



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 657, 658, 659 & 660 OF 2010**

**RAPHAEL KIMANI GACHIE .....1<sup>ST</sup> APPELLANT .**  
**SULEIMAN ASITIVA LIPAPU .....2<sup>ND</sup> APPELLANT .**  
**ERIC MUYELA ISABWA .....3<sup>RD</sup> APPELLANT .**  
**JOSEPH WAINAINA WAMBUI .....4<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 4985 of 2009 in the Chief Magistrate's Court at Kibera – Mrs. Nzioka (SPM) on 10<sup>th</sup> November 2010)*

**JUDGMENT**

**Introduction**

1. The four appellants **Raphael Kimani Gachie, Suleiman Asitiva Lipapu, Eric Muyela Isabwa** and **Joseph Wainaina Wambui** were charged together with two counts of robbery with violence Contrary to **Section 296(2)** of the **Penal Code**. At the close of the trial they were all convicted. The first, third and fourth appellants were sentenced to four (4) years imprisonment each, while the second appellant was sentenced to five (5) years imprisonment.

**Brief Facts of the Case**

2. The brief particulars were that on the 7<sup>th</sup> day of October 2009, at Kinoo in Nairobi, jointly with others not before court while armed with offensive weapons namely pistols, they robbed James Karimi Waiganjo of his motor vehicle registration No. KBJ 729 A make Toyota Premio white, cash Kshs.3,000/=, wrist watch make Oris, Nokia 1202 and Nokia 720 mobile phones and a pair of shoes all valued at Kshs.1.2 million in **count I**. On the same date and place, they also robbed Josephine Zipporah Mwiwaki of cash Kshs.2,700/=, Nokia Mobile phone, silver chain, silver ring, wrist watch make Omax and other personal documents all valued at Kshs.12,000/= in **count II**. That at or immediately before or immediately after the robbery they threatened to use actual violence against the said victims.

**Case Summary**

3. The prosecution's case was that **PW1**, James Karimi Waiganjo gave a lift to **PW2**, Josephine Mwihaki as he drove motor vehicle registration No. KBJ 729 A Toyota Premio from Nairobi towards Nakuru. At Kinoo area he branched off the road to drop **PW2** at her home. On arrival a watchman opened the gate for them but hardly had **PW1** parked the vehicle inside the compound for **PW2** to alight than a person armed with a pistol emerged and went to the driver's door. The intruder ordered **PW1** to get out of the motor vehicle and move to the back seat. **PW1** obliged. A second person entered the car as it started to drive out of the compound. **PW2** was also ordered to get into the back seat and two more people entered the motor vehicle at the gate.
4. The motor vehicle was driven towards Kikuyu hitting other motorists along the way. Somewhere on the way, **PW2** was put in the boot of the motor vehicle, robbed of his Oris watch, a mobile phone make Nokia, Kshs.3,000/= and a pair of shoes. From the boot **PW1** could hear gun shots and screams as the motor vehicle drove along. At one time he heard the car door open and someone shout "shoot them Striker". At about 2.30 a.m. the victims were dropped off at Kinoo area where they managed to get a taxi to Kabete Police Station to report the matter.
5. At the police station, other people came to report that they had been shot at by people in a Toyota Premio which happened to be that of **PW1**. A total of four identification parades were conducted out of which **PW1** was able to identify the person who sat in the co-driver's seat as the third appellant, and the one who sat next to him referred to as "Striker" as the fourth appellant, herein respectively. **PW2** his passenger was able to identify the first and second appellants, from the parade.

### **Appeal**

6. Being aggrieved the appellants filed **appeals No. 657, 658, 659 and 660 of 2010** respectively. During the hearing, the four appeals were consolidated into **appeal No. 658 of 2010**. Mr. Raphael Kimani Gachie became the first, Suleiman Asitiva Lipapu the second, Eric Muyela Isabwa the third and Joseph Wainaina Wambui the fourth appellant respectively.
7. Before the hearing of the appeal the State served the appellants with notice to enhance the sentence if they chose to proceed with the appeal. The notice was explained to the appellants by the court and the appeal was deferred to allow them time to consider the import of the notice. When the appeal came up again for hearing the fourth appellant, Joseph Wainaina Wambui applied and was allowed to withdraw his appeal. This appeal is therefore in respect of the first, second and third appellants only. They elected to proceed with their appeals inspite of the notice to enhance sentence.

### **Grounds of Appeal**

8. The three appellants filed joint submissions in which they urged that the subject motor vehicle was not produced in court, and the owner was not known either. That the identification parade was not properly done, and there was contradiction in the dates of the identification parade. That the evidence on the dates of the robbery were also contradictory, and that the dusted finger prints on the motor vehicle were not produced in court. Lastly they argued that vital witnesses were not called to testify in court.
9. The state opposed the appeal through learned counsel Mr Kabaka, who submitted that there was overwhelming evidence on record to sustain the conviction. He gave a brief summary of the circumstances under which the appellants were arrested, and argued that all three appellants were positively identified at an identification parade which was arranged in conformity with the Police Standing Orders and was therefore admissible. That the appellants' defences were duly considered by the trial court and rejected for want of truth.
10. Mr. Kabaka further contended that the trial court convicted the appellants on a lesser charge under **Section 296(1)** of the **Penal Code** for reasons that the appellants did not use violence. Mr. Kabaka

urged that this was a misdirection by the court since the appellants numbered more than one and were armed with a dangerous weapon and that therefore, whether or not violence was actually used, the ingredients of **Section 296 (2)** of the **Penal Code** were met.

11. For those reasons Mr. Kabaka urged the court to dismiss the appeal and uphold both convictions and sentences. He also urged the court to go further and set aside the sentences imposed upon each of the three appellants, and exercise the powers provided under **Section 354(2)** of the **Criminal Procedure Code**, to enhance the sentence to that which is provided by law, which is death.
12. We have analysed and re-evaluated afresh the evidence that was adduced before the lower court, as expected of us as the court of first appeal bearing in mind that we neither saw nor heard the witnesses as they testified. We find that there is no dispute that both **PW1**, and **PW2**, were attacked and robbed of their personal effects and **PW1**'s motor vehicle registration No. KBJ 729 A Toyota Premio as stated in their evidence. Only the motor vehicle was subsequently recovered.
13. The more vexing question is on the sufficiency of the evidence of identification of the persons who carried out that ignoble deed against the complainants, and on which the prosecution case rests. There is no other evidence on the record to link the appellants to the offence. Indeed as complained in the grounds of appeal neither the subject motor vehicle nor photographs thereof, nor the fingerprints lifted therefrom were produced in evidence.
14. The material witnesses on the question of identification were the two complainants, **PW1** and **PW2**. We bear in mind that evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize danger. In considering the evidence of identification we have taken into account the caution advised by the Court of Appeal in **KARANJA AND ANOR. VS REPUBLIC [2004] 2 KLR PG 140** that:  
  
***“Whenever the case against an accused depends wholly or to a great extent on the correctness of one or more identifications of the accused of which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification”.***  
  
We have therefore, considered the circumstances under which the two identifying witnesses identified the appellants with great circumspection, in view of the fact that the robbery occurred at night. This is because mistakes can be made even in cases of recognition and an honest witness may none the less be mistaken. See - **Republic Vs. Turnbull & others (1976) 3 All ER 549**.
15. Although there were two identifying witnesses in the case before us, each of the appellants was identified by one witness only. Each was therefore convicted in reliance of the evidence of a single identifying witness. We note however that the learned trial magistrate duly warned herself on the dangers inherent in basing a conviction on the evidence of a single identifying witness.
16. Upon analysis of the evidence we find that there is no dispute that there was good lighting at the scene of the carjacking. There is however no evidence on the period that the witnesses had the appellants under observation at the said scene. There is also evidence that the witnesses stayed with the robbers in the motor vehicle for several hours but there is no indication on the manner of lighting that obtained inside the motor vehicle.
17. Although each witness later picked two of the appellants out of an identification parade, doubts arose when we considered the manner in which the identification parade was conducted. Ordinarily evidence of successful identification from a parade is intended to fortify the evidence of visual identification. In the case before us however, the uncertainty of the witnesses revealed itself in the fact that they identified the appellants along with other parade members who were not linked to the offences.

18.This can be discerned from the evidence where, upon cross-examination by the 4<sup>th</sup> appellant, **PW4** Ag IP Shamalla who was the parade officer admitted as follows:

**“Yes I know there are those who were identified but they are not here. They were not suspects”.**

He did not however record this in the identification parade forms as required by the Parade Rules. The trial court analysed the above evidence in the following manner:

**“There was the issue of other persons who were identified on the parades and released. The issue was dealt with in a lukewarm manner. The witnesses giving varying evidence, the defence counsel decided to deal with it in submissions. How can issues of facts be a matter of submissions unsupported by any defence. The investigating officer said he was not aware of such people. The identification parade forms are silent on that issue. The accuseds are silent. Even if there was doubt which I do not have! Who has raised it?”.**

In our humble view this was a fact which was admitted by the parade officer in evidence and to blame the appellants for their silence on the matter, or for not supporting their misgivings with evidence was tantamount to shifting the burden of proof to the defence.

19.We also find that the parade officer did not act with scrupulous fairness in the manner in which he conducted the parade as required by rule 13 of the Parade Rules provided in the Kenya Police Standing Orders. By using one parade line-up for all the four appellants, and the same witnesses we find that the appellants were prejudiced as the witnesses may have been able to identify a face they did onto see on the first or second inspection and larch onto that person as their suspect.

20.The evidence of the arresting officer was crucial as it may have connected the appellants with the offence if he was able to recall the registration number of the motor vehicle in which he arrested them. He was not however, of much help to the court on that score. He could not recall the registration number of the motor vehicle he found in their possession.

21.On the contradictions in dates of the parade, we find that the proceedings appear to have been tampered with. Ordinarily in a case where it is suspected that proceedings have been tampered with, the appellants are not automatically entitled to have their appeal allowed. The court may instead be minded to order for a re-trial in fitting circumstances. In the circumstances of this case however, we find that a reasonable doubt exists in the prosecution’s evidence.

22.For the reasons set out above we find that the appeal has merit, and is allowed. The **first, second** and **third** appellants are set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED and DELIVERED** in open court this **29<sup>th</sup>** day of **April 2014**.

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**A.MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**