



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.96 OF 2010**

**GEORGE MWAI KABUE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH CRIMINAL APPEAL NO.97 OF 2010**

**EDWARD WANJOHI MUCHIRI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against both conviction and sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No.1014 of 2008 by S.M. MUKETI – CM)***

**J U D G M E N T**

The appellants were charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code.

The particulars of the charge were that on the 20th August 2008 at strategic mobile shop Olkalou in Nyandarua District within the Central Province, jointly with others not before court while armed with dangerous weapons namely AK 47 rifle robbed **Simon Gitonga Mwangi** cash Kshs.195,000/=, ten mobile phones make Nokia 1200, and Safaricom credit cards all valued at Kshs.170,500/= and immediately before the time of such robbery threatened to use actual violence to the said **Simon Gitonga Mwangi**.

In the trial court, the prosecution called 5 witnesses. PW1 was Simon Gitonga Mwangi. At the material time he was working with strategic company that was engaged in the business of selling phones, mobile phone accessories and airtime for Safaricom Company. His duty was to ensure that the proceed of the sales was banked and to ensure that stock movement was carried out and also to ensure that computers were used in an orderly manner.

On 20th August 2008, he was on duty at Strategic Mobile Olkalou branch with workmates Mercy Wangari, Mercy Nduta and Anne Wangari Kimani.

At 6.00 pm when they were about to leave, they heard a knock on the door. He went and peeped and saw a man standing at the door in blue jeans and white sports shoes. He went back inside but the person continued knocking the door. Mercy Nduta opened the outer door and Mr. Simon Gitonga

Mwangi opened the inner door. Five people entered and one told him money or death. Three other persons were wearing black jackets. One person opened his jacket and removed a gun. They gave the attackers their mobile phones. They demanded for money that was in PW1's hands and he complied. They took more money, cards and mobile phones. They ordered him to lie down and he complied. He heard a voice saying that the attackers had left. It was the girl who serves them tea. He used the lady's phone to call the manager. The robbers stole cash Kshs.195,000/= and property valued at Kshs.170,500/=. Amongst the five people he was able to identify two persons thus the 1st and 2nd appellants. The 1st appellant was the one picking money while the 2nd appellant was the one armed with a gun. There was electricity when the robbery occurred. On the 18/9/2008 he was called to identify the persons who had robbed them and was able to identify them in two different parades.

In the first parade he identified the second appellant while in the second parade he identified the 1st appellant. He recorded a further statement after identification. During cross-examination, PW1 was steadfast that he identified the 1st appellant as at the time of the robbery there was light and he looked at the 1st appellant at the time of the robbery and therefore he could identify him. He further more states that he could identify the 2nd appellant because he was the one wielding the gun. He met him face to face.

PW2, Mercy Nduta was the sales representative for Strategic Mobile. Her work was to sell credit cards in the shop. On the 20th August 2008 at about 6.00pm she was at the shop when she heard a knock as she was going out. The manager was behind her. They opened the shop to get out and as she got out, she met the 1st appellant holding a note of Kshs.1000 and pretending that he wanted to buy a credit card of Kshs.20 but as she talked to the 1st appellant the 2nd appellant emerged with a gun and aimed it at the PW2 and told her to produce money or die. He led her to the rear office and told her to lie down and went in front. He asked for her phone which she answered that it was at the front office. While lying down somebody said that they had left and when she looked up she saw the girl who serves them tea called Margaret. They used Margaret's phone to call the manager and police officer. Later in the month of September, they were called for an identification parade at Nyahururu. He had seen the 2nd appellant in the shop before the incident. She was able to identify the 2nd appellant and 1st appellant in different parades. She stated that the gun used was small about the size of a hand.

PW3 was P.C. Robert Mutuku who was at the material time attached to Olkalou Police Station.

On 20th August 2008 at around 6.30pm, he was at Olkalou Police Station when the OCS informed him that a robbery was going on at Strategic Mobile Company at Olkalou. He rushed to the scene with other policemen and found the premises closed. When they finally entered the premises, they found papers scattered all over. They tried to pursue the robbers but all was in vain. They booked the report in the OB and recorded statements from possible witnesses. However, a few days thereafter, he learnt that the people had been arrested in connection with the robbery. An identification parade was carried out and the appellants were identified hence were charged in court.

PW4 was Chief Inspector of police Patricia Nasio who was the deputy O.C.S Olkalou at the material time. She conducted the identification parades. The 1st parade was for the 2nd appellant Edward Wanjohi Muchiri. He was informed in advance of the intention to carry out an identification parade. He accepted to participate and stood between member number 4 and 5. PW1 positively identified him by touching on the shoulder.

The second witness was called and the 2nd appellant stood between member number 4 and 5 because he did not want to change his position. The 2nd witness identified the 2nd appellant by touching his shoulder. He was satisfied and signed the parade form.

The 1st appellant was also brought to his office and was informed of the intention to conduct identification parade. He consented and members were arranged. He chose to stand between No.5 and 6. he was positively identified by the PW1 and PW2. He was satisfied and signed the parade forms.

PW5 was police Constable Philip Kibet stationed at CID Nyandarua. On the 14th September 2008

he was in the office and was instructed by the then D.C.I.O Sgt Bosire to go to Ndarague police station and collect four suspects amongst whom were the two appellants. The suspects were found with motor vehicle KAY 501N Toyota salon whose case was in court No.4. They were led to recover a riffle AK 47 with 7 rounds of ammunition. The suspects gave information that hey had stolen a number of vehicles. They also disclosed that they had robbed a mobile shop at Olkalou.

The officer amongst others proceeded to Olkalau to find out whether the robbery had been reported and confirmed that it had been done. The identification parade was carried out upon which the appellants were identified by the PW1 and PW2. Nothing was recovered from the appellants.

The appellants in their defence gave evidence that they were not at the scene of robbery on the day and time of robbery.

The evidence against the appellants is solely identification by PW1 and PW2. The Chief Inspector of Police Patricia Nasio did carry out identification parades using the same members for the two parades and by allowing the appellants to stay in the same position during identification by PW1 and PW2. This court finds that this was improper as It was necessary to constitute different parades with different members and to change the positions of the appellants in the parade during identification by PW2. The court finds that identification by the 2nd witness in both parades was not properly done as the appellants did not change their position in the parade and therefore creating doubt as to whether the 2nd witness properly identified the appellants. The second parade was also flawed for using the same members as it was necessary that deferent members be used to avoid a situation where the witness would obviously pick on the appellants .

This court remains with only the evidence of a flawed identification parade and finds that the bungled identification parade was prejudicial to the appellants as it was the only evidence against them.

Moreover, the prosecutor did not disapprove the appellants alibi. An accused person does not assume the burden of proving the defence of alibi he may put forward. In criminal cases the burden lies squarely on the prosecution, except in those cases where the section creating the offences specifically places the burden on the accused person to establish a fact, to prove a charge beyond any reasonable doubt. It is the duty of the prosecution to disapprove any alibi defence an accused person puts forward unless it appears to the court that the alibi cannot be sustained. The appellants in this case put forward an alibi defence and even called witnesses to show that they were not at the scene of the robbery.

The 1st appellant, **George Mwai Kabue** appealed on grounds that;

1. ***That the learned trial magistrate erred in both law and facts by failing to comply with Section 169(1) of the C.P.C.***
2. ***That the learned trial magistrate erred in law and facts by failing to observe that there was no identification at the scene.***
3. ***That the learned trial magistrate erred in both law and facts by failing to observe that identification parade was not conducted properly.***
4. ***That the learned trial magistrate erred in law and facts by failing to observe that there was no circumstantial evidence to link me with the commission of crime as alleged.***
5. ***That the learned trial magistrate erred in both law and facts by failing to to observe that the prosecution case was riddled with contradictions.***
6. ***That the learned trial magistrate erred in both law and facts by failing to observe that the prosecution witnesses lacked credibility.***
7. ***That the learned trial magistrate erred in both law and facts by failing to observe that the mode***

***of arrest was not as alleged.***

This court finds that the identification parade was flawed and since this was the only tangible evidence the appeal by the 1st appellant is found merited and is hereby allowed .

The second appellant **Edward Wanjohi Muchiri** filed amended grounds of Appeal. His appeal is based on the following grounds;

1. ***That the learned trial magistrate erred in both law and fact by failing to comply with Section 169 (I) of the CPC.***
2. ***That the learned trial magistrate erred in law and facts by failing to observe that there was no positive identification at the scene.***
3. ***That the learned trial magistrate erred in both law and facts by failing to observe that identification parade was not properly conducted.***
4. ***That the learned trial magistrate erred in law and facts by failing to observe that there was no circumstantial evidence to link me with the commission of crime as alleged.***
5. ***That the learned trial magistrate erred in both law and facts by failing to to observe that the prosecution case was riddled with contradictions.***
6. ***That the learned trial magistrate erred in both law and facts by failing to observe that the prosecution witnesses lacked credibility.***
7. ***That the learned trial magistrate erred in both law and facts by failing to observe that the mode of arrest was not as alleged (of the motive of the case in question) and further violated Section 169 (I) of CPC.***
8. ***That the learned trial magistrate erred in both law and facts by failing to give my defence due consideration.***

The first ground revolves on the section 169 of the C.P.C. That the date of sentence is not shown despite the fact that the date of conviction was shown. This court finds that failure to indicate the date of sentencing is not fatal to the proceedings and does not prejudice the appellant as the date of judgment and conviction is given.

This court finds on ground 2 that there was no proper identification as it was flawed and therefore the appeal by the 2nd appellant is also accordingly allowed.

The upshot of the above is that the conviction of the appellants by the trial court is set aside, they will accordingly be released from prison unless otherwise lawfully held.

***Dated, signed and delivered at Nyeri this 30th day of January 2014***

**J. WAKIAGA**

**JUDGE**

**A . OMBWAYO**

**JUDGE**

Judgment is read in the presence of the appellant and Mr.Njue for the state.

**J. WAKIAGA**

**JUDGE**

**A . OMBWAYO**

**JUDGE**