



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL APPEAL NO. 239 OF 2008**

SAMWEL WANYOIKE MUCHIRI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(From original conviction and sentence in Criminal Case Number 1380 of 2006 in the Chief Magistrate's Court at Nairobi – T.N. Ngugi (SRM) on 9<sup>th</sup> July 2008)*

**JUDGMENT**

The appellant, Samwel Wanyoike Muchiri was charged jointly with three others with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

It was alleged in the particulars of the charge that on 2<sup>nd</sup> April 2005 with others not before the court while armed with dangerous weapons namely AK47 assault rifles and pistols they robbed one Charles Wanjohi Kabiru of one motor vehicle registration number KAP 095S Toyota Corolla 100 white in colour valued at Ksh. 400,000/-, cash Ksh. 800/- and one mobile phone make Sagem valued at Ksh. 2,500/- and at or immediately before or immediately after the time of the robbery threatened to use actual violence on the said Charles Wanjohi Kabiru.

There were two other offences of handling stolen goods and being in possession of narcotic drugs which however did not feature his name.

After the full trial, the appellant was convicted and sentenced to death. It is from the said conviction and sentence that this appeal arises.

As the first appellate court it is our duty to re-evaluate the evidence adduced before the learned trial magistrate and arrive at independent conclusions. This we have done.

Charles Wanjohi Kabiru PW8 was employed as a driver by Caroline Ochieng Ogogo PW6. It is his evidence that on 2<sup>nd</sup> April 2005 at about 9.00 pm he was going to pick his employer at Roasters Inn when he was carjacked by four gangsters armed with guns. A gun was pointed at him and he was ordered to move to the back seat. Four men got into the car and after a few metres, two ladies joined them. The motor vehicle was then driven towards Kasarani along Thika Road. At Jawake Supermarket, the two ladies alighted and PW8 was moved into the boot of the car. As this was happening, his telephone and cash was taken away. They then proceeded to Mwiki while he was still in the boot. At Mwiki, he was led into a bush and left behind guarded by two people. At about 4.30 am, he was released and that is

when he went to Kinyago Police Station to seek help. Later, he reported at Kasarani police station.

The people who carjacked him were strangers but he said he was able to identify two who were left guarding him at that night. One of them was his age mate with similar appearance like him. Later he was called to Kiambu police station to identify the motor vehicle. Investigations led to the arrest of the appellant among others.

After some suspects were arrested PW8 was called to participate in an identification parade. This parade was arranged and conducted by PW1 Abdul Mwika at the request of acting Inspector Kisinju. It is the evidence of PW1 that the appellant was identified by PW8 by touching.

When he asked the appellant if he was satisfied with the manner in which the parade was conducted, he said “no” without explanation.

There is evidence from PW9, Cpl John Ndiga that it is first accused in the lower court who led the police to the house of the appellant where the arrest was effected. The appellant in his appeal has challenged his conviction on the basic ground of identification by the driver of the motor vehicle, that is PW8. He also faulted the identification parade in that it was not likely to get people of similar physical appearances in a police cell as stated by PW1. He also faulted the learned trial magistrate for convicting him and acquitting his co-accused number one, three and four yet they were not subjected to an identification parade like him. That to him was a misdirection and led to a miscarriage of justice on his part.

The circumstances upon which he was alleged to have been identified were not conducive and as a result should not have been relied upon by the learned trial magistrate. He also faulted the learned trial magistrate for not warning herself of the inherent danger of relying on the evidence of a single identifying witness under difficult circumstances.

On our part, we have considered the evidence adduced leading to the conviction of the appellant herein. In arriving at that conclusion, the learned trial magistrate had the following to say:

**“In respect of the 2<sup>nd</sup> accused person, he was positively identified by PW8. PW8 candidly stated how he was able to identify the 2<sup>nd</sup> accused person. They had been together the whole night of the robbery as the 2<sup>nd</sup> accused and another guarded him. They admitted that he was lying face down in the bush. He explained that as they drove to the place and as they waited, they passed places where there was light. He further stated that he was able to identify the 2<sup>nd</sup> accused due to his apparent age and physical appearance whom he described as bearing a close resemblance to him in looks and age. I had an opportunity to look at both the 2<sup>nd</sup> accused and PW8 and indeed, they bore close resemblance on the face and shape of the heads.**

**Accuse two defence which was unsworn was that the police were looking for one Kamau, his neighbour but they arrested him and the wife when they failed to get Kamau and even charged him and his wife with possession of all the items recovered from Kamau’s house in a different case in Kiambu.**

**He stated that this was a frame up and that is why it was not filed in Kiambu court. I have considered the evidence on record and the accused defence and find him guilty of the offence as charged in count one and convict him accordingly.”**

It is true that the appellant was convicted on the basis of the evidence of PW8, a single identifying witness. It is also true that the learned trial magistrate did not warn herself of the danger of convicting the appellant on the basis of such evidence. The offence took place at night and although there is evidence that there was light along the road taken by the gangsters, the intensity of such light is not given.

That notwithstanding, PW8 appears to have been very alert. He saw the four armed gangsters. He also

saw two ladies join the gang after a few metres.

He noticed the car join Thika road towards Kasarani. He also observed that the car stopped at Jawake supermarket where two ladies alighted and at which point he was moved to the boot. It is not clear how he noticed that the car then proceeded to Mwiki because he was in the boot thereafter.

At the place where he alleged he was left with the two gangsters guarding him, there was no light in the surrounding areas in the first place and secondly, he was ordered to lie face down throughout.

All these allegations came from one single witness without any corroboration whatsoever. As we have observed, the learned trial magistrate did not administer any warning in relying on such evidence.

In **CR Appeal No. 114 of 1995, Peter Wekesa – Vs – Republic** (UR), the Court of Appeal observed;

**“Mistakes are often made and many witnesses cannot even be able to properly identify their attackers even in broad daylight.”**

There is another piece of evidence in this case that is disturbing. According to PW9, the police were led to the appellant’s home by his co-accused number one. This co-accused was an accomplice if at all the two were involved in the same offence. However, this co-accused was acquitted of the main count of robbery with violence contrary to Section 296 (2) of the Penal Code. This fact was not addressed by the learned trial magistrate. And so whereas PW8 may have honestly believed that the appellant was one of the four people who robbed him, and that he picked him at the identification parade believing him to be one of his attackers, there is in our minds a reasonable doubt in view of lack of corroboration that indeed he was one of the robbers. That reasonable doubt should have been accorded the appellant.

In our view, the conviction was unsafe and therefore we allow this appeal by quashing the conviction and setting aside the sentence imposed.

The appellant shall be set free forthwith unless otherwise lawfully held.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of July 2013**

**A. MBOGHOLI MSAGHA**

**JUDGE**

**FRED A. OCHIENG**

**JUDGE**