



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 190 OF 2015**

**PETER KARIUKI NDUMBERI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence S. Jalango S.R.M,*

*in the Chief Magistrate's Court at Makadara Cr. Case No. 4691 of 2011*

*delivered by Hon. S. Jalang'o, SRM on 6<sup>th</sup> November, 2015.)*

**JUDGMENT**

**BACKGROUND**

*Peter Kariuki Ndumberi, 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 offence were that on 12<sup>th</sup> September, 2011, at Umoja One Estate in Nairobi District within Nairobi Area province, jointly with others not before the court while armed with a dangerous weapon, namely a pistol, robbed one Geoffrey Muguna Mutuma of one motor vehicle Reg. No. KBD 665U make Nissan Matatu, two mobile phones make Nokia kabambe, one pair of shoes and Kshs. 5,400/= and immediately before or immediately after the time of such robbery used actual violence on the aforementioned Geoffrey Muguna Mutuma.*

*The Appellant was found guilty and sentenced to death. Being dissatisfied with the verdict of the court, he lodged this appeal. In his Amended Grounds of Appeal, he was dissatisfied that he was not properly identified, more particularly that the identification parade was flawed, that the exhibits identified were not adduced as evidence, that there was non-compliance with Section 200 of the Criminal Procedure Code, that no investigations were carried out, that his alibi defence was not considered and finally, that the evidence on record did not prove the case beyond a reasonable doubt.*

**SUBMISSIONS**

*The Appellant chose to file written submissions as his preferred means of canvassing the appeal. He also highlighted the same. The Respondent, represented by learned State Counsel, Mr. Ongige made oral submissions. In his submissions, the Appellant argued the grounds of appeal cumulatively. He submitted*

that the investigating officer had admitted that no description of the suspects was given in the first report. He submitted that the importance of the description was critical as it meant that the complainant could not later allude that he was able to identify him as one of the robbers.

He referred the court to the first report made by the driver and the conductor in which they did not state that the scene of crime had lights that would have enabled them to identify him. Hence, his identification by one of them in the identification parade was mistaken and in any case, ought to have been treated with a lot of care.

In addition, he submitted that the fact that the exhibits identified were not produced could not be relied on to buttress the prosecution case. Further, that the magistrate who convicted him, having taken over the trial from another magistrate did not comply with Section 200 of the Criminal Procedure Code, thus rendering the trial a nullity. It was also his view that the evidence adduced was at variance with the charge. He cited the registration number of the stolen vehicle which the witnesses gave as different from the one cited in the charge. Finally, he submitted that the prosecution case was fatal for failing to call as witnesses the arresting officers. He urged that the appeal be allowed.

Mr. Ongige, for the Respondent, submitted that the complainants were not able to immediately describe their assailants as they were in shock. Furthermore, that the Appellant was positively identified in the identification parade which was proof that he committed the offence. Furthermore, the identification parade was conducted in a manner that conformed to the Force Standing orders. He submitted that the scene of the crime was well lit and since the ordeal took a clear 30 minutes, the complainants properly identified the Appellant. He submitted that Section 200(3) of the Criminal Procedure Code was complied with. On the registration number of the stolen vehicle, he urged the court to take the number indicated on the charge sheet as the correct one. He urged that the appeal be allowed.

## **EVIDENCE**

This court is mandated to reevaluate and reanalyze all the evidence afresh, in exercising its appellate jurisdiction, but take into consideration that it has neither heard nor seen the witnesses and give regard for that. See: **Okeno v. Republic [1972] E.A 32.**

**PW1, Kennedy Mutuma Kimathi**, testified that he lived in Umoja 1 G estate and worked as a conductor in Nissan matatu Reg. No. KBD 665U belonging to Moses Murungi. He recalled that on 12<sup>th</sup> September, 2011 they did not go to work as they spent the whole day in the garage. In the evening the driver, Geoffrey Muguna, took the car with him home. Their job involved picking up passengers at Tearoom bus stage headed to Meru to buy goods. They usually traveled at night to save time.

On the midnight of 12<sup>th</sup> September, 2011 Geoffrey Muguna, PW2, came and knocked at the gate of his home and called him so they could begin the journey. He went outside and found PW2 and three other people. PW2 informed him that the 3 men were police officers who alleged that the vehicle was involved in an accident in the city. As they conversed they removed guns as he was trying to lock the gate. A pistol was pointed at him. The men were holding PW2 and they started harassing them before pushing them into the matatu. One of the men drove the matatu and the rest sat next to them.

After about 30 minutes they were removed from the matatu and placed in another vehicle, a saloon car. They were taken around and at around 3.00 am they were informed by the robbers that they would return the vehicle after they were done with it. They then removed them from the car and dropped them off at Ngomongo near Kasarani Sports Center. The robbers had stolen his phone and sports shoes plus Kshs. 5000/- meant for fueling the matatu.

They reported the matter at Ngomongo Police Post. They then spent the rest of the night there until the owner of the vehicle, Moses Murungi came in the following morning. The officers advised them to report the matter at Buruburu Police Station which they did.

After about a week the owner of the motor vehicle informed them that the suspects had been arrested and

he wanted them to go to the station. They went to the police station where they were asked to take part in an identification parade. A parade was conducted and he identified the robbers. He testified that he had easily identified them under the light outside his house emanating from Nairobi City Council street lights.

**PW2, Geoffrey Muguna Mutuma**, the driver of Nissan Matatu Reg. No. KBB 665 U corroborated the evidence of PW1. In addition, he testified that he was confronted by three men at PW1's gate as he waited for PW1 to join him. The attackers posed as policemen. They accused him of causing a hit and run accident in Nairobi City. One of the men had a pistol. He testified that there was light at the gate, and he could clearly see them. As they talked, PW1 arrived from inside the compound. He asked them to take them to the police station and this is when they confronted them and held them by their hands before making them lie on the matatu floor. He testified that he was able to identify the Appellant in the identification parade as one of the attackers.

**PW3, No. 37885 P.C Simon Mokaya of Buruburu Police Station** was the investigating officer. He recalled that he was at work on 12<sup>th</sup> September, 2011 when the theft of Nissan Matatu registration number KBB 665S from Umoja estate was reported. PW1 and PW2 explained how the robbery had occurred and what they had lost. On 29<sup>th</sup> September, 2011 some suspects who allegedly took part in the robbery were brought to the police station from Makadara Law Courts by Sergeant Muinde and PC Mutahi. He was informed that the complainants were coming the following day to identify them. An identification parade was carried out by C.I Peter Mwaura in which the Appellant was identified by PW1. He preferred the charges against the Appellant.

**PW4, Moses Murungi Mulira** confirmed that he owned a motor vehicle Reg. No. KBB 655U and that PW2 was its driver. He learnt of the robbery from police officers from Ngomongo Police Station who called him after PW1 and 2 reported the incident.

**PW5, No. 232172 C.I Peter Mwaura** conducted the identification parades in which the Appellant was the suspect and PW1 and 2 the witnesses. Only PW1 identified the Appellant.

In his sworn evidence, the Appellant recalled that on 23<sup>rd</sup> September, 2011 he was arrested in Kayole and charged with trafficking drugs. He was arraigned in court in criminal case 4586 of 2011 on 26<sup>th</sup> September, 2011. The matter was heard and decided on 14<sup>th</sup> November, 2011. On 28<sup>th</sup> September, 2011 while in custody he was produced in court where the prosecution claimed he was wanted at Buruburu Police Station for further investigation. He was taken to the police station where his fingerprints were taken. He was then called by a police officer who informed him he was to take part in an identification parade. He agreed to the same and the second witness identified him. He was asked to sign the parade form which he did and thereafter was arraigned in court.

### **DETERMINATION**

I have considered the evidence and the respective submissions. The issues for determination are whether Section 200 of the Criminal Procedure Code was complied with and whether the case was proved beyond a reasonable doubt.

On compliance with Section 200 of the Criminal Procedure Code, the record of proceedings shows that the entire prosecution evidence was heard by Hon. Nyongesa. Hon Jalang'o who completed the trial took over the matter at defence hearing. At page 67 of the record, it is clear that he complied with the provision. He asked the Appellant if he wished the matter proceeds from where it had reached or to start afresh. The Appellant replied that he wanted the trial to proceed from where it had reached. That ground of appeal then lacks merit.

The proof of the prosecution case was pegged on the identification of the Appellant. The same was based purely on his identification at the identification parade. The Appellant was positively identified by PW1 and PW2 who also took part in the identification parade. The test is whether the said identification was full proof. The complainants were informed of the suspects' arrest by the owner of the vehicle, PW4, and

then proceeded to Buruburu Police Station where according to the investigating officer they informed him that the people who had robbed them had been brought from the court. They wanted to identify the suspects. And so an identification parade was organized and conducted. But the question that begs is how the witnesses knew that the suspects would be escorted to the police station and commanded the Police that an identification parade be conducted. Whereas there was nothing sinister with going to the police station the person who was supposed to organize the parade was the investigating officer himself. Instead, the Investigating Officer was directed by third parties on what to do.

Be that as it may, it is worthwhile to note that an identification parade is conducted with a view to erasing doubt that the suspect the victim saw at the scene of crime is the person who was arrested. If the identification in the parade is positive, the court is convinced that the accused was one of the assailants. In that case, the victim ought to have described the suspect to the police and noted some marked physical features that would enable him identify him a second time. This is further attested by the report made to the Police which ought to contain details of how the victim was able to identify the assailant. Positive identification is also given weight by the manner of the arrest of the suspect.

In the present case, Appellant was arrested in Kayole for the unrelated offence of drug trafficking in criminal case No. 4586 of 2011 on 26<sup>th</sup> September, 2011. He was arraigned in court and the matter decided on 14<sup>th</sup> November, 2011. He testified that while he was in remand he was produced in court vide a production order and the court prosecutor alleged he was wanted for further investigations. That is how he was escorted to the police station after which an identification parade was conducted. Another question begs; Who was carrying out the further investigation? The investigating officer did not comment on this issue in his evidence. It is the complainants who brought to his attention of the fact that the Appellant was at the police station which fact was corroborated PW1 and PW2. In these circumstances, I do not find any evidence that linked the Appellant to the commission of the offence. That is to say, reasonable or probable cause linking him to the commission of the offence. I do then agree with the Appellant that the evidence of an arresting officer would have shed light on what informed the investigating officer to charge the Appellant. The absence of this crucial evidence was definitely fatal to the prosecution case. At best, the failure to call it gave the inference that had the witness testified, his evidence would have been adverse to the prosecution case. See **Bukenya and Others vs. Uganda [1972] E.A.** , where it was held that:

***“The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”***

Back on the identification of the Appellant, no evidence showed that the complainants had described the persons who robbed them. The report made to the police station did not also indicate they described the assailants. It is therefore doubtful how they picked on the Appellant at parade. Given the manner in which the Appellant was hooded to the police station for the parade, it is safe to conclude that the complainant must have seen him elsewhere before the parade was mounted. And of course that must have been in court where he was being tried for the drug related case. No wonder they were the ones commanding the investigating officer to conduct an identification parade. As such, I hold that the identification of the Appellant did not sufficiently establish that he was one of the robbers. Infact, his entire prosecution was unwarranted and not founded on any concrete evidence.

Having found that no evidence existed to warrant a conviction, I need not delve into other grounds of appeal. In the upshot, and on evaluation of the entire evidence, I find that the prosecution did not prove their case beyond a reasonable doubt. The appeal is meritorious and I allow the same. I quash the conviction, set aside the death sentence and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

**DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF OCTOBER, 2016.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Appellant present in person.
2. Miss Atina for the Respondent.