**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APEAL NO. 168 OF 2010**

**WILSON NGUGI WAMBUI ……..…… APPELLANT**

**VERSUS**

**REPUBLIC …….…… RESPONDENT**

***(From original conviction and sentence in Criminal Case Number 206 of 2007 in the Chief Magistrate's Court at Limuru – M.A. Murage , S.P.M) on 3rd December, 2008)***

**JUDGMENT**

The appellant Wilson Ngugi Wambui was charged with four counts of robbery with violence contrary to section 296 (2) of the Penal Code. He denied the offences but after a full trial he was convicted on one count and acquitted of the other three.

The count upon which he was convicted related to robbery upon P.W. 2 Moses Karinya Karunda. Upon conviction he was sentenced to death. This appeal arises from the said conviction.

The facts and evidence relating to the original trial are that on 14th November, 2007 P.W. 1 Daniel Karanja was driving motor vehicle registration No. KAS 826 U a Nissan Matatu from Nairobi towards Naivasha and P.W. 2 was the conductor. At a place called Kimende four passengers boarded the motor vehicle and after passing a police road block at Kinale somebody banged the roof of the motor vehicle from inside. The person demanded mobile phones and money. At this stage one person who sat next to the driver took over the motor vehicle.

In the meantime, P.W. 2 the conductor was robbed of some money amounting to Kshs. 900/=. The person who took over the motor vehicle drove in a zig zag manner. One person went out of the motor vehicle through the window, climbed onto the roof and started screaming. The motor vehicle was stopped and the person driving ran away followed by another person. One other person remained behind and was arrested. It is said that this is the appellant in court. The motor vehicle was then driven back to the Police road block where the suspect was handed over to the police.

Upon being searched, he was found to be in possession of the money said to have been robbed off P.W. 2, the conductor. It is the evidence of P.W. 2 that he saw the suspect well as the light inside the motor vehicle was on and that the money stolen belonged to him. P.w. 4 is one of the police officers manning the road block along the Nairobi – Naivasha road. He received a suspect arrested by members of public and conducted a search. He recovered 2 wallets and Kshs. 900/= from that suspect. He also recovered a mobile phone and identification card.

P.W. 3 is a police officer who was on duty on mobile patrol. He received a call about a robbery along Nakuru Highway and proceeded to the scene. He found some passengers and one suspect who had been held by Police Officers. There were two other men arrested but it was later discovered that they were not part of the robbery. He took the suspect into custody at Lari Police Station. He was in the company of the driver and the conductor. By then the suspect had been searched and Kshs. 900/= recovered which was handed over to this witness.

When called upon to defend himself the appellant gave a sworn statement and told the court that he conducted business at Kimende, and on the date of the alleged offence he closed his business at 7 p.m. He had Kshs. 1000/= and so he removed Kshs. 100/= and kept Kshs. 900/= in a wallet. He boarded a motor vehicle to Naivasha where he lived and paid Kshs. 100/= to the conductor. Then somebody ordered passengers to give out money.

Some people then jumped out of the motor vehicle and one passenger said he, the appellant, was one of them. He was beaten and become unconscious and later was taken to the police where upon being searched, a wallet containing 900/= an identification card and voters card where found in his underwear. He was later arrested and charged with the offence which he denied.

He said he was not with the robbers and was not armed. He never hit nor robbed anybody. The person who implicated him never gave evidence and no parade was conducted. When the motor vehicle started moving in a zig zag manner he tried to get out through the window to save his life. He did not try to run away.

The learned trial magistrate believed the evidence of the prosecution witnesses, found the defence of the appellant unconvincing and convicted him. In his petition of appeal the appellant has faulted the learned trial magistrate on the grounds that she relied on identification by P.W. 2 whereas the circumstances favouring positive identification were not favourable.

It is also his position that critical witnesses where never called to testify and the case was never proved to the required standards in law. He has also submitted that Section 169 of the Criminal Procedure Code was violated and that the prosecution evidence was riddled with inconsistencies and contradictions. Finally, that the learned trial magistrate erred in law and fact in failing to consider his defence.

As the first appellate court we have taken into consideration all the evidence adduced before the learned trial magistrate with the view to arriving at independent conclusions. The offence took place along the Nairobi – Naivasha high way at night. According to P.W. 2 it was around 8 p.m. and dark. However, inside the motor vehicle the light was on and he saw the appellant. He described the appellant as short and dark.

The driver also testified to the fact that it was dark and he did not see the assailants in the motor vehicle. He did not testify as to the lighting in the motor vehicle. The evidence points to a group of people who were allegedly armed and robbed passengers in the subject motor vehicle. Only the appellant was charged as a result. Other than the conductor who gave evidence as to the robbery attributed to the appellant, no other evidence exists. This is therefore evidence of a single witness.

In the case of **MAITTANYI VS REPUBLIC (1986) 1 KAR 75** the court held,

> **"Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule doesn't lessen the need of testing evidence of a single witness with the greatest care…..especially when it is known that the conditions favouring a positive identification were difficult".**

P.W 2, the conductor, may well have been honest and confident about the identity of the appellant and the role he played in the robbery. His evidence however, remains that of a single identifying witness.

On the other hand, the appellant gave a sworn statement of defence where he stated the circumstances

under which he found himself in the whole episode. His defence in our view is plausible and casts some doubt on the prosecution evidence relating to the offence. Two other people were arrested alongside the appellant other than the alleged accomplices who ran away. Those two people were released when it was established they had no connection with the robbery. The appellant may as well fall into that category.

The money recovered from him had no special marks. He claimed it belonged to him and the explanation has not been dislodged. At the end of it, it is his word against that of P.W. 2, the conductor. Both of them could be telling the truth. In our view, the conviction was unsafe in the circumstances of this case.

Accordingly, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

**Dated** and **delivered** at Nairobi this **16th Day** of **December, 2014.**

**A.MBOGHOLI MSAGHA** **L.A. ACHODE**

**JUDGE** **JUDGE**