



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 449 OF 2007**

**PATRICK KIMANTHI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 7560 of 2005 in the Chief Magistrate's court at Kibera – Mrs. H. Wasilwa (PM) on 16/7/2007)*

**JUDGMENT**

1. The appellant has appealed against conviction and sentence by the trial court in four counts in which he had been charged as follows:
  - i. **Count I and II:** robbery with violence contrary to **Section 296(2)** of the **Penal Code (Cap 63 laws of Kenya)**.

In **count 1** it had been alleged that the appellant jointly with others not before the court were on 21<sup>st</sup> day of September, 2005, armed with a dangerous weapon namely a pistol, as they robbed Geoffrey Kinyanjui Ngechu of Kshs. 29,700/= . In **count II** it had been alleged that the appellant jointly with others not before the court were on 14<sup>th</sup> October 2005 armed with a dangerous weapon namely a pistol, as they robbed Hesbon Gwiyanga Busisa of Kshs. 20,300/=

**ii. Count IV and V:** Being in possession of Public Stores contrary to **Section 324 (3)** of the **Penal Code**, and having in possession suspected stolen property contrary to **Section 323** of the **Penal Code** respectively. In these two counts the appellant was said to have been detained on 24<sup>th</sup> October 2005 near Ambassador Hotel in Nairobi, by No. 58101 CPL Indeché and No.50754 PC Wanyoyi in the exercise of powers conferred upon them by **Section 26** of the **Criminal Procedure Code**, and found to be in possession of a pair of hand-cuffs, the property of the Disciplined Forces, and a pocket phone make Motorola serial no. obliterated, which were

reasonably suspected to have been unlawfully obtained.

2. In the appellant's first and second grounds of appeal he faulted the evidence of identification and the manner in which the identification parade was conducted. It was argued by Mr. Kanyi, learned counsel for the appellant that the trial court did not direct itself properly on the issue of identification, and that the identification parade conducted for the appellant did not meet the required standard.
3. On behalf of the Respondent the appeal was opposed, on grounds inter alia, that the prosecution adduced sufficient evidence to sustain a conviction, all mandatory legal provisions were strictly complied with; and the trial court in its judgment wholly complied with the provisions of **Section 169** of the **Criminal Procedure Code**.
4. **On identification** Mr. Kanyi contended that in cases of this nature the victim must describe the special features or other special marks that made the victim properly identify his assailant without any possibility of error. Counsel did not deem it sufficient for the learned trial magistrate to merely comment that the robbery occurred during the day and that the circumstances were favourable for identification. The respondent argued that both robberies occurred in broad day light and that both **PW1** and **PW2** were able to positively identify the appellant as their assailant.
5. In considering the evidence of identification, we directed our minds to the passage in **Blackstone's Criminal Practice 2001 (12<sup>th</sup> ed., by Peter Murphy and Eric Stockdale Oxford: OUP 2002) pg 2304 para, F18.2** which was cited with approval by Ojwang and Dulu JJ, in the case of **Charles Njoroge Ndura vs Republic, Cr. App No. 5 of 2006 NBI** (unreported), to which we were referred by Mr. Kanyi. The passage appears as follows:

**“The visual identification of suspects or defendants by witnesses has for many years been recognized as problematic and potentially unreliable. It is easy for an honest witness to make a confident, but false, identification of a subject, even in some cases where the subject is well known to him. There are several possible reasons for errors of this kind. Some persons may have difficulty in distinguishing between appearance, and many witnesses to crime are able to see the perpetrators only fleetingly, often in stressful circumstances. Visual memory may fade with the passage of time and may become confused or distorted by suggestive influences from photographs or other sources of contamination. There is evidence that false identification can sometimes be caused by a process known as unconscious transference, in which the witness confuses a face he recognizes from the scene of the crime (perhaps that of an innocent bystander) with that of the offender. Such problems may then be compounded by the understandable, but often misguided, eagerness of many witnesses to help the police by making positive identification.”**

6. We have been circumspect on the question of identification, noting that although the appellant was convicted on two counts of robbery with violence, there was only one identifying witness in **count 1** and one identifying witness in **count II**. We revisited the age old caution which has been restated in cases without number, and which was captioned in the case of **Kiarie v Republic [1984] KLR pg 739**, wherein Kneller, Chesoni & Nyarangi JJA, held, *inter alia*, that:

**“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.**

**Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”**

7. In the case before us Geoffrey Kinyanjui Ngichu **PW1**, who was the complainant in **count 1**, testified that he was walking along in Uthiru area of Nairobi at about 1 p.m. on 20<sup>th</sup> September 2005, when a motor vehicle registration no KAT 494 V salon pulled up next to him. The person

inside the car called him and when he moved nearer, what happened next in his own narration was as follows:

**“The person inside called me and greeted me and told me they were police officers and they were around as one of their colleagues had been shot the previous day. He asked for my ID card and I gave him. The other in vehicle (sic) opened both hind doors of vehicle and came out, the one in car continued interrogating me saying we were thugs killing officers in the area. The one in the vehicle ordered I be taken to Kikuyu police station (sic). He held me and put me in the vehicle behind – seat in the middle (sic).”**

8. We note from the evidence that the occupants of the salon car to which **PW1** was called, greeted him, conversed with him, and asked him to produce his Identification card before they opened the back doors of the car, and bundled him inside. The interrogation continued inside the car as they drove around. All this time **PW1** believed his fellow passengers were police officers, and the button only clicked when one of the men ordered him to empty his pockets.
9. It is also notable from the evidence that he was in the car for quite some time with the robbers because the car moved from Uthiru to Kinoo junction and branched into a dirt road which led to some farms near Alliance Girls High School, where he was abandoned. The robbery occurred in broad day light as observed by the trial magistrate and the assailants were not camouflaged, or was the appellant blindfolded. There is no evidence that he kept his head down nor that he was ordered not to look at his abductors during the ordeal.
10. **PW1** was emphatic that the appellant was one of the occupants of the car in which he was consigned as an unwilling passenger and in which he was relieved of the Kshs. 29,700 he had just withdrawn from K-Rep bank. In his description of the part the appellant played, **PW1** stated that:

**“Among the people in that vehicle was accused in court. (Pointed at accused) He was one who sat on my left and he is one who put me in the vehicle. Accused kept threatening he would shoot me but I did not see any gun..... Accused is the one who dragged me to the farm with a cold metal pointed on my neck. He then ordered me to keep quiet and if I made any noise he would kill me, it was now 11 am – He threw my ID card at me.”**

11. According to **PW1**, at the time of making his report to the police he explained what his abductors looked like. The impressions made in his mind during the observation of his captors, was that one looked like a Nandi or Maasai, another like a Kamba and yet another like a Kikuyu. We are aware that this might have no bearing on the actual extraction of the persons involved, when they are finally found. We however noted that he did give those impressions to the police at the time of making his report.
12. **PW2**, Hesbon Gwiyanga Nabusisa, was the complainant in **count II**. His testimony was that on 14<sup>th</sup> October 2005 at 1 p.m., he was at Adam’s Arcade when a motor vehicle registration no KAR 318 C pulled up next to him. He saw four people in the car, two of whom came out, introduced themselves as police officers and bundled him into the car. All this occurred in broad day light and the robbers neither camouflaged themselves nor blindfolded **PW2**. He recalled that:

**“Before I crossed the road to come to Kibera a vehicle stopped behind the matatu, 2 people came out and said they were police officers. The vehicle was Toyota corolla no KAR 318C, it had 4 people and 2 on left got out while other 2 remained inside vehicle (sic). They forced me inside their car and made me sit the in back seat behind and the vehicle drove off.**

**The person who sat behind with me had handcuffs like this one (MF1). Among the people in the car was accused in court, he was being called Sergeant. He sat on left side behind where I sat while in vehicle they said they had a description that suited me and**

**they were looking for me. I expected us to go to Kilimani Police Station but on reaching City Mortuary they drove to Mbagathi Way and then South C. I did not see any weapons. Before reaching South C they checked my pockets and searched up and took all my money and ID card. Accused took the money, 20,300/= bank book.”**

13. Thereafter his abductors did not seem to be in a hurry to release their unwilling passenger. They took him on what seems to be a tour of Nairobi city through South C, Mombasa Road, South B, Bunyala Road round about, Upper hill, Kenyatta National Hospital, Valley Road, Uhuru Highway, Waiyaki Way in Westland and Kangemi. He testified that at Kangemi it is the appellant who escorted him out of the car and instructed him to go and buy airtime to enable them call their boss. The appellant returned to the car and it drove off abandoning **PW2**.
14. Eleven days later the police called him to Kabete police Station where he attended an identification parade and identified the appellant. He testified that the robbers went round town with him until he just sat back to see what was to follow. Further that he sat with the appellant for so long that he could not forget his appearance.
15. On the **identification parade**, Mr. Kanyi argued that **PW7** the Parade Officer conducted two parades and filled two parade forms yet he testified that he did not know where the other parade form was. Mr. Kanyi also submitted that there were other police officers in the parade area, during the parade, the identifying witnesses did not know how many parade members there were nor where the appellant stood among them. He further averred that the appellant's assertion that he was seen by the witnesses before the parade was not rebutted.
16. Mr. Kanyi further pointed out that there was no evidence as to who called the witnesses to the parade or escorted them from the parade. Further that the appellant should have been allowed to choose the parade members, and that the said parade was held more than one month after the attack. Mr. Kanyi averred that the parade conducted by **PW7** in respect of the appellant fell below the required standard due to the foregoing reasons.
17. For the Respondent it was contended that from the testimony of **PW7** which was neither rebutted nor shaken at cross examination stage, the identification parade rules as provided under **Section 6 (iv) of the Force Standing Orders (Chapter 46 of the Laws of Kenya)**, were clearly complied with. That identification parade form showed clearly that the appellant was satisfied with the parade as was conducted.
18. We made reference to **SENTALE VS. UGANDA 1968 EA 365**, which stated that the identification parade therein had been held in a manner contrary to the rule approved by the Court of Appeal in **REPUBLIC V MWANGO S/O MANAA (1936) EACA 29**, which set out 13 Parade Rules as provided in the Kenya Police Standing Order No. 15/26 and approved by the then Chief Justice as hereunder:
  1. *That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.*
  2. *That the officer in charge of the case, although he may be present, does not carry out the identification.*
  3. *That the witnesses do not see the accused before the parade.*
  4. *That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.*
  5. *That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires.*

6. *Care to be exercised that the witnesses are not allowed to communicate with each other after they been to the parade.*
  7. *Exclude every person who has no business there.*
  8. *Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.*
  9. *If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.*
  10. *See that the witness touches the person he identifies.*
  11. *At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.*
  12. *In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say "Pick out somebody", or influence him in any way whatsoever.*
  13. *Act with scrupulous fairness, otherwise the value of the identification, as evidence will depreciate considerably.*
19. We made an inquiry of the evidence, to establish whether the parade as conducted by **PW7** passed the acid test in the cases of **Sentale** and **Mwango**. **PW7** the Parade Officer narrated to the court in great detail how he went about conducting the parade. He testified that the parade had nine members of almost similar, age, colour, height and appearance as the appellant. That the parade members were sourced from the police cells since there had been a police raid the previous day. He also stated that he gave the appellant the opportunity to choose, if he so wished, where to stand in the line-up, whether or not to have his attorney or a friend present and to change his clothes.
20. He testified further that there were four witnesses who participated in the parade and that he informed each of them that the suspect in his case may or may not be on the parade. After the end of the parade each witness was taken outside to the yard to avoid contact with the remaining witnesses, and that before the parade those witnesses were held at the CID offices which are in a different building from the police station where the identification parade was conducted.
21. Indeed the identification parade came one month after the robbery for **PW1**, while for **PW2** it came some eleven days after the attack. In the evidence of these two witnesses and that of **PW7** the two witnesses had no difficulty picking the appellant from the parade. They identified the appellant by touching him, while two other witnesses who included **PW3** did not identify him. The appellant signed the parade forms to say he was satisfied with the manner in which the parade was conducted. **PW7** produced the relevant parade form in evidence.
22. The gist of the other three grounds of appeal raised by the appellant is that the evidence for the prosecution was inadequate while that of the defence was given due consideration. Mr. Kanyi contended that the prosecution did not produce evidence to prove that the appellant was in possession of the two cars used in the robbery at the pertinent time, nor call a witness from the company which was said to have his details. He also argued that the witnesses differed on the colour of the car which was a material contradiction, and that the trial magistrate erred in making a finding that the appellant was in possession of motor vehicle registration number KAR 318C at the time of arrest.
23. In answer the respondent countered that the prosecution's case was watertight and the contradictions, if any in their case, was immaterial.

24. **PW1, PW2 and PW3** categorically identified the motor vehicle in which they were robbed a saloon car as bearing the registration number KAR 318C **PW1** identified the motor vehicle relating to the robbery against him as a saloon car bearing registration number KAT 494 V. These are the unique and reliable identifying marks of motor vehicle as opposed to colours, which human beings are prone to interpret differently. **PW5** testified that the motor vehicle registration number KAT 494 V Toyota Salon belonged to his aunt and she had allowed him to lease it to a car hire company owned by **PW8** from June 2005 to October 2005. **PW6** was the owner of motor vehicle registration number KAR 318 C and he too leases it to the Car Hire Company owned by **PW8** from April 2005 to October 2005. **PW8** the owner of Cyber Tourist Information Centre confirmed that **PW5** and **PW6** did lease the two motor vehicle described above to his car Hire Company for rental purposes in 2005.

25. He also confirmed that from his record the car was in the custody of a client called Patrick on the dates inquired about by the CID officers concerning this case. His testimony was as follows:

**“We went to Kabete Police Station and were referred to CID office. We told them what we do. I explained. They gave me different days and asked me who had the car i.e. within September and October. I checked our diary and found the vehicle was with Patrick Kimanthi. They asked if we had KAT 494V and I said yes. They also asked who had it and I said Patrick. They asked me if it was possible to get Patrick. I said it is possible as he is still having our vehicle.”**

According to **PW8** the appellant had returned the car registration number KAR 318 C the Saturday before the police came calling. The witness retrieved it from the client in whose custody it was and called the appellant who seemed to have a preference for the car to come for it. When he arrived to collect the car he was arrested.

26. On **counts IV and V**, Mr. Kanyi averred that the prosecution did not produce an inventory or evidence to show that the appellant had in his possession the walkie-talkie and the handcuffs. **PW1** did testify that while in the car one of the men threatened to handcuff him although he did not. **PW2** on his part, testified that one of the men who sat behind with him had handcuffs like those produced in evidence, while the man who sat in the co driver’s seat had a radio phone (walkie-talkie).

27. **PW8**’s testimony was that at the time of arrest the appellant had a jacket in his hands which he tried to pass on to someone who was in another car. The police intercepted it and it was part of the evidence in this case. **PW8** testified further that:

**“The officer checked jacket and found handcuffs and walkie talkie (MF1-2). I was driving and they showed me the handcuff and walkie talky I was surprised I had never seen these items on Patrick before.”**

In cross-examination **PW8** stated that he drove the car to the police station while the police officers sat in the back seat with the appellant, and searched his jacket. He stated that:

**“They told me after searching the jacket “you see what your guy does” showing me handcuffs and walkie talkie.”**

28. **PW9**, CPL Wanyonyi a CID officer attached to Kabete Police Station, testified that he received the complaint of **PW1** on 2<sup>nd</sup> September 2005 and that of **PW2** on 14<sup>th</sup> October 2005 while on duty at the Police Station. He traced the two vehicles used in the robberies and found that they were in use for hire services at Cyber Tourist Information Centre owned by one Mr. Mathu (**PW8**).

29. **PW9** corroborated the evidence of **PW8** that he together with a CPL Indeché who did not testify laid ambush for the appellant and arrested him at Ambassador Hotel where he came believing that

he was coming to pick car registration number KAR 318C from **PW8**. **PW8** who was present identified the appellant for purposes of arrest. **PW9** further corroborated the evidence of **PW8** that upon arrest he recovered a jacket from the appellant and on checking its pockets he recovered a pair of handcuffs and a walkie talkie.

30. We considered the appellant's evidence in defence in the context of the rest of the evidence and not in isolation. He gave sworn testimony in which he admitted that he knew **PW8** and that they were friends. His version of what transpired was that he went to Ambassador Hotel on 24<sup>th</sup> October 2005 to collect money from a debtor. The debtor was one James Kimani and that at Ambassador Hotel it was Kimani who was first picked by the police.

31. He testified that when he got into the car in which the police were, he found that **PW8** was the driver. The police wanted to know why he was talking to James. The police took him to the Police Station because he did not have Kshs.10,000/= to give them to secure his freedom, and he first heard of the handcuffs and walkie talkie at the police station. He denied the offence.

32. After a careful reassessment of the evidence we have therefore considered the evidence of identification carefully, cautioning ourselves on the dangers of placing reliance on the evidence of a single identifying witness in each of **count 1** and **2**. We are satisfied that the observation was not fleeting and that the circumstances of identification were, favourable and free from possibility of error. We are also satisfied that the parade was conducted in compliance with the provisions of the Forces Standing Order **Section 6(iv) Cap 46** laws of Kenya.

33. The evidence of **PW8** corroborates that of **PW1** and **PW2** that the two motor vehicles which were used in the robbery were in the custody of the appellant on the pertinent dates. We find that it was remiss of the police to fail to call for the records from the car Hire Company to which **PW8** was referring, and also to fail to make an inventory of the two items recovered in **count IV** and **V** respectively. We however find that evidence of the eye witnesses in this case was sufficient to prove the prosecution case.

34. We have anxiously considered the evidence that the appellant gave in his defence in the context of the rest of the evidence on record, bearing in mind that this being a criminal case there was no burden whatsoever on the appellant to explain his innocence. We find however, that evidence of the prosecution interlocked well and was cogent, and proved the guilt of the appellant on the four counts in which he was convicted beyond any reasonable doubt.

35. All in all we find that the appeal on conviction and sentence in respect of each of the four counts is wanting in merit. This appeal is accordingly dismissed.

It is so ordered.

**SIGNED DATED and DELIVERED in open court this 25<sup>th</sup> day of July 2013.**

**A. MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**