



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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 115 OF 2009**

**CHARLES NJAU KURIA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 4143 of 2007 in the Chief Magistrate's Court at Makadara – K. Muneeni (Ag. P.M.) on 13<sup>th</sup> Mach 2009)*

**JUDGMENT**

1. The appellant's appeal stems from his dissatisfaction with the conviction by U. P. Kidula, Chief Magistrate at Thika Chief Magistrate's court in three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.
2. The particulars of the offence were that on the 4<sup>th</sup> day of February 2000 at Kavenge market in Machakos District within Eastern Province, jointly with others not before court and armed with dangerous weapon namely a pistol, they robbed Peter Mburu Munyambu of a motor vehicle registration number KAA 563J Peugeot 504 Saloon valued at Kshs.1.5 million in **count I**. They also robbed Peter Ng'ang'a of Kshs.40,000/= and Humphrey Thuo Muigai of Kshs. 1,400 in **count II** and **III** respectively. It was further alleged that at, or immediately before, or immediately after the time of such robbery they used actual violence against the said Peter Mburu Munyambu, Peter Ng'ang'a and Humphrey Thuo Muigai respectively.
3. In his first appeal to the High Court the conviction of the lower court was quashed, sentenced set aside and the case ordered to return to the lower court for retrial. The appellant was tried and convicted for a second time in the lower court, and sentenced to suffer death in accordance with the law. Whereupon he filed this appeal. In the five grounds of appeal he contended that he was not positively identified, and neither did **PW1**, **PW2** and **PW3** provide his description to the police prior to his arrest. He also averred that the identification parade did not follow Chapter 46 of the Force Standing Orders, and that the prosecution did not prove his case to the required standard. Lastly, he argued that the trial court did not consider his defence.
4. Mr. Kabaka learned counsel for the state, opposed the appeal on grounds that although **PW1**, **PW2** and **PW3** did not provide the appellant's description to the police, the trial court noted this and recorded that it was true that the recording in the OB did not carry the appellant's description, but that **PW1**, **PW2** and **PW3** told the police that they could identify their attackers if arrested. Mr. Kabaka averred that indeed they positively identified the appellant at a subsequent

identification parade which was mounted in conformity with Chapter 46 of the Force Standing Orders. Mr. Kabaka submitted that the offence was committed in broad day light and that it was **PW1** who saw the appellant in a telephone booth two months later and called the police to arrest him.

5. Mr. Kabaka also argued that the prosecution had proved that the appellant together with others while armed with a pistol robbed the complainants as stated in the charge sheet, and that the trial magistrate did consider the appellant's defence but rejected it as lacking in merit.
6. To re-assess the evidence on record we set it out in summary. Eight witnesses testified for the prosecution and stated that **PW1** and **PW2** the complainants in count 1 and count 2 respectively, who are employees of Nation Newspapers Distributors, were on a routine round collecting proceeds of the sale of newspapers from their outlets on 4<sup>th</sup> February 2000. They had just collected cash from their last dropping point at Kabange and returned to their car when three men accosted them. One of the intruders had a pistol which he pointed at **PW1**'s head. Both **PW1** who was the driver, and **PW2** who was carrying the day's collections were pushed into the passenger side as one of the intruders took the steering wheel, and the two other men got into the car with them.
7. The motor vehicle was driven in the direction of Thika town as the intruders demanded cash from their hostages. Somewhere along the way the newspapers and spare tyre were jettisoned from the boot of the car and the three witnesses bundled therein. The intruders drove the motor vehicle further but were forced to abandon it, when one of the wheels came off. The three witnesses were rescued by members of the public who heard them calling for help. They reported the matter at Matuu Police Station. Two months later **PW1** saw the appellant in a telephone booth in Thika and called the police who arrested him. He was subsequently charged.
8. Upon re-evaluation of the evidence before us, we find that the prosecution case against the appellant depends wholly or to a great extent on the correctness of the evidence of identification of the appellant which he alleges to be mistaken. We have therefore warned ourselves of the special need for caution before sustaining the conviction of the appellant in reliance of the correctness of the identification. We reminded ourselves of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, inter alia, that:

***“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light”.***

9. The robbery occurred on 4<sup>th</sup> February 2000, but the appellant's arrest was effected on 9<sup>th</sup> May 2000 according to **PW3** the Investigation Officer. Although the robbers drove about with their victims in the car for some time, no evidence was led to indicate how long this was. According to **PW8** Mr. Humprey Thuo Muigai, the complainant in count III, the circumstances prevailing were that **PW1** and **PW4** the complainants in count 1 and count II respectively, were on the floor in the front part of the motor vehicle where all three robbers sat.
10. It is not clear in what position the witnesses were, and whether those positions could afford them opportunity to observe their abductors. **PW8**, who sat alone in the back seat with a heap of unsold newspapers, remained with his head bent down and with one of the intruders holding it firmly in place. The motor vehicle stopped in the bushes where the newspapers were jettisoned from the boot and the witnesses ordered to take their place.
11. The appellant not having been arrested at the scene, and there being no recoveries to connect him to the case the identification parade was of paramount importance in the prosecution case.
12. From the evidence of **PW3** the parade officer, and that of **PW4** and **PW8** it is not possible to tell

with any degree of certainty, who the witnesses who identified the appellant on the identification parade at Matuu were: The following is an excerpt of his testimony on cross-examination.

**“I am not aware about an identification parade at Thika Police Station. I have produced the one for Matuu. The identification parade for Matuu has the name of Peter Mburu Munyambu as an identification witness.**

**Peter Ng’ang’a Gutimba was a witness. He is one of called 1<sup>st</sup> to appear on the parade (sic). The 2<sup>nd</sup> witness was Humphrey Thuo Mungai. Peter Mburu Mungai appeared on a parade in Thika. I testified earlier in the earlier case.**

**I gave the same evidence in the earlier trial. I had read the evidence, Peter Ng’ang’a is not one of the witnesses. I have also said there were 3 witnesses for the parade here during this trial, I have said two I have not mentioned Thuo. There is confusion between Matheka and Muya. I confused the names. The identification report should have Peter Ng’ang’a**

**and Thomas Matheka and Philip Muya are one who identified you on the parade at Matuu the proceedings do not show those names.”**

13.The evidence of **PW3** was not only jumbled up but also appeared to introduce other witnesses such as Thomas Matheka and Philip Muya who did not feature anywhere in this case. The evidence of Peter Ng’ang’a Gutimba (Gatiba) who testified as **PW4** and that of **PW8** indicated that they appeared at only one identification parade and that it was at Thika Police Station and not Matuu. **PW7**, the Investigation Officer on the other hand was only aware of parades conducted at Matuu Police Station and not Thika Police Station.

14.For the foregoing reasons we find that the appeal is meritorious, and allow it. We quash the conviction and set aside the sentence imposed on the appellant and order that, the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED and DELIVERED in open court this 13<sup>th</sup> day of August 2013.**

**A.MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**