



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 138 OF 2010**

**JOSEPH ONYIKWA NYARIKI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 4984 of 2007 in the Chief Magistrate's Court at Thika – B. A. Owino (SRM) on 4<sup>th</sup> March 2010)*

**JUDGMENT**

**Background**

1. This is an appeal against conviction and sentence imposed upon the appellant by B. A. Owino Senior Resident Magistrate (as she then was), in **Cr. Case No. 4984 of 2007**, on two counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.

**Facts of The Case**

2. It had been alleged that on 12<sup>th</sup> day of October 2007, at Kihunguro in Ruiru Thika District, within Central Province, jointly with others not before the court, while armed with dangerous weapons namely pistols, they robbed **Jane Wambui Gichohi** of motor vehicle registration No. KAW 830P make Toyota L Touring valued at Kshs. 680,000/=, a mobile phone make Sumsung D 500 valued at Kshs.25,000/=, Safaricom calling cards valued at Kshs.3,000/= and cash Kshs.6,000/- all valued at Kshs.714,100/=. That on the same date and place, they robbed **Alfred Eliud Mathu** of a mobile phone make Motorola C168 valued at Kshs.4,500.-, and cash 200/= all valued at Kshs.4,700/=. and that at the time of such robbery they used personal violence against the said victims.

**Grounds of Appeal**

3. Upon conviction the appellant was sentenced to suffer death in the manner prescribed by law. Being aggrieved he filed an appeal and in the supplementary grounds thereto he contended that the learned trial magistrate erred in law and fact by:
  1. **Basing his conviction on an unreported matter.**
  2. **Failing to observe that Section 137 (d) of Criminal Procedure Code was fatally violated;**

3. *Acting upon unsubstantiated circumstances of identification.*
4. *Failing to observe that the identification parade was flouted.*
5. *Failing to “enact section 213 and 310 of Criminal Procedure Code and Section 77 (2) of the former Constitution” while accepting written submissions.*
6. *Failing to observe that no independent witness touched on his mode of arrest.*
7. *Failing to give his sworn defence adequate consideration.*

### **Respondent’s Reply**

4. Learned state counsel Miss Maina, opposed the appeal on behalf of the Respondent, and urged that the incident was first reported at Pangani Police Station by **PW1** who was referred to Ruiru Police Station, and that the Occurrence Books from both police stations were produced in evidence by **PW3**. On identification, Miss Maina averred that the offence occurred in broad daylight and the identification of the appellant was positive.

### **Synopsis of The Case Appealed From**

5. The appellant was tried together with one Samuel Irungu Karega in the two counts and the summary of the prosecution evidence was that **PW1**, Ms. Jane Wambui Gichuhi and **PW2** Mr. Mathu were driving out of Ruiru town and were about to join the Thika-Nairobi highway at 4.30 p.m. on 12<sup>th</sup> October 2007, when three men blocked their way. One man approached **PW1**’s side of the car, pointed a pistol at her and ordered her to move to the back seat. The two other men went to the side of the car where **PW2** was seated and also ordered him to move to the back of the car.
6. The gun man took the wheel and drove off while his cohorts sat in the back seat and sandwiched **PW1** and **PW2** between them. The robbers drove around Ruiru town as they relieved their passengers of the property listed in paragraph two of this judgment. They finally abandoned them unharmed on the main road at 7.30 p.m.
7. **PW1** reported the matter to Pangani and Ruiru Police Stations on 15<sup>th</sup> October 2007 and was called back on 28<sup>th</sup> October 2007 together with **PW2** and informed that some suspects had been arrested. They were required to attend an identification parade. At the parade **PW1** identified one man who was subsequently charged and is the appellant before the court.
8. The appellant in his defence gave sworn testimony and called no witnesses. He stated that on the 27<sup>th</sup> October 2007 he went to tend to his tree nursery as he always did and that at about 3 p.m. police came and arrested him and escorted him to Ruiru Police Station. He was charged with the offence of robbery which he denies.

### **Analysis of The Evidence**

9. This being the first appeal, we re-considered and re-evaluated the evidence adduced by witnesses as pertains to each of the grounds advanced by the appellant to arrive at our own independent decision whether or not to uphold the conviction of the appellant. In drawing our own conclusion we were cognisant of the fact that we neither saw nor heard the witnesses as they testified and gave due therefor. - **see Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.**

### **Basing The Conviction on Unreported Matter.**

10. On this ground the appellant averred that the conviction was based upon an unreported matter and that it is a requirement of the law that evidence of a first report to a person in authority be produced since it is important as it often provides a good test by which the truth and accuracy of the subsequent statement can be gauged. Miss Maina urged that the incident was first reported at Pangani Police Station by **PW1** who was referred to Ruiru Police Station, and that the Occurrence

Books (O.B.s) from both police stations were produced in evidence by **PW3**.

11. The complainant's evidence is that she reported the robbery to Pangani Police Station three days after the occurrence. From Pangani she was referred to Ruiru Police Station under whose jurisdiction the robbery occurred.

12. The evidence therefore agrees with Miss Maina's submissions that indeed the incident was reported at two police stations and the O.B.s from both police stations were brought to court by **PW3** PC Kangogo. Pangani police who first received the report did not record it but instead referred **PW1** to Ruiru police under whose jurisdiction the matter fell. During the cross-examination of **PW3** who was the Investigation Officer in this case on 10<sup>th</sup> June 2009, the appellant requested for the Occurrence Books from the two police stations to be availed in court. The witness was stood down and when he took to the witness stand on 24<sup>th</sup> June 2009 the record reflects as follows:

**“Further cross-examination by 1<sup>st</sup> Accused witness says: ‘Yes these are the occurrence Books you asked for.’”**

The appellant did not raise this line of question any further. We therefore find that this ground cannot stand and must fail.

#### **Violation of Section 137 (d) of The Criminal Procedure Code**

13. The appellant submitted that the said section of the law was “fatally violated” because the prosecution did not inquire into the description. In this case we are of the view that the appellant misapprehended the import of this section. **Section 137 (d)** of the **Criminal Procedure Code** to which the appellant has specifically adverted refers to the description or designation of Accused persons in a charge or information and requires it to be as clear as reasonably practicable in the circumstances. The charge sheet herein shows that the appellant was described by name and there is no misapprehension as to who was being referred to therein. We therefore find no merit in this ground.

#### **Acting upon unsubstantiated circumstances of identification.**

14. The appellant submitted, and rightly so, that room for mistaken identity always exists even during broad day light where people confuse someone they know with someone else. He cited a slew of cases which included:

(1) **Kiarie v Republic Cr. App No. 1983**, whose proper citation is **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.”**

(2) **Charles Maitanyi vs Republic (1985) 2 KAR pg. 75**, which dealt with the question of visual identification by a single witness and

(3) **Charles Njoroge Ndura vs Republic Cr. App No. 5 of 2006 Nbi.**

15. On identification, Miss Maina submitted that the offence occurred in broad daylight and that **PW1** and **PW2** were able to positively identify the appellant as the one who had the gun during the car-jacking. Further that he was the one who ordered them into the back of the car and talked to them and that during the identification parade **PW1** positively identified him as did **PW2** who also

identified him by voice.

16. In **Charles Njoroge Ndura** (Supra), the court observed that it was 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. That there are several reasons for errors of this kind. Some of the reasons are that 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.
17. It was also stated in **Charles Njoroge Ndura** that 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. That 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 by-stander) with that of the offenders. Such problems may then be compounded by the understandable, but often misguided, keenness of many witnesses to help the police by making positive identification.
18. In the case before us there was nothing fleeting about the encounter. The witnesses were carjacked at 4.30 p.m. and released at 7.30 p.m. The witnesses were therefore in the company of their captors for three hours. They were abducted in broad day light and were not blindfolded nor was there evidence that their captors wore any disguises. Although the case rested on the evidence of visual identification therefore, there was nothing to hinder their observation of the abductors and they had a lot of time within which to make that observation.
19. The witnesses were called to the police station within two weeks of the attack and were able to identify the appellant from the identification parade. We are satisfied that in the circumstances of this case there was no evidence of suggestive influences which might have distorted or confused the memories of the witnesses and there were no other persons at the crime scene for the phenomenon of transference to be held to have occurred.
20. We agree with Miss Maina that the appellant was properly identified as the one who wielded the gun and also drove the car. Both witnesses were agreed on this and we so find.

**Failing to observe that the identification parade was flouted.**

21. On this ground the appellant contended that the identification parade as conducted in his regard fell below the required standard. Miss Maina maintained that the identification parade was properly conducted in accordance with the law. We tested the evidence on the manner in which the identification parade was conducted using the litmus paper test set in the case of **REPUBLIC V MWANGO S/O MANAA (1963) EACA 29**, to which the appellant referred us. The said case considered the 13 Parade Rules as provided in the Kenya Police Standing Order No. 15/26.
22. From the evidence adduced the identification parade was conducted by an officer other than the Investigation Officer of the case and the witnesses did not see the appellant before the parade. **PW4** was the officer who conducted the identification parade. He did not tell **PW1** and **PW2** that the appellant was on the parade. His testimony was that he sourced 8 parade members from suspects held in the police cells for various offences. Meanwhile the two identifying witnesses were accommodated in two different offices at the CID premises and did not communicate with each other once **PW1** had been to the parade and before **PW2** attended it.
23. **PW4** also testified that before the parade he did inform the appellant of his rights and privileges and that the appellant did not request to have his counsel present during the parade and further that he did choose for himself where he wished to stand in the line-up. After a careful analysis of the evidence on record we are satisfied that **PW4** acted with scrupulous fairness in the parade arrangement and that the identification parade was properly conducted.

**Failure to Observe Section 213, and 310 of Criminal Procedure Code and Section 77(2) of the Constitution (repealed)**

24. The appellant contended that **Section 213** and **310** of the **Criminal Procedure Code** use the term “address the court” which in his view means “talk to or lecture to an audience”. Further that **Section 77(2)** of the **repealed Constitution** made it mandatory for an accused person in a criminal case to be present at the hearing of his case except where he voluntarily removed himself. He therefore faulted the trial court for accepting his written submissions instead of requiring him to address the court orally.
25. Miss Maina argued that the appellant on his own motion requested and was allowed to put in written submissions and that it was not the court which directed him to do so.
26. The evidence does indeed indicate that the appellant requested the court at the close of the defence on 27<sup>th</sup> January 2010, to be given a date on which he would submit. The court granted his wish and when he returned on 16<sup>th</sup> February 2010, he informed the court as follows:

**“I have prepared written submissions on my part. I wish to rely wholly on them.”**

27. The Court did note and received the said written submissions and referred to them in the judgment. **Section 213** of the **Criminal Procedure Code** provides for the order in which the parties shall address the court, while **Section 310** of the **Criminal Procedure Code** gives the prosecution the right of reply should an accused person introduce new evidence during their defence. With regard to **Section 77(2)** of the repealed Constitution, nothing in the record indicates that allowing the appellant to tender written submissions caused him to suffer any prejudice. He had the opportunity to hear the evidence of each witness and interrogate it through cross-examination. He also had opportunity to tender evidence in his own defence.
28. He was presumed innocent before the trial was concluded and he was found guilty. He was informed of the nature of the offence with which he was charged and he has not complained that he did not understand the language used in court or the charge he was facing. He had adequate time and facilities to prepare his defence and he did defend himself.

In our view therefore the appellant did not suffer any prejudice.

29. From the assessment of the evidence we do not see the prejudice, if any, that the appellant suffered by putting in written submissions, instead of making oral submissions. Indeed he was allowed to do so at his own request and it was not the court which demanded it of him. With respect this ground too must fail.

### **Mode of Arrest**

30. The appellant submitted that his evidence that he was arrested while watering his tree nursery was not refuted by an independent witness from the prosecution. We did not belabour this ground since there is no dispute about where or how he was arrested. The manner of his arrest does not create doubt in the prosecution case in any way.

### **On Failing to give The Defence Adequate Consideration**

31. The learned trial magistrate did consider and reject the appellant’s defence in her judgment. This is what she had to say:

**“In my considered opinion, PW1 and PW2 gave consistent evidence. Their evidence corroborated the other’s in all material aspects. I find that the evidence of PW1 and PW2 was unshaken even during cross-examination. From the evidence of these 2 witnesses, I am satisfied that the prosecution had demonstrated that there was a robbery, the identified offender was armed with a dangerous weapon namely a pistol and that the offender was in company of 2 other men. The ingredients of the offence of robbery with violence have been proved.**

**I have also considered the defence of the 1<sup>st</sup> accused. I find that the same cannot**

**stand in the face of the strong evidence offered by the prosecution. The complainants were able to positively identify 1<sup>st</sup> accused at the scene. I find that they were credible witnesses who told court the truth. I dismiss the defence of 1<sup>st</sup> accused as untenable.”**

We were therefore satisfied that the appellant’s defence was adequately considered by the trial court.

32. On the offence itself, although not forming a ground of appeal we assessed the evidence to establish whether the ingredients of **Section 296(2) of Criminal Procedure Code** had been satisfied. **Section 296** of the **Penal Code** provides:

*“(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*

*(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons,*

*(3) or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”*

33. In the case before us **PW1** and **PW2** testified that the appellant was with two others and that he carried a pistol during the robbery although it was not recovered. They did rob the witnesses of the property set out in paragraph 2 above. We therefore find that the ingredients of the offence of robbery contrary to **Section 296(2)** of the **Penal Code** were met.

34. For these reasons we find that there is no merit in the appellant’s grounds of appeal. The conviction for the offence of robbery with violence on two counts was well-founded on the evidence and in law and is therefore upheld together with the sentences following therefrom except to add that the sentence in count No. II shall be held in abeyance since the appellant cannot be hanged twice.

This appeal is therefore dismissed in its entirety.

**SIGNED DATED and DELIVERED** in open court this 27<sup>th</sup> day of **November 2013**.

**MUMBI NGUGI**

**L. A. ACHODE**

**JUDGE**

**JUDGE**