



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NUMBER 203 OF 2008**

(From original conviction and sentence in Kiambu Chief Magistrate’s Court Criminal Case No. 54 of 2006, D Mulekyo, SRM on 25<sup>th</sup> June 2008)

**ANTHONY NJOROGE KARANJA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The appellant in this appeal, **Anthony Njoroge Karanja**, was charged in the Chief Magistrate’s Court at Kiambu in Criminal Case No. 54 of 2006 with seven counts of Robbery with violence contrary to section 296(2) of the Penal Code and he was convicted in all the seven counts and sentence to suffer death in all the seven counts. We now proceed to set out the said counts as follows:

**COUNT I**

**ANTHONY NJOROGE KARANJA:** On the 25<sup>th</sup> day of November 2005 at Ruaka Trading Centre in Kiambu District within Central Province, jointly with others not before court, being armed with dangerous weapon namely a gun, robbed PETER WANG’ERI KAGIA cash Kshs.1400/= two mobile phones make Nokia 3310 and 1100 a wallet all valued at Kshs.13,400/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said PETER WANG’ERI KAGIA.

**COUNT II: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**

**PARTICULARS: ANTHONY NJOROGE KARANJA:** On the 25<sup>th</sup> day of November 2005 at Ruaka Trading Centre in Kiambu District within Central Province, jointly with others not before court, being armed with dangerous weapon namely a gun robbed CHRISTINE NZUKI MUENI cash Kshs.250/= a mobile phone make Nokia 6100, wrist watch make Kenneth-cole and a purse all valued at Kshs.11,750/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said CHRISTINE NZUKI MUENI.

**COUNT III: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**

**PARTICULARS: ANTHONY NJOROGE KARANJA:** On the 25<sup>th</sup> day of November 2005 at Ruaka Trading Centre in Kiambu District within Central Province, jointly with others not before

court, being armed with dangerous weapon namely a gun robbed CATHRINE NJERI WAWIRA of mobile phone make Nokia 1120 a purse all valued at Kshs.9,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said CATHRINE NJERI WAWIRA.

**COUNT IV: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**

**PARTICULARS:** ANTHONY NJOROGE KARANJA: On the 25<sup>th</sup> day of November 2005 at Redhill Estate in Kiambu District within Central Province, jointly with others not before court, being armed with dangerous weapon namely a gun robbed JOHN KAMAU OF his motor vehicle make Toyota Corolla valued at Kshs.500,000/= a mobile phone make Nokia 3100 valued at 8500/= and cash Kshs.500/= all valued at Kshs.509,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said JOHN KAMAU.

**COUNT V: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**

**PARTICULARS:** ANTHONY NJOROGE KARANJA: On the 25<sup>th</sup> day of November 2005 at Ndenderu Trading Centre in Kiambu District within Central Province, jointly with others not before court, being armed with dangerous weapon namely a gun robbed ROBERT NDINGURI MWEKA of mobile phone make Samsung valued at Kshs.6,500/= and cash Kshs.60,000/= all a total of Kshs.66,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ROBERT NDINGURI MWEKA.

**COUNT VI: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**

**PARTICULARS:** ANTHONY NJOROGE KARANJA: On the 25<sup>th</sup> day of November 2005 at Ndenderu Trading Centre in Kiambu District within Central Province, jointly with others not before court, being armed with dangerous weapon namely a gun robbed EJIDIAH WANJA CIIRA of a mobile phone make Nokia 1100 valued at Kshs.6,500/= and cash 1,300/= a total of Kshs.7,800/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said EJIDIAH WANJA CIIRA.

**COUNT VII: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**

**PARTICULARS:** ANTHONY NJOROGE KARANJA: On the 25<sup>th</sup> day of November 2005 at Redhill Estate in Kiambu District within Central Province, jointly with others not before court, being armed with dangerous weapon namely a gun, robbed JOHN CAURI KAMAU of his mobile phone Nokia 3410 valued at Kshs.9,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said JOHN CAURI KAMAU.

Being dissatisfied with the conviction and sentence, the appellant has appealed against the same on the following grounds:

1. **THAT the pundit magistrate erred in both law and fact while convicting me on reliance of the purported visual identification evidence which the same:-**
  - i. **Was made under hectic prevailing circumstances.**
  - ii. **None of the witnesses were one anticipating to be attacked and robbed.**
  - iii. **Whoever the victims assailants were being total strangers to them.**

2. **THAT the pundit magistrate erred in both law and fact while convicting me on reliance to my mode of arrest whilst the advanced Evidence in support of the same remained to be totally doubtful.**
3. **THAT the pundit Magistrate erred in both law and fact while convicting me on all the counts without considering that the prosecution side failed to prove their case beyond all shred of doubt.**
4. **THAT the pundit magistrate erred in both law and fact while not according me a fair trial which contravened sec 50 (2) (a) (4) of the Constitution.**
5. **THAT the pundit Magistrate erred in both law and fact while convicting me on reliance to the prosecution witnesses advanced Evidence which was riddled with lots of doubts which contravened sec 165 of the evidence act.**
6. **THAT the pundit magistrate erred in both law and fact by rejecting my defence that wasn't challenged by the prosecution side as they were duty bound to.**

The brief facts as can be gleaned from the record are as follows: **Peter Wange'eri Kagia** (PW1), a taxi operator was on 25<sup>th</sup> November 2005 at about 11.30 pm on his way home when on reaching the gate to his house and on hooting five men emerged and ordered him to turn off his car Toyota G Touring registration number KAP 550Y and get out which he obliged and was shoved into the boot of the station wagon car. The said assailants, one of whom was armed with a gun and was in military fatigues with his head covered save for the face, robbed him of his two phones and his wallet. The said assailants then proceeded to rob a second motorist at his gate while similarly waiting for the gate to be opened for him. They then followed two other vehicles to the compound where they were going and similarly robbed them. While they were doing so, PW1 managed to remove the keys from the ignition ran and hid in the farm until after the matters quieted down. He then went to the house and explained to them that he had been robbed and waited until 1 am when he locked his vehicle left it there and was escorted by Securicor personnel to his home. The next day he visited the other two sets of victims who had been robbed explained himself and in the company of flying squad police officers went to Karuri Police Station where he recorded his statement. Although he was later called to identify the assailants in an identification parade, the suspect refused to participate therein hence no parade was conducted. He was however able to identify the appellant in court as the person who had the gun. Though the appellant was not known to him previously, he was able to see him through headlamp and gate lights. According to him he described the thieves in his statement.

PW2, **Christine Mueni Nzuki**, was heading home in her motor vehicle registration number KAN 624V from Ruaka at about 11.30 pm in the company of her friends **Catherine** and **Brigitte** along when on driving into her driveway in Runda, they were followed confronted by three men from a station wagon pick up one of whom was tall in a military jacket and had a gun and she robbed of a phone Nokia 6100, Kshs 250/-, and a watch. It was her evidence that she could clearly see what was going on due to the security lights at the gate and the headlights of the station wagon as well as the car interior lights. According to her she informed the gun wielder that he resembled Justo after which the robbers drove away. To her his face was not concealed. In the morning in the company of PW1 they went where PW1's car was where they recovered her friends' handbags, an umbrella and documents although she was unable to recover her items. They then proceeded to Karuri Police Station where they recorded their statements. Later they were called to identify a suspect at an identification parade but the same aborted as the suspect declined to participate in the parade. She was able to identify the person whom she said resembled Justo as the appellant. According to her she described the appellant as she could not forget the eyes due to her training. PW3, **Catherine Njeri Wawira**, corroborated the evidence of PW2 and testified that she was robbed of her bag containing her wallet, business cards, a Nokia phone valued at Kshs 6,000/- and make up. The following day when they went to the car which the robbers occupied she found her bag and her documents. She was able to identify the gun wielding person as the appellant with the help of security lights, the headlamps of the car behind them and the car interior lights. She also reiterated that the appellant's eyes resembled those of their friend called Justo.

PW4 was on the same night driving his pick up KXT 018 in the company of his wife when they were confronted at their gate by two men one of whom wore a jungle jacket and had a gun. He was robbed of a Samsung and Kshs 60,000.00. by the gun wielding person. He was able to see the thieves by the help of the headlights. When he came out he fired ten rounds of ammunition at the car. He recorded his statement and was later called to an identification parade which aborted after the suspect declined to participate therein. He was able to identify the appellant as the person who had the gun. Pw5, **Ejidiyah Wanja Cira**, was the wife of PW4 who was together with him in the car. She corroborated what PW4 had said and said that she was robbed of her handbag containing her purse, Kshs 1,300/-, passport, ID, a Nokia 3100 and other documents. Though she was unable to see the person who took these items clearly she saw the people on the side of PW4 one of whom wore a military jacket and had a rifle. She was able to see him through the help of the light from a torch from the person on her side and the headlights. She was able to identify the appellant in court.

The same night PW7, **John Cauri Kamau** was heading home at 11.20 pm when his vehicle KAP 820Y broke down at Ndenderu and he called his grandson to pick him up. After fixing the vehicle and as they were on their way home, they were joined by another car when they were branching into their compound and a man in a jungle jacket alighted from the said car wielding a gun and ordered him out and robbed him of a Nokia phone and Kshs 1,000/- plus loose change. They then got into the grandson's car and the robbers who were three young men in number left theirs. He was however unable to identify them. Thereafter PW1 came from his hiding and explained what had happened to him. The car was late recovered.

PW9, **John Kamau Waweru**, PW8's grandson corroborated PW8's testimony and said that he was robbed of his phone and Kshs 500/- by a man wielding a gun. After the robbery the robbers drove away in his vehicle registration number UAF 950 Toyota Corolla after leaving their vehicle motor vehicle registration number KAP 550Y behind. Though he had not known the robbers previously, he was able to identify two of the robbers one of whom was the appellant by the assistance of the headlights of the vehicles as he was facing the one robbing him one of whom he identified as the appellant who had not concealed his face. He was however not called to participate in any identification parade.

PW6, **John Kago Mrima**, was the appellant's cousin who borrowed a Samsung phone from the accused and in the course of making a call became acquainted to one of the PW10 whose number was in the phone but whom he later came to know was a daughter to the owner of the said phone. On his arrest he directed the police on how to trace the appellant who was thereby arrested.

That the appellant declined to participate in identification parade was confirmed by PW11, **Inspector Muguna** which information was confirmed by PW12, **PC Julius Karuthia**, who arrested the appellant.

The accused gave an unsworn statement in which he stated that on the material day he was coming from Christmas party and while in Gachie Trading Centre was arrested for drunkenness and later charged with the offence before the Court.

That was the evidence upon which the appellant was convicted. In her judgement the trial magistrate while appreciating that the evidence of identification could be described as dock identification, was satisfied that based on the evidence of the witnesses the identification of the appellant was proper since the appellant declined to participate in identification parade. She found that whereas the appellant declined to participate in the said parade there were too many links tying him to the chain of robberies that could not merely be brushed off as mere coincidences including the injuries he sustained. She then held that she considered the defence which she found inconsequential and dismissed the same. She found that the accused was armed with a gun and was in the company of several others hence the two ingredients of the offence were satisfied in each count and proceeded to convict the appellant accordingly.

This being a first appeal, it is incumbent upon us to make an independent evaluation of evidence and draw our own conclusions while recognizing that we had no opportunity to see or hear the witnesses and should give due allowance for that. See **Okeno vs. R [1972] EA 32** and **Nguli vs. Republic [1984] KLR 729**.

The conviction of the appellant in this case depended on the evidence of PW1, PW2, PW3, PW4, PW5, PW8 and PW9 who were the complainants. These witnesses apart from PW8 all testified that due to the illumination from the headlamps, security lights and car interior lights, they were able to see the appellant clearly. PW2 even went as far as informing the appellant that he resembled her friend “Justo”. That the appellant resembled “Justo” was confirmed by PW3. According to PW9, the appellant stood near the driver’s window facing him hence he was able to see him as he had not concealed his face. The appellant contends that he was convicted on visual identification in conditions which were not conducive to proper identification. From the evidence on record, it is clear that the appellant was properly identified and PW2 and PW3 even had an opportunity to visualize his resemblance to a friend of theirs. The Court appreciates that prior to the incident, the appellant was unknown to the complainants and that the identification was dock identification. It was however the prosecution evidence that the appellant declined to appear on the identification parade. In the circumstances the mere fact that this was a case of dock identification was not necessarily fatal to the prosecution case. As was held by the Court of Appeal in **Nathan Kamau Mugwe vs. Republic [2009] eKLR:**

**In MUIRURI & 2 OTHERS V. REPUBLIC [2002] 1 KLR 274, the Court consisting of Kwach, J.A as he then was, Bosire & Ole Keiwua, JJ.A stated at pg. 277 between paragraphs 25 and 40:-**

*“We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep (1953) 20 EACA 166, Roria v. Republic [1967] EA 583, and Charles Maitanyi v. Republic (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”*

That position was again followed in the recent decision of the Court in the case of **GRACE WAMBUI NJOROGE alias WANANCY & 3 OTHERS VS. REPUBLIC**, Criminal Appeal No. 201 of 2006 (unreported). Having considered and compared the decisions in GABRIEL’s Case, supra, and that in MUIRURI’s Case, supra, we have come to the conclusion that the more correct position at law is the one propounded in MUIRURI’s case and not that stated earlier in GABRIEL’s case. We accept the position as stated in MUIRURI’s case rather than that in GABRIEL’s case. We must point out that Mr. Obuo must have been unaware of the latter two decisions for he did not cite any of them to us. James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring upto the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade. True, the evidence of James was that of a single witness and the courts below did not warn themselves on the dangers of relying on it, but if the two courts had the correct principles in mind, they would have realized that the dock identification of the appellant by Mwendo must have lent some weight to the identification by James. We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person. As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the

person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness "SHOULD" be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected. .... In our view, the charge against the appellant was proved beyond any doubt that is reasonable and that being the view we take of the matter, we must order, as we hereby do, that his appeal against the conviction be dismissed. The sentence imposed was the only one available in law and there can be no basis for interference by us. The appeal fails in its entirety and these shall be the orders of the Court."

Apart from the fact of identification, PW6, the appellant's cousin clearly testified how he got acquainted to one of the complainant's daughter, PW10, courtesy of one of the complainant's phone which he had briefly borrowed from the appellant which triggered the arrest of the appellant. The appellant in his evidence did not comment on this aspect of damning evidence in his evidence at all.

The totality of the evidence of the complainants' evidence taken together with the evidence of PW6 and PW10 in our view was sufficient to prove that the appellant was one of the people who participated in the robbery. All the robberies in question were conducted using PW1's vehicle who was present throughout hence there was no break in the chain-link in the said robberies.

As correctly found by the trial magistrate two ingredients of the offence charged were proved. In Masaku vs. Republic [2008] KLR 604, the Court reiterated that:

**"It is now well settled that any one of the following need be proved to establish the offence:**

- 1. If the offender is armed with any dangerous or offensive weapon or instrument or**
- 2. If the offender is in the company of one or more offenders or**
- 3. If at or immediately before or immediately after the time of the robbery he wounds, strikes or uses any other violence to any person.**

**In this case, the particulars of the charge stated that the appellant was with another at the time of the robbery and further that at or immediately before or immediately after the time of such robbery wounded the deceased. It is plain therefore that two of the three ingredients of the offence of robbery with violence under section 296(2) of the Penal Code were given. It should be remembered that a single ingredient is sufficient."**

We have considered the grounds of appeal raised by the appellant and we are not satisfied that the appeal is merited. In our view the conviction on all the seven counts was safe and we disallow the appeal on conviction.

With respect to the sentence we agree with Miss Mwaniki, learned counsel for the State that the learned trial magistrate erred in sentencing the appellant to death on all the seven counts since the appellant could

only suffer death once. In **Fanuel Makenzie Akoyo vs. Republic** – Criminal Appeal No. 45 of 2006 (unreported) the Court of Appeal said:-

**“Regarding sentence the appellant was sentenced to death in respect of three counts of robbery with violence. That was in our view, erroneous as the appellant cannot logically suffer death twice or thrice. We accordingly correct the error by setting aside the sentences in counts 2 and 3. The result is that the appellant shall suffer the sentence of death in count 1 only.”**

Accordingly pursuant to section 354(3)(b) of the *Criminal Procedure Code* we substitute the sentence of death on all the counts with a sentence of death on only count one and order that the other sentences be held in abeyance.

Subject to the foregoing this appeal fails and is dismissed.

Judgement accordingly

**Judgement read, signed and delivered in open court this 26<sup>th</sup> day of November 2013.**

**F N MUCHEMI**

**JUDGE**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**The appellant**

**Ms Gichohi the State Counsel**