



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.186 OF 2005

JAMES MAINA WANJIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment in the Chief Magistrate's Court at Nyeri in Criminal Case No.966 of 2003 by M. R. Gitonga – PM)

J U D G M E N T

The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the penal code. The particulars of the charge were on the 31st day of March 2003 at about 2:35pm at Karatina township in Nyeri District of the Central Province, jointly with others not before court and while armed with dangerous weapon namely a pistol, robbed Annette Muthoni Mahu of cash Kshs.130,000/=, a camera make Olympus zoom 115 valued at Kshs.18,340/=, a bunch of keys, an interim driving licence, two passports and a national identity card. All valued at kshs.148,340/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Annette Muthoni Mahu.

The prosecution called eight witnesses the first being **Annette Muthoni Mahu** who has a hardware shop at Karatina together with the husband. On the 31/3/2003 at 2.35pm she was given Kshs.130,000 by her husband at his office to purchase nails at Thika. Her husband gave her car keys to enable her drive to Thika. She was to give the accountant and the cashier a lift. As she went to open the door, she saw a man seated on a stone looking at her, she also looked at him and as she went to open the door the man whom she identified as the appellant pointed a gun at her and grabbed the handbag that had the said Kshs.130,000/= an Olympus camera and a bunch of keys, driving license and other items as per the charge sheet. The man was with the others who stood on the other side of the vehicle and were wielding pistols. She screamed and started running to the office and heard gunshots and fell down. She identified the appellant at the police station as the man who attacked her and also identified him in court. On cross-examination, this witness maintained that it was the appellant who attacked her and she was able to identify him at the parade.

The second witness was **Naphtaly Ngatia** the accounts clerk for G.M. Kariuki hardware Karatina. He recalls that it was 2.40pm when he was called by his boss and was sent to the bank with kshs.95,000/=. He requested Annette to drop him to the bank. He entered the car and Beatrice joined him. She too had been sent to the bank.

Annette then came to the car and opened the door of the car but before entering the car, she was confronted by a stranger who was armed with a gun. He saw the stranger by the side of the vehicle and the other man each had a pistol. The one on Annette's side, the appellant, commanded them to surrender everything they had and in compliance he handed over kshs.95,000/= to the one who was on his side. He

then heard a loud bang and took cover and took time to look at what had happened and when he looked out he saw a huge crowd of people, but the robbers had disappeared. After one month the police informed them that the robbers had been arrested but he was unable to identify them.

The third prosecution witness, **Beatrice Muthoni Kiune** was a shop assistant who stated that on 31/3/2003 at 2.45 pm she was called by the manager and given Ksh 95,000/ to take to the bank and as she was heading to the bank she saw Naphtally inside a motor vehicle ready to go to the bank. She entered the car but before they could leave Annette came towards the car however, before she entered the car, a man appeared and pointed a gun at her and asked them to surrender all they had. Two other men came on the other side of the car and pointed guns at them. They surrendered the money to the men who walked away but as they were doing so they screamed an act that prompted to robbers to shoot in the air. Police officer came but did not get the robbers. She did not see the faces of the robbers.

The 4th witness, **Patrick Kariuki Mutia** was an employee of G.M. Kariuki hardware Karatina who states that on the fateful day, he was standing at the shop door when he saw Annette walking towards the car that she was to use to Thika. He suddenly heard her scream and went to help her. He saw a man with a pistol who fired one gun shot, he fell down and saw Annette on the ground. He took her to the shop and found the car keys on the ground and picked them up. This witness identified the appellant as the person who was holding the pistol. He identified the appellant at the parade. On cross-examination by the appellant he states that he saw a short brown man with big sunken eyes. The robbery took place 30 meters from where he was standing. He came face to face with the appellant when he fired the pistol in the air. He identified the appellant at the identification parade. The appellant took the 3rd position in the parade but this witness was able to pick him as he had seen him at the scene of crime.

The fifth witness, **Peter Mahuu Muthee** was the operator of the hardware shop in Karatina and husband of the 1st witness. On 31/3/2003 he was at the shop and at 2.30pm he told his wife to go to Thika to buy some nails. He gave her kshs.130,000 the 2nd and 3rd witnesses were each given kshs.95,000 too take to the bank .The latter two requested for a lift from his wife and left the office however ,after a short while, he heard a scream and a gunshot and went out. He found his wife on the road lying down and one shopkeeper trying to help her. He assisted her to the shop and calmed her. The police came went for the robbers but did not get them. She was taken to Jamii Hospital as she was expectant. On cross-examination by the appellant he stated that his wife described the attacker as a short brown man with big ears and deep eye sockets.

The sixth prosecution witness was inspector **Stanley Musugo**, O.C.S Karatina police station, who conducted the identification parade on 30/4/2003. he was given instructions to conduct the parade by P.C Joseph Kariuki on James Maina Wanjira alias cianyama for the offence of robbery with violence under section 296(2) of the Penal Code. The members were 8 in number drawn from the cells. The suspect was brought before him and asked if he was willing to participate. He agreed and wished not to call a friend or solicitor and signed the notification. He was asked to chose a position between the 8 people who were of similar height and built and he chose to be No.3.

Witness No.1 was called and identified the appellant by touching his right shoulder. The appellant signed the report and the 6th witness also did signed the same.

On cross-examination by the appellant, the witness stated that he did not talk to the complainant before the identification parade. He was not given the appellants description and had not seen the appellant before. The 8 members of the parade were similar to the appellant.

The 7th witness is a person who knew the appellant as he usually sees him. He was asleep in the house with James Maina Njeri when the police entered with the appellant in handcuffs. The police searched the house and found 53 rolls of bhang. They were all arrested but he was released as it was ascertained that he was a visitor and that the house belonged to James Maina Njeri.

The last prosecution witness was **P.C. Joshua Otieno** attached to flying squad Karatina. He recalled that on 23rd, 24th April 2003 while in Karatina town, they received information that the

appellant had been seen at Karatina town. They rushed to the place at Alikara building and met a lady carrying bottles of beer. They stopped her and requested that she takes them to her house. When they reached the house, they found the appellant seated on a sofa. He was searched and found in possession of one round of ammunition. He was taken to the police station, then to Regati where he resides. They entered the sister's house first and got his ID. They later went to the appellant's house and found the sister's son who is in class 7 and the 7th witness Paul Muchoki. They searched the house and recovered 53 stones of bhang. They were informed by the sister's son that the bhang belonged to the appellant. On cross-examination by the appellant this witness states that the appellant had been wanted by police since 1999 for robbery cases. He had been told that the appellant had big eyes and ears. All this information came from an informer whom the witness could not ascertain whether there was a grudge between the two.

In **his defence**, the appellant states that on 23/4/2003 he was sleeping at Ilikana building at 2.00 am when he heard a knock on the door. The lady he was with opened the door and the police entered, beat him and put him into a vehicle and asked him to take them into his house. He complied and when they reached the house they took his identity card and arrested his sister's son and his friend. They were taken to the Karatina police station and an identification parade was conducted. They were nine members of the parade, he was the only one who had been assaulted and the others were very tall others very short. He was surprised that PW1 stated that he had been robbed by someone who had big eyes when the OB said that she was robbed by a person who had deep eyes and big eyes. After the robbery, she fell and became unconscious and did not tell the husband who robbed her. The arresting officer said that the appellant was arrested through an informer who did not come to court to testify. He claimed that on the material date, he was busy hawking with Joseph Mwangi. On cross-examination he states that he did not know G.M. Kariuki Hardware in Karatina. He states that he used to hawk in the town center but had not seen the hardware. He denied having committed many offences.

The defence called one witness who said that the appellant was identified by a lady who said that it was him because he had a scar.

After hearing the prosecution and defence witnesses, the trial magistrate retired to consider evidence from both sides. In conclusion, the trial magistrate found that the prosecution had proved its case beyond all reasonable doubts on the 1st count and convicted the appellant on this count and acquitted him on the other counts.

The appellant has appealed to this court on grounds that:

1. ***That the honorable trial court erred in law and facts in occasioning the trial some procedural irregularities.***
2. ***That the honorable trial court erred in law and facts in holding that he was positively identified at the scene whereas the description of events show or indicate otherwise.***
3. ***That the honourable court erred in law and in facts in failing to gauge the quality of the convicting evidence essentially so when the respondents allegations were never investigated at all.***
4. ***That the honourable trial court erred in law and facts in declining to evaluate the defence case alongside the respondent's contrary to section 169 (1) of the C.P.C.***

On the 1st ground of procedural irregularities the appellant submits that the provisions of Article 50(2)m of the Constitution of Kenya and/or Section 198(1) of the Criminal Procedure Code were breached as the trial record does not show any language to have been used when it is clear that the trial court used one language or the other. However, the appellant appears to agree that it is common sense that the language used by our courts is either Kiswahili or English but he insists that the same should be indicated.

The appellants complaint as we understand it, is not that he did not understand the language used, but he says that it should be indicated in the record that a particular language was used which he understands. We have perused the proceedings and do find that it is not clearly indicated in which language the charge was read but it is clearly indicated that the charges were read to the appellant and when asked to plead, he pleaded not guilty to all counts and a plea of not guilty was entered. There is evidence on record that the appellant was allowed to cross-examine PW1 and did so extensively on the 9/6/2003. He even applied for the OB to be produced and the same was produced on 7/1/2004 when he further cross-examined the PW1. He further cross-examined PW3, PW4, PW5, PW6, PW7 and PW8 and at no time did he ever state that he was not able to follow the proceedings. The trial magistrate could have erred by failing to record in the proceedings the language of the court and whether the same was translated into a language understood by the appellant if the the same was a language not understood by the appellant, however, the record does not indicate that the appellant did not understand the language.

Article 50(2)m should be read together with Article 159(2)(d) of the Constitution that pre-empts the court from unduly relying on procedural technicalities. The court should rely on the substance of the matter. In this case, the substance of the matter is that the appellant freely participated in the proceedings, understood the same and was allowed to cross-examine witnesses. The same applies to the arguments of the missing information on the charge sheet as the same does not prejudice the appellant. This ground of appeal is rejected.

The appellant argued grounds 2 and 3 jointly whose gist is that the execution of the offence was properly planned and done with speed that the complainant could not have observed what happened. This argument lacks basis as the PW1 mentioned in the OB that the appellant was brown short and with big ears. She wrote the same in her statement and was also able to identify the appellant at the identification parade. The PW1 noticed the appellant seated on a stone and she went to open the car door, the appellant confronted her. This court finds that there was enough time and light for the PW1 to see the appellant and mark his features and therefore identify him later. She became unconscious after marking the facial features of the appellant and therefore could identify him later after becoming conscious. We find that the appellant was properly identified and do reject this ground of appeal.

The forth ground is that the appellant was put on his defence and elected to make a sworn statement. He told the court who he was, where he hailed from and what he did for a living. He explained to court how he was arrested after an informer had implicated him in crime but the informer was not called as a witness. This court observes that it was not necessary to call the informer to testify so long as it can be established that the police carried out investigations. In this case, the police after receiving information, arrested the appellant and and carried out an identification parade. We do not find any mischief in the identification of the appellant by the PW1 as the members of the parade were 8 drawn from the cells. The appellant was willing to participate but did not wish to call a friend or solicitor. The members of the parade were of similar height and built and therefore the requirement for identification parade was complied with.

The upshot of the above is that the appeal is dismissed and the conviction and sentence upheld.

Dated, signed and delivered at Nyeri this 13th day of November 2013

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE

Judgment is read in the presence of the appellant and Mr. Njue for the state. The appellant has right of appeal.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE