REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NUMBER 575 OF 2009

(From original conviction and sentence in Kibera Chief Magistrate's Court Criminal Case No. 2385 of 2008, Uniter Kidullah, CM on 10th December 2009)

ANTHONY MWANGI KIMANI…..……..……APPELLANT

VERSUS

REPUBLIC……....…..……..….RESPONDENT

JUDGEMENT

The appellant in this appeal, **Anthony Mwangi Kimani**, was charged in the Chief Magistrate's Court at Kibera Chief Magistrate's Court Criminal Case No. 2385 of 2008 with four counts of Robbery with violence contrary to section 296(2) of the ***Penal Code*** and in the alternative Handling Stolen Goods contrary to section 322(2) of the ***Penal Code***. The said counts were particularized as follows:

COUNT I

PARTICULARS

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

(1) GLADYS WANJIRU KIHARA

(2) JANE NJERI NJOROGE

(3) ANTONTHY MWANGI KIMANI

On the 3rd day of April 2008 at Muthiga in Nairobi within the Nairobi Area, jointly with others not before court, while armed with dangerous weapons namely pistols, robbed EPHANTUS MAINA MUTURI of his motor vehicle registration number KAL 375Y make Toyota Corolla E91, two mobile phones make Nokia 6070, Sony car radio face, sugar case and cash Kshs.8,000/= all valued at Kshs.528,000/= + and at immediately before or immediately after the time of such robbery threatened to use actual violence to the said EPHANTUS MAINA MUTURI.

ALTERNATIVE COUNT I

HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE

(1) GLADYS WANJIRU KIHARA

(2) JANE NJERI NJOROGE

On the 3rd day of April 2008 at Kangemi within the Nairobi Area, otherwise than in the course of stealing, dishonestly received Sony car radio face and sugar case the property of EPHANTUS MAINA MUTURI knowing or having reason to believe them stolen goods or unlawfully obtained.

COUNT II

ROBBERTY WITH VIOLENCE CONTARY TO SECTION 296(2) OF THE PENAL CODE

(1) GLADYS WANJIRU KIHARA

(2) JANE NJERI NJOROGE

On the 3rd day of April, 2008 at Kihumbuine in Kangemi within Nairobi Area, jointly with others not before court, while armed with dangerous weapon namely pistol, robbed BRANDAN MUDAKI MWALA of his motor vehicle registration number KAM 929P Nissan B14, 2 Kenya Commercial bank ATM cards, One job card, National Identity card and cash kshs.1,000/= all valued at kshs.400,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said BRANDAN MUDAKI MWALA.

ALTERNATIVE COUNT II

HANDLING STOLEN GOODS CONTARY TO SECTION 322(2) OF THE PENAL CODE

(1) GLADYS WANJIRU KIHARA

(2) JANE NJERI NJOROGE

On the 3rd day of April, 2008 at Kangemi in Nairobi within the Nairobi Area, otherwise than in the course of stealing, dishonestly received Two Kenya Commercial Bank ATM cards, National identity card, job card and IC Memory card the properties of BRANDAN MUDAKI MWALA knowing or having reason to believe them to be stolen goods or unlawfully obtained.

COUNT III

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

(1) GLADYS WANJIRU KIHARA

(2) JANE NJERI NJOROGE

On the 3rd day of April, 2008 at Muthiga within the Nairobi Area, jointly with others not before court, while armed with dangerous weapon namely pistol robbed PARASIN LENANGECHEI of a Maasai sword and cash Kshs.1,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said PARASIN LENANGENCHEI.

ALTERNATIVE COUNT III

HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE

(1) GLADYS WANJIRU KIHARA

(2) JANE NJERI NJOROGE

On the 3rd day of April, 2008 at Kangemi in Nairobi within the Nairobi Area, otherwise than in the course of stealing, dishonestly received a masai sword the property of PRASIN LENANGECHEI knowing or having reason to believe it to be stolen good or unlawfully obtained.

COUNT IV

HAVING IN POSSESSION OF SUSPECTED STOELN PROEPRY CONTRARY TO SECTION 323 OF THE PENAL CODE

(1) GLADYS WANJIRU KIHARA

(2) JANE NJERI NJOROGE

On the 3rd day of April 2008 at Kangemi in Nairobi within the Nairobi Area, having been detained by No.222908 CPL.ZACCHAES KIRIMI and No.99012557 APC. CLIFF MWAMBA as a result of the powers conferred to them under section 26 of Criminal procedure code had in their possession five Nokia mobile phones, two Motorola mobile phones and two belts and cash Kshs.580/= which were reasonably suspected to have been stolen or unlawfully obtained.

After the hearing, the learned trial magistrate convicted the appellant in counts 1, 2 and 3 and sentenced him to death. Being dissatisfied with the conviction and sentence, the appellant has appealed against the same on the following grounds:

1. **That, the learned trial magistrate erred in law and fact by convicting me in reliance of single identification evidence of pw2 without proper warning herself of the dangers of convicting in reliance on a testimony of a single witness.**
2. **That, the learned trial magistrate erred in law and fact by failing to find that there is no evidence to suggest that pw2 gave descriptions of the assailant to the police in his first report.**
3. **That, the learned trial magistrate erred in law and fact by considering the exhibit I/D parade which was flowed hence a nullity.**
4. **That, the learned trial magistrate erred in law and fact by failing to exclude on her part the possibility of mistaken identity.**
5. **That, the learned trial magistrate erred in law and fact by failing to find that the source of my arrest is unsound as it was not established to have any connections with this offence.**
6. **That, the learned trial magistrate erred in law and fact by filing to consider my defence.**
7. **That, the learned trial magistrate erred in law and fact by denying me a chance to recall the complainant for re-examination and also failed to comply with provision of section 211 C.P.C. before recording my defence.**

From the record, the facts were briefly as follows: On 3rd April 2008, PW1, **Brandan Mudaki Mwala**, at about 2.00pm was driving motor vehicle registration no. KAM 929P, Nissan B14 along Malenga Road in Kangemi when he slowed at a bump near Jehova's Witnesses Church to allow pedestrians cross the road, a man with a gun approached, opened the passenger door and sat down. PW1 then jumped out as another person took his seat while a third person entered the back seat and the attackers drove off. He called the police who told him to wait for them at Total Petrol Station near Mountain View. When the police officers came he briefed them and he was told to get means and go home. He later received a call that his vehicle had been recovered at Kikuyu and he went to Kabete Police Station at 9.00pm where he found the said motor vehicle with a small dent on the front and the back and had an electrical problem. He found his wallet which had Kshs 1,000/- missing as well as 2 ATM Cards. He identified his documents in court. He however was unable to identify the people since according to him it was dark as his vehicle was tinted. In support of his case he produced a copy of the log book. He however confirmed that he was robbed by men and that he neither heard the voice of women nor saw any woman. PW2, **Ephantus Maina Muturi**, testified that on 3rd April 2008 at about 8.20pm, he was coming from Muthiga Shopping Centre in his

motor vehicle registration no. KAL 375Y along Nairobi Nakuru Road on a feeder road, when he saw an on-coming vehicle which flashed twice but he did not stop. He drove along the narrow murram road leading towards his house. Halfway he met his neighbour, **Mwangi**, going to his house and stopped to have a chat with him over the need to keep security lights at the gate on. He then saw head lights at the turn off to his house and saw the vehicle stop about 20 metres from where he was. When he moved towards his gate he saw the said vehicle also move ahead and before his gate could be opened by his watchman, the said vehicle approached and saw the watchman being held and pushed towards his car. Behind the man pushing the watchman was another man with a pistol. According to him his security lights were on. The watchman was ordered to lie down after he was told that the gun was a real gun and not a toy. PW1 was then ordered out of the car onto the ground and ordered to declare what he had. Which he did as Kshs 8,000/=. His money was then taken together with his two phones as well as his ATM Card. He was then asked his PIN number which he gave and was asked whether the vehicle was his which he answered in the affirmative. On opening the door his daughter saw what was happening and closed the door. According to him the watchman was robbed of his sword. The robbers then took his car keys and drove of in his vehicle leaving the other car behind. When he entered his house he used his daughter's phone to call his friends who put him through to a Police Officer at Kinoo Police Post who he called. As he was waiting, a motor vehicle passed his gate, came back and stopped at the gate. He saw Sahara boots under the gate and during the incident he had noticed that the man with the pistol had the same Sahara boots. When they knocked the gate and were not opened for they drove away and he relayed this information to the police and was given the number for the OCS Kabete to whom he passed the information. According to him the vehicle which had been left in his compound was registration number KAM 921P. On giving the registration number of his vehicle he was informed that the vehicle had been recovered abandoned at the bridge near Kabete Police Station and after 20 minutes he came with a breakdown and towed the vehicle which had been left in his compound. He then went to the Police Station where he identified his vehicle. When he looked inside the vehicle he found that his sony detachment face and sugar sweeter container were missing which he identified in court as his. The next day he identified the sword belonging to his watchman. On way to the police station he picked one of his ATM cards on the grass. According to him the robbers were young people and the one with the gun had a fair complexion and had a black leather jacket on his waist while the other was not as light but had a flowered shirt with a whitish background. He however saw the driver vaguely. He said that his security light on the door was on and he had packed 2 metres from the door and the light was very bright and covered the whole area. None of the attackers was masked and they spoke in Kikuyu and in particular the person wielding the gun who told him not to bring problems and took 3 minutes to ransack him before driving off. On 19th August 2008 he attended identification parade at Kabete where on a second attempt he identified the person who was wielding the gun after looking a long time and asking them to turn round and face the wall and asking them to speak in Kikuyu although he had not known him before. According to him he lost goods worth Kshs 528,000/-. He confirmed that he was robbed by men and did not see who looked like a woman and that the appellant was a young man of fair complexion and not very tall and clean shaven.

PW3, **CPL Zacchaeaus Kirui** was on patrol together with Sergeant **Francis Nzioka** and PW4, **APC Cliff Mwamba** on 3rd April 2008 at about 11pm when on passing through a path in Kangemi area they heard people talking in a certain mabati house. On knocking the house and identifying themselves as police officers they heard people escaping from the other side. When the door was opened they found two girls inside who informed them that the people who had escaped leaving certain things behind which they gathered and arrested the two girls. The two girls were charged in the lower court as 1st and 2nd accused. According to him the items which were recovered were 7 phones, a Masai sword as well as a Sony face and two belts. PW4 confirmed the testimony of PW3 and that he saw three young men run away though he did not identify them. PW5, **IP Patrick Gogo** was the one who conducted the identification parade on 18th August 2008. According to him the witness walked from the beginning to the end of the parade and back. The witness asked the 7th person and the appellant in Swahili to talk after which he told them to turn and face the back and when they did so he touched the appellant. PW6, **PC Mohammed Ali** was the arresting officer. According to him he got a call from a member of the public as to where they could find the appellant and in the company of **PC Nicholas Kibwalei**, he arrested the appellant whom he knew before. The investigations officer, PW7, **PC Patrick Lumbasi Sikole** on 4th April 2008 was instructed to

investigate this case and that two of the suspects accused 1 and 2 were already in court custody. He went and found the items which had been recovered such as cell phones, Masai sword, Sony radio car face in the armoury. After interviewing the two and the witnesses he charged them with the offence. On 19th September 2009 he received information that a suspect involved in the offence was being held at Spring Valley and this suspect, the appellant was identified by PW2. He then produced the items which had been recovered as exhibits. In cross examination by the appellant the witness said that he went to PW2's house and confirmed that there was electricity light at the gate though he could not say how bright they were as it was during the day.

In his unsworn statement, the appellant testified that on 19th August 2008 while he was at Spring Valley Police Station facing other charges, two police officers came and he was called from the cells, interviewed about a robbery which he denied and was then charged with the offences he knew nothing about.

In her judgement the learned trial magistrate recognised that the most crucial evidence in the case was PW2's evidence. She went ahead to find that despite the fact that the robbery took place within a space of about 3 minutes as PW2 lay on the floor with a gun held over him, PW1 (sic) was a truthful and credible witness who was able to see and identify the robbers later on. To her PW2 did not appear as a person who could easily be ruffled even with a gun pointed at him. The learned trial magistrate went on to find that the conditions for a proper identification existed due to the bright security lights outside the house. The learned trial magistrate found PW2 confirmed the identification of the appellant beyond doubt and went on to find that the appellant was identified by PW2 beyond a shadow of doubt. The Court further found that the time lapse between the robbery of the motor vehicle from PW1 and the time PW2 was robbed and the time PW1's vehicle was abandoned in PW2's compound was too short for the occupants to have changed hand moreso with one of them still wielding the gun. She therefore found that the appellant with others not before the court are the ones who robbed PW1 of his motor vehicle registration KAM 929P. She similarly found that it was the appellant is the one who committed robbery on the Masai watchman who never testified. According to her therefore the appellant's defence was a bare denial and the prosecution proved the case against him beyond reasonable doubt. She accordingly found him guilty and convicted him of all the three offences in counts 1, 2 and 3 and proceeded to sentence him to death. The learned trial magistrate however found that the items which were recovered were not found in the 2nd accused's house and that the 1st and 2nd accused were not in possession of the said items.

Ms Mwaniki, learned State Counsel did not support the appellant's conviction on count 3. She submitted and rightly so in our view that since the complainant in that count did not testify, conviction on that count was not safe. In In **Aloise Onyango Odhiambo vs. Republic [2006] eKLR,** it was held:

> **"The prosecution did not call the Complainant in the second count of ROBBERY WITH VIOLENCE, yet the learned trial magistrate found the Appellant "guilty as charge". Where an accused person faces more than one count, it is advisable for trial courts to carefully consider the evidence adduced in respect of each count before arriving at a decision. It is improper to make a general conclusion to the offences, in the manner the learned trial magistrate did in these cases. Section 169 of the Criminal Procedure Code requires that the trial court indicates specifically the offences for which an accused person is found guilty and under which law these offences fall. In the instant case, we do not find the generalization entered herein as serious as to have caused the Appellant any prejudice since the 3 offences he faced were similar and had occurred in the same incident. The defect is in our view curable under Section 382 of the Criminal Procedure Code. The evidence in support of counts I and 3 was overwhelming and the conviction entered in their respect correct. We shall quash the conviction and aside the sentences in respect of count 2. The conviction in respect of count 1 and 3 were safe and are upheld. On sentence, we confirm sentence of death in count 1 and suspend the sentence of death in count 3."**

We accordingly allow the appeal on count three and set aside conviction and quash the sentence thereon.

We have considered the grounds of appeal which in our view are interrelated. We will consider them

together. We wish to deal with the appellant's complaint that he was improperly denied his request for recall of the complainant. The issue was dealt with by the Court of Appeal in **Michael Kinuthia Muturi vs Republic [2011] eKLR** where the Court expressed itself as follows:

> **"We have considered the provisions of the Constitution cited in aid of the ground of appeal and have examined the entire record of appeal. We are satisfied that the appellant was accorded the protection of the law as required under section 77 of the Constitution. The only complaint, at any rate was about recall of a witness for the second time without stating the reason for that recall. The law which guided the trial was the Criminal Procedure Code which gives the power under *section 150* to recall witnesses or summon new witnesses under some circumstances. That power is, however, fairly circumscribed and will only be exercised when it is essential to a just decision of the case. As the predecessor of this Court stated in Maalim v R [1964] EA 672 at page 676: -**
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> > ***"In East Africa much learning in many conflicting cases has been expended on the interpretation of this section, and of similar section in the Procedure Codes of other East African territories. It is however a remarkably simple section, and means no doubt precisely what it says. It is the duty of the court, inter alia, to recall and re-examine any persons, at any stage of a trial, if his further evidence appears to it essential to a just decision of the case. This does not, we apprehend, mean that an appellate court is bound to uphold as correct every re-call or examination merely because the judge of the court below has said "it appears to me that to call (or to re-call) so and so is essential to a just decision of the case." Plainly an appellate court can inquire whether the examination of a witness under the section was indeed essential to that end, and may inquire whether the examination was or was not calculated to do injustice to the accused. If injustice is in fact done to an accused by the examination, if by the examination the defence is put to an unfair disadvantage, then clearly the examination has militated against a just decision of the case however certain the court was of the need to conduct the* examination."**
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> **We think in this case the trial court acted within its powers and duty to reject further applications for recall and that no injustice, embarrassment or unfairness resulted to the appellant from the course taken by the court. It is instructive that even in his defence the appellant said nothing to justify the recall of the witness. We are of the further view that even if the trial court erred in some irregularity, it was not fatal to the conviction. The last ground of appeal fails too."**

We on our part have considered the said complaint and are not satisfied from the record of the proceedings that the purported irregularity even if it could be termed so, was fatal to the appellant's conviction.

It is trite law that where the evidence relied on to implicate an accused person is entirely of identification, the evidence must be water tight to justify a conviction. (***Kiaria vs. Republic* - 1984 KLR 739**). It is also trite law that the evidence of a single witness respecting identification especially where the conditions for identification are not favourable should be tested with the greatest care ***(Maitanyi vs. Republic [1986] KLR 198).***

The learned trial magistrate found that the items which were produced in court were found in possession of the 1st and 2nd accused. Having so found, there was no other evidence showing in whose possession they were found. If the items were not found with the 1st and 2nd accused the question then is where were these items recovered? It is noteworthy that one of the items taken from PW2 was in fact recovered by him in the grass on his way to the police station. According to PW2, the robbers were young people and the one with the gun, whom according to him was the appellant, had a fair complexion and they spoke in Kikuyu. However, when he went for the identification parade he looked for a long time and asked them to turn around and face the wall. When they did so he recognised the appellant. He then asked the appellant to utter words that had been uttered and when the appellant did so he identified him beyond doubt. From PW2ps evidence it is clear that he was unable to identify the appellant from his appearance. No

explanation was given why the appellant had to face the wall before he could identify him. It is only then that he asked the appellant to utter the words which had been uttered on the fateful night. According to PW5, PW2 walked from the beginning to the end of the parade and back. The first time the witness stopped at the 7th person before going to the appellant. The fact that the witness stopped at the 7th person rather than the appellant is a clear indication that PW2 could not identify his attackers merely on the basis of the complexion. Apart from that according to PW5, PW2 talked to the appellant in Swahili as opposed to Kikuyu which was the language used during the robbery according to PW2. In other words PW2 could not be certain one way or the other based on the complexion that the appellant was the one who robbed him. There was however no indication what other feature he had indicated that would have enabled him to identify the appellant.

From the judgement of the learned trial magistrate there is no indication that the learned trial magistrate warned herself on the dangers of convicting the accused based on the evidence of a single identification witness. That however would not have been fatal to the prosecution case as this being a first appeal the Court is entitled to re-evaluate the evidence afresh and arrive at its own decision. In any case as was held in **Nathan Kamau Mugwe vs. Republic [2009] eKLR:**

> **"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."**

Taking into account the circumstances of this case, the fact that the robbery of PW2 took three minutes and the fact that he did not identify the appellant immediately at the parade cast some doubt as to whether the identification of the appellant was free from error. In **Anjononi & Others vs. The Republic [1980] KLR 59**, the Court held thus:-

> **"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."**

in ali bonea barisa vs. republic [2009] eklr, the court of appeal expressed itself as follows:

> **"It is an established principle of law that certain safety measures have to be taken to ensure reliability and safety of evidence, as a basis for conviction, where visual identification is concerned. This principle is well stated in *Blackstone's Criminal Practice 2002* (12th Edition by Peter Murphy and Eric Stockdale) Oxford Oup, 2002 pg 2304 paragraph F 18.2**
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> > ***"The visual identification of suspects or defendants has for many years been recognized as problematic and potentially unreliable. It is easy for an honest witness to make a confident but false identification of a subject, even in some cases where the suspect is well known to him. There are several possible causes for errors of this kind. Some persons may have difficulty in distinguishing between different subjects of only moderately similar appearance and many witnesses to crime are able to see the perpetrators only fleetingly, often in stressful circumstances…"***
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> **PW2 was already under very stressful circumstances, having been beaten and a gun trained**

at him, while another demanded for money. He claims to have had a conversation with appellant – the content of the conversation is not disclosed and we are inclined to conclude that the only "conversation" they had was the demand for money.

What defining physical marks regarding the appellant's appearance were observed by PW2 and disclosed to PW5? There is none referred to by either witness and in fact it is only the appellant who says PW2 said the person who attacked him was tall.

It is against this background that we then must consider whether there was any other corroborative evidence – we find none. The identification by PW2 was not free from possibility of error."

It would seem that part of the identification of the appellant was based on his voice. In **Libambula vs. Republic Criminal Appeal No 140 of 2003 [2003] KLR 683,** the issue of voice identification was dwelt on by the Court of Appeal in which it stated as follows:

"Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See *Choge v Republic* [1985] KLR 1."

There was no doubt that in this case the appellant was not known to the complainants before the date of the incident. In our view no sufficient basis was laid upon which conviction could be based on voice identification. In **Kerish Ole Masaku vs. Republic [2011] eKLR** the Court of Appeal expressed itself as follows:

"As we have indicated briefly above and considering the part of its judgement reproduced above, the first appellate court did not, with respect consider all the above matters we have stated. Indeed it did not occur to it that as there was no identification parade arranged for Kirongo to identify the attacker, her evidence on identification remained dock identification. That court did not consider how long the light was on when it came back and was put off by the attackers. It did not consider the effect of Njuguna lying down and claiming that she nonetheless fully identified one of the attackers by his face. It did not consider why Njuguna having properly identified the appellant, if she did, should have again sought to talk to him to hear his voice for assurance that he was one of the attackers. It did not consider that before the two witnesses could identify the attacker they were hit with a sword while still in the dark and Njuguna forced to lie down. We would not mention all matters that needed to be considered if fresh analysis and evaluation of the entire evidence was done as is required by law."

In the premises we are unable to uphold the appellant's conviction on all the counts which we hereby set aside and quash the sentence of death imposed on him. We hereby direct that he be set free forthwith unless otherwise lawfully held.

Judgement accordingly

Judgement read, signed and delivered in open court this 4th day of December 2013.

F N MUCHEMI

JUDGE

G V ODUNGA

JUDGE

In the presence of:

Ms Kithikii for State

Appellant in person