not only physically known to the Appellant but knew him by name. Besides, a scrutiny of the evidence of both PW4 and 5 who were the arresting and investigating officers respectively does not in any way mention that PW1 was known to the Appellant. In fact, a twist is added to the prosecution case by the evidence of PW4 who testified that he was informed of the theft of the motorcycle by a pastor. He also testified that it is this pastor who told him that the Appellant had been spotted within Emali where he was arrested.

From the foregoing, this court needs not belabor to state that the identification of the Appellant was not full proof. Nothing prevented PW1 either to personally report the theft of the motorcycle to the police or even inform the said Peter Njoroge who told the police about the theft that the assailant was the Appellant. That way, the court would be convinced that the identification of the Appellant was by way of recognition which would have convinced the court that PW1 was not mistaken of the person who robbed him. See the case of **John Bosco Ziro Kalume vs Republic, Criminal Appeal No. 41 of 1998**, the

Court of Appeal stated:-

***“We think that the failure by PW6 to mention to anyone at the earliest opportunity the fact that he had seen the Appellant among the persons who attacked them can only weaken his evidence that he did see and recognize the Appellant.... Had they, for example, dealt with the issue of failure by PW6 to name the Appellant at the first available opportunity, they may well have found that PW6 was not as trustworthy a witness they thought he was ...”***

It is also clear from the first report made to the police that the account on how the robbery took place was not consistent. According to Peter Njoroge, the secretary of the boda boda riders, PW1 was requested by a person physically known to him to allow him to briefly ride his motorcycle. It is then that this person rode off with the motorcycle. PW1 on the other hand testified that one Saidimu approached him to ferry him to Thome Road area. That is when Saidimu and the Appellant who accosted him brandishing a knife robbed him of said motorcycle. That contradiction in my view is material in proving whether or not this is a case of capital robbery. It is also core in establishing the elements of the offence of robbery with violence. It is a contradiction that weakens the prosecution case.

From the chronology of the summary of evidence I have given, I come to the conclusion that the Appellant was not properly identified as one of the robbers. Given the testimony of PW1, had the case been proved sufficiently, this court would have upheld that all the elements of the offence of robbery with violence were proved. This is so because the robbers were armed with a knife, were more than one in number and used actual violence through threat by knife in stealing the motorcycle and the mobile phone belonging to PW1. Unfortunately, there is no evidence to prove that the robbery was perpetrated by the Appellant. At this point then, I hold that the prosecution case did not dislodge the Appellant's alibi defence. I find that the same was not proved beyond a reasonable doubt. I quash the conviction and set aside the death sentence. I order that the Appellant be and is hereby forthwith set free. It is so ordered.

**Dated and Delivered at Nairobi this 23<sup>rd</sup> March, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. Appellant present in person.*
- 2. M/s Aluda for the Respondent.*