REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 145 OF 2012

PETER MURITHI WANJIKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(Appeal from original conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 538 of 2011 (Hon. E Makori, Senior Principal Magistrate) on 16th August, 2012*)**

JUDGMENT

On 26th May, 2011 at 8 PM, **Francis Wanjohi Ndungu** was riding a motorcycle from Mweiga to Kabati in Nyeri county; he was carrying two pillion passengers who had hired him to take them to Kabati. Somewhere along the road, he lost control of his motorcycle as a result of which it overturned. Immediately thereafter, a group of six people attacked them; they hit them with the crude weapons with which they were armed and robbed them of their property which included money. They also stripped them naked. They later managed to escape and sought refuge from a nearby General Service Unit camp at Solio ranch.

On 15th June, 2011, the appellant was arrested by administration police officers attached to the office of the District Officer at Mweiga; these officers handed him over to the regular police at Mweiga police station on allegations that he was caught touting. The following day, the officer in charge of the station conducted an identification parade in which the appellant was singled out as having been one of the people who had attacked and robbed Ndungu and his passengers. He was therefore charged with three counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**.

In the first count, the particulars were that on 26th May, 2011at Koroini, Solio Ranch area, in Kieni West District within central province, jointly with others not before court and while armed with pangas, rungus, iron bars and iron pipes, the appellant robbed Francis Wanjohi Ndungu of Kshs 3,350 and other assorted items whose cumulative value was Kshs 74,799/=. The second and third counts were similar in material respects except that the complainants were named respectively as Peter Muriithi and Karika Muchiri; like the first complainant, they also lost various sums of money and other items during the robbery.

The appellant was tried and convicted of all the three counts; he was sentenced to death on each of them. He has now appealed to this Honourable Court against the conviction and the sentences meted out against him. I understand the grounds he raised against the decision of the magistrates' court to be as follows: -

1. The learned magistrate erred both in law and in fact in convicting the appellant based on the evidence of identification by recognition when circumstances were such that such identification was not possible.

2. The learned magistrate erred both in law and in fact when he held that the appellant had been positively identified in an identification parade that was conducted in breach of the police standing orders.

3. The learned magistrate erred both in law and in fact in convicting the appellant based on the evidence that was not proved beyond reasonable doubt.

4. The learned trial magistrate erred both in law and in fact in rejecting the appellant's defence that was not challenged by the prosecution.

The learned counsel for the state opposed the appeal and submitted that the appellant had properly been identified in an identification parade as one of the assailants who attacked the complainants. On the question whether the appellant was booked for the offence of robbery with violence when he was arrested and brought to the police station the learned counsel conceded that the occurrence book was not availed in the trial court but and that should this Honourable Court hold that this book should have been availed at the appellant's request, then it should order a retrial.

The motorcycle rider and his two passengers testified that they were attacked and robbed on the night of 26th of May, 2011. Apart from losing money and other property, they also sustained injuries in the course of the robbery. On 16th of June 2011, the officer in charge of Mweiga police station conducted an identification parade in which the first complainant identified the appellant as one of the robbers. It is then that the appellant was charged with the offence with the offence of which he was convicted.

The appellant himself denied the offence when he was put on his defence. In his sworn testimony, he said that he was a tout and on 15th June, 2011 he was arrested by administration police officers and taken to Mweiga police station for touting. On the following day at around 4 PM he was removed from the cells and asked to join a line of people outside the cells. Thereafter was asked to sign some papers and subsequently he was brought to court where, to his surprise, he was charged with the offence of robbery with violence.

In a nutshell that was the evidence that was presented before the trial court; as usual, it is incumbent upon this court to evaluate this evidence afresh and come to its own conclusions but without forgetting that the trial court had the advantage of seeing and hearing the witnesses. This fresh analysis can properly be understood in the context of the offence the appellant was charged with and it is this direction that I now turn to.

The offence of robbery is defined in **section 295** of the **Penal Code**, **Chapter 63 Laws of Kenya;** the elements of the offence of robbery with violence and the penalty thereof are prescribed in section **296(2)** of the Code. **Section 295** states:

> ***"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual 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, is guilty of the felony termed robbery."***

Section **296(2)** of the Code prescribes circumstances when simple robbery, as is popularly known, metamorphoses into the offence of robbery with violence otherwise referred to as aggravated robbery; this provision of the law also prescribes the punishment for the offence. It states as follows: -

> ***"296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

The provision is more or less self-explanatory; for a conviction to be sustained under it, it must be proved beyond reasonable doubt that the victim of the robbery was not only robbed but also that at the time of the

robbery either all or any of the following circumstances existed: -

(a) The accused was armed with any weapon or instrument that may deemed to be dangerous or offensive;

(b) The accused was in the company of one or more persons; or

(c) Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

The complainants were consistent in their testimony that they were not only attacked but that they were also robbed of their valuables including money. Their attackers were armed with crude weapons with which the assaulted them. There was uncontroverted medical evidence that at least two of them sustained injuries in the course of the attack. All the three possible scenarios contemplated under **section 296(2)** were proved to exist and therefore there was ample evidence which left no doubt that the offence of robbery with violence had been committed; to this extent I agree with the conclusion arrived at by the learned magistrate.

The only other question that the trial court was faced with was whether the appellant was one of the gang members who robbed and attacked the complainants. In considering this issue, the court had to deal with the question whether the appellant was properly identified or recognised considering the time and the conditions under which the complainants were robbed; in other words, were the circumstances favourable for proper identification? As always, this is a question that largely has to do with the evidence and therefore it is necessary to consider here the evidence that was offered to resolve this issue.

According to the **Francis Wanjohi Ndungu**, the motor cycle rider, he recognised two of the attackers with the help of the light from his motorcycle; he described one of them as being tall and dark while the other one was fat and short. The appellant was one of the two people he identified; he testified that he gave his description to the police. He was able to pick out the appellant from the identification parade which was conducted on 16th June, 2011.

Isaac Ndungu, the second complainant**,** was one of the two pillion passengers on the first complainant's motorcycle on the material night. His evidence was that he was able to identify at least one of the attackers when he helped him (the complainant) light a cigarette; he recognised the other attacker because he was a person that he used to see at a bus stage. When he made his report to the police he told them that he knew one of the attackers. It was his evidence that the person he recognised was the appellant.

This complainant, however, admitted that in the statement he gave to the police he said that he saw two faces and only identified one of them as that of one Kiboi who he alleged had been his driver before. This Kiboi was, however, not arrested. He also admitted that he did not give the description of the appellant to the police in his statement.

This admission obviously put to doubt the second complainant's evidence that he recognised the appellant on the material night. Taking him at his own word, he only recognised one person, whom he was also able to identify by name; this particular person was not arrested or charged. He did not give any form of description of the one who was charged-the appellant herein; it is therefore doubtful whether he could identify him or whether he even saw him at all. To have alleged that he recognised the appellant when his statement to the police was to the contrary was simply being untruthful. This being the case, it is safe to conclude that the evidence of this particular witness on the identification of the appellant was not useful to the prosecution and taken on its own, it could not support the appellant's conviction.

The third complainant**, Isaac Ndungu**, was also the first complainant's pillion passenger but was categorical in his evidence that he could not tell whether the appellant was one of the people who attacked them. He simply did not pretend to offer any evidence on the identification of the appellant.

It is clear that of the three complainants, it is the first complainant's evidence that remains central to the

identification and therefore the conviction of the appellant. As noted earlier, the first complainant was clear in his testimony that he gave the description of at least two of the attackers to the police; however, as the evidence of both the officer in charge of the station in which the appellant was booked and investigations officer revealed, the identification parade from which the complainant allegedly identified the appellant was unrelated to the offence for which the appellant had been arrested and booked.

The identification parade was conducted by **Mr Raphael Gaa (PW2)** who was then the officer in charge of Mweiga police station. Mr Gaa marshalled a group of touts, eight in total, from a nearby matatu terminus to form the parade in which the appellate would participate; according to him, they were of the same age, height and physical appearance as the appellant. They were also more or less of the same social status as the appellant.

The officer paraded them in a single file at the station. He then called the appellant who, according to the officer, agreed to participate in the parade. The appellant chose to stand between the fourth and fifth members of the parade. He then called the first complainant to pick the person he had recognised on the fateful night. He picked out the appellant by touching his left shoulder. The appellant signed the parade form and confirmed that he was satisfied with the parade. In answer to questions put to him in cross examination, the officer testified that the complainant who picked out to the appellant was in transport business and was usually based about 300 metres away from the matatu terminus where he picked the touts.

One can quickly see that if the appellant was a tout himself operating at the same terminus, there is the possibility that he was familiar, at least in appearance, to the complainant since they operated in the same locality. If the complainant was in the passenger transport business it is quite likely that he frequented the terminus either to collect or drop passengers.

It is also important to note that the administration police officers who arrested the appellant did not arrest him because of the robbery incident; neither did they arrest him because they had been given his description by the complainant or the police officers who received his complaint. They arrested him because he was touting and this fact was confirmed by none other than the investigations officer himself and the officer in charge of the station in which the appellant was booked. Incidentally, it is this latter officer who conducted the identification parade.

It is obvious from the evidence on record that the parade had nothing to do with the offence for which the appellant had been arrested and booked. The record shows that the appellant applied to have the occurrence book of the material date produced in court; although the trial court allowed his application and ordered the production of this book, the trial was concluded before it was produced. The only inference that can be drawn from its non-production is that the particular entry in which the appellant was interested and which he wanted to bring to the attention of the court was adverse to the prosecution case.

Be that as it may, one is left wondering why the investigations officer and his boss staged an identification parade to identify the appellant when they were well aware that the appellant was not booked as a suspect of the violent robbery.

Identification parades must have some basis; police officers cannot simply huddle people together, all of whom have nothing to do with the crime that they are investigating, and ask the complainant to single one of them out as the person who perpetrated the crime. **Prabhas C. Sarkar, in his book Sarkar's Law of Evidence, 12th Edition** stated the purpose of an identification parade; he said:

> ***"Identification parades are held by the police for the purpose of enabling witnesses to identify the properties which are the subject matter of offence, or to identify the persons who are concerned in the offence."*** (see page 89)

This statement means that identification parades are not pastime activities for police officers and are not ordinarily conducted just for the sake of it; they are conducted whenever it is necessary to identify the properties which are the subject matter of an offence or to identify the person concerned in the offence. In

this case, having been booked for the offence of touting, it cannot be said that the appellant was concerned with the offence for which the parade was conducted.

As to when an identification parade can be conducted, Sarkar stated, at page 90 of his book that:

> ***"Identification parade belongs to investigation stage. Whether a witness has or has not identified the accused during investigation is not of itself relevant at the trial. The actual evidence regarding identification is that given by the witness in court."***

If identification parades constitute an investigatory tool for police officers, then the identification parade they conducted was, for all intents and purposes, unnecessary since it had nothing to with the complaint for which the appellant had been booked.

But even if it was to be assumed that the appellant was being investigated for the alleged robbery, the manner in which the identification parade was conducted left a lot to be desired; it was contrary to the police force standing orders in its material respects and therefore, though admissible the evidence gathered from this exercise was going to be of little probative value.

According to the evidence of the officer in charge of Mweiga police station, both the appellant and the complainant worked more or less at the same place and there is a possibility that the complainant must have seen the appellant before. There is no doubt that if the accused person is known to identifying witness or witnesses, the identification by them is a farce.

It is also one of the cardinal rules of identification parades that in introducing the identifying witness to the parade, the officer in charge of the parade must tell him that he will see a group of people one of whom may or may not be the suspect. The identifying witness cannot be told "pick out somebody" or be influenced in any particular manner. (See **Republic versus Mwango s/o Manaa (1936) 3EACA 29)**

The officer who conducted the parade did the direct opposite; this is what he said he did after staging the parade:

> ***"I then called the complainant to pick on the person he had recognised on that fateful night. He then picked the accused person by touching his left hand side shoulder***."

It is obvious that the officer did not introduce the identifying witness to the parade; he did not inform or rather caution the complainant that the suspect may be or may not have been in the parade. He instead literally directed the appellant to pick the suspect from the parade; this was a gross error that compromised the validity of the parade and deprived it of any evidential value.

It must be borne in mind that the complainant was a single identifying witness and sufficient precaution was necessary before accepting his evidence as conclusive proof that the appellant was properly identified. The Court of Appeal in O**geto versus Republic (2004) KLR 19** acknowledged that a fact can be proved by a single identification witness but it cautioned that such evidence must be admitted with care where circumstances of identification are found to be difficult; the court said: -

> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".***

This point was emphasised in **Wamunga versus Republic (1989) KLR 424 where** the same Court held at page 426 that: -

> ***"…it is trite law that where the only evidence against a defendant is evidence 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 possibility of error before it***

can safely make it the basis of a conviction." (see page 426)

Complainants were attacked at night, it was dark and the first complainant testified that it had rained; although he alleged that he was able to identify the appellant with the help of the light from his motorcycle, it is more probable than not that the conditions were unfavourable for a clear identification.

Besides the danger of relying on the evidence of a single identifying witness, it has been accepted that where the evidence relied on to implicate an accused person is entirely of identification that evidence must be watertight to justify a conviction; this has been so held in **R versus Eria Sebwato (1969) EA 174**.

My conclusion is that the identification of the appellant as one of the gang members who robbed the complainants fell below the threshold required for a proper and unequivocal identification; it was not free from the possibility of error. More so, the backdrop against which the parade was conducted was questionable and cast a dark cloud of doubt on the entire identification exercise.

In a nutshell, it was not proved beyond reasonable doubt that the appellant robbed the complainants or was in the group that robbed them. In the absence of sufficient evidence linking the appellant to this crime, I am inclined to conclude that his conviction cannot be sustained and it was unsafe from the very beginning; I would allow his appeal, quash the conviction and set aside the sentence. Accordingly, the appellant is set at liberty unless he is lawfully held.

You are Signed, dated and delivered in open court this 18th November, 2016

Ngaah Jairus

JUDGE