REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NUMBER 559 OF 2009

(From original conviction and sentence in Kibera Chief Magistrate's Court Criminal Case No. 3683 of 2008, U P Kidula (Mrs) CM on 1st December 2009)

WILLIAM ONYANGO OKUMU……..……APPELLANT

VERSUS

REPUBLIC…….....…..……...….RESPONDENT

JUDGEMENT

The appellant in this appeal, **William Onyango Okumu**, was charged in the Chief Magistrate's Court at Kibera in Criminal Case No. 3683 of 2008 with Robbery with violence contrary to section 296(2) of the ***Penal Code*** and the particulars were that the appellant on the 21st day of November, 2008 at Muthiga in Nairobi Area, jointly with others not before court, while in the company of three more other persons robbed GABRIEL NDUNG'U ESAYA WARUI of Motor Vehicle Registration KBB 239L Toyota Corolla AE 110 Saloon Colour Pearl/White, cash Kshs;300/=, a coat and personal documents all valued at Kshs;700,000/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said GABRIEL NDUNG'U ESAYA WARUI. He also faced an alternative count of Handling Stolen Property Contrary to Section 322(1) of the ***Penal Code*** whose particulars were that the appellant on the 22nd day of November, 2008 at Kijabe hospital in Naivasha within the Naivasha District of the Rift Valley Province, otherwise than in the cause of stealing dishonestly retained one motor vehicle Reg. KBB 239L Toyota AE110 Saloon Colour pearl/white valued at Kshs;60,000/= the property of Gabriel NDUNGU ESAYA WARUI knowing or having reason to believe it to be stolen or unlawfully obtained.

He was convicted of the charge of Robbery with Violence Contrary to Section 296(2) of the ***Penal Code*** and sentenced to death.

The appellant has now appealed against the same on the following grounds:

1. **That, the Learned Trial Magistrate erred in law and fact by relying on the evidence of PW1 (the complainant) on the issue of identification which was false.**
2. **That, the Learned Trial Magistrate further erred in law and fact by failing to observe that the identification parade was improperly conducted under ill-motive.**

3. **That, the Learned Trial Magistrate further still erred in law and fact by failing to observe that this is a case of single evidence and was not proved beyond reasonable doubt.**
4. **That, the Learned Trial Magistrate erred in law and fact by failing to observe that I was not arrested in the circumstances alleged by the prosecution.**

5. **That, the Learned Trial Magistrate further erred in law and fact by failing to weigh the credibility of the witnesses and which was negative.**
6. **That, the Learned Trial Magistrate erred in law and fact by failing to observe that the prosecution case was full of discrepancies, contradictions and loopholes.**
7. **That, the Learned Trial Magistrate erred in law and fact by failing to give due consideration to my unsworn defense.**

According to PW1, **Gabriel Ndungu Esaya Warui**, he works with Kenatco Taxis as a driver and on 21st November 2008 at about 8.00pm he was at Hilton Stage with motor vehicle registration number KBB 239L Toyota Saloon when the appellant, dressed in a blackish T-shirt which resembled a track suit asked to be taken to Kinoo Muthiga to collect laptops then back to Hilton and to the Airport. Since he was in a hurry and PW1 was next in line, PW1 talked to him for about 3-4 minutes outside the vehicle after which they entered the vehicle and continued to discuss the fare and agreed at Kshs 3,000/- which was to be paid after the services. The appellant sat on rear left passenger seat and PW1 drove off. The appellant told PW1 that he was required at the airport at 10 o'clock since he was flying on Kenya Airways to South Africa. He requested for PW1's number but PW1 declined to give out his number since the vehicle was a company vehicle. At the road block near Kabete Police Station was a roadblock and, PW1 got out and went to report to the police that he was suspicious of the appellant since he had been carjacked before. Although the police searched the appellant no ammunition was found and they continued with the journey. On arriving at Muthiga after passing Mugane Flowers at about 10.00pm, when they were on a rough road the appellant told PW1 to stop and turn the vehicle so that they could leave immediately after collecting the luggage. PW1 saw another car white in colour following them and the appellant told him to just stop but PW1 defied and drove on as he was suspicious of the appellant's conduct of constantly sending messages rather than talking on the phone. According to him the white car was about 50 metres behind and there were other vehicles around the place. PW1 turned round and came to the place where he had been told to stop by the appellant and stopped. He saw the white vehicle in front and when he told the appellant to go and get his luggage the appellate demanded for the car keys and when he asked why the appellant bent forward and held him by the neck but PW1 defied the order and drove off. However, the appellant held the steering wheel and the vehicle hit the wall on the building and he saw three people struggling to open the back doors which were locked as the keys were stuck in the ignition. PW1 then got out of the vehicle and ran towards the main road and boarded a matatu and reported the matter at Kabete Police Station. He then called the Company and was given a Landrover and together with a Company vehicle they went to search for the vehicle. However the vehicle was not where he had left it. Since the vehicle had a car track device called "Stoic" they started tracing it and thereafter went back to the office in the Company vehicle after which he went to his house and slept. On 22nd November 2008 at about 9am he was called and asked to go to Kabete Police Station and identify the motor vehicle which had been recovered. He did go and found the vehicle with dents though the two way radio communication, ordinary radio and his jacket which was on the front seat and documents were missing. He also found his driving licence, PSV, more than Kshs 300/- and Bank Card and other documents such as burial certificate for his father missing. He was informed the vehicle had been recovered at Kijabe with someone who was in the cells. He then recorded his statement. On 24th November 2008 at 8am he went to Kabete Police Station and he identified the appellant from his features such as his height and colour which were tall and black and who was still in the same clothes. According to him he did not have to talk to him as he recognized the appellant immediately. According to PW1 there was a lot of light at Hilton in form of security lights and his car was about 30 feet from the Hotel entrance almost directly in front of the Hotel entrance. In his view the appellant appeared to have come from or was pretending to have come from the Hotel. According to PW1 the appellant entered the vehicle and he saw him well. He also saw him well at the road block when he stopped and the police shown their torches at and searched him. According to PW1 he was not injured in the incident.

In cross-examination PW1 stated that the appellant had wanted the car belonging to PW1's fellow driver, **Samuel Karonyo**, which had already been booked to go to the airport. He confirmed that although they agreed at Kshs 3,000/- this was not in the statement though he told the police officer who was recording his statement. He said that Kenatco is a company and they do issue receipts. According to PW1, he was with the customer from 8pm to almost 10 O'clock a period of about 2 hours. At the road he said the saw the appellant through a spot light though there were no lights there. The appellant was however not asked

his name. He however informed the police of the tracking device so that the same could be activated. Although when he went to identify the vehicle, he was informed that there was a suspect in the cells but did not see the person as he was told to go back later for identification parade. According to him he recorded his statement on Saturday and attended the parade on Monday though the statement indicated that it was written on 24th. He however confirmed having signed the same and confirmed that it was his statement. While conceding that he could have been confused, according to him the day he went to see the vehicle was the day he recorded his statement. While he described the appellant to the police he confirmed that the statement did not have the appellant's description. He however said that the appellant's description was in the statement he wrote after discovery of the vehicle. The said statements were however written the same day on 24th. In re-examination he stated that on 24th November 2008 he recorded two statements one at 2.30pm and a further statement at 4.10pm the latter being after the parade. He however gave the description of the person who had robbed him before he wrote his the statement at the report office when he was reporting the robbery although he did not know whether it was recorded.

PW2, **James Simon Mwangi** gave evidence that he was working for tracking company called Stoic Company Ltd located on Menelik Road as in charge of tracking stolen cars. On 22nd November 2008 at 4.00 o'clock in the night he was woken up by his office which is on 24 hour operation and informed that a motor vehicle had been stolen. They disabled the vehicle and tracked the vehicle to Kijabe by getting its co-ordinates using GPRS System. From the road block they took some policemen and located the vehicle at the Hospital. They saw the vehicle at a distance with its bonnet up and as they approached someone ran from there but he was chased by the people who were there as well as the police who had gone earlier and arrested inside the office. PW2 identified the person he saw running as the appellant though he had never seen him before. According to his evidence the registration number of the vehicle was KBB 239L and it belonged to Kenatco Company. In cross examination he said he arrived with **Paul** and that police from the road block had been taken by an earlier team. According to him this team could not trace the exact place where the vehicle was although from the screen they had located it at Kijabe hence the reason why he had to go with GPRS. In his evidence the Hospital had an open gate and he didn't check whether there was security at the gate. He said he clearly saw a person run and the person had long hair but though he couldn't describe him, the person was the appellant. Apart from the vehicle there were about 6 other vehicles in the compound. According to the witness the appellant was arrested by other people and the police in the corridors of the building though he did not know who arrested him. In his evidence the appellant was searched but nothing was found on him. According to him **Ephantus Murage** was his colleague but had resigned.

PW3, **CIP Peter Ndubi** was on 24th November 2008 requested to conduct an identification parade at which the appellant was identified without any difficulties by touching him. The appellant commented that it was well done. PW4, **PC Edward Muhia** was the police officer who took the photographs of the motor vehicle. PW5, **Zaverio Nkubitu**, testified that he was a director of a company known as Giaki Super Travel Ltd which was the registered proprietor of motor vehicle registration No. KBB 239L which they subcontracted to Kentacto Travels. On 22nd November at about 6.00am he was informed by Kenatco that his said vehicle had ben carjacked and had been recovered and he went to Kabete Police Station where he found the car. He later sold the vehicle but identified its photographs.

PW6, **CPL David Chesire** was, on 21st November 2008 at about 11pm, on a road block on Nairobi Mai Mahiu Road when a person called **Murage** came in company of two people and informed them that they were tracking motor vehicle registration no. KBB 239L which had been located in the area. They tracked the vehicle until 22nd November 2008 at Kijabe Town and another employee was sent with a hand gadget to pin point where the vehicle was. They were led to Kijabe Mission Hospital where at a distance of 30-50 metres they saw the vehicle with its bonnet up and the appellant, who was unknown to him, standing next to it. When the appellant saw them he ran away and they chased him and caught up with him and arrested him. According to him the appellant was not far from them and they did not lose sight of him. The appellant was escorted to Lari Police Station where he was booked. In cross-examination he said that when he saw the appellant the appellant was bent over and he was the only one in the yard and that the appellant was blocked from going further by members of the public when he had reached a certain pavement path in the hospital. He denied that the appellant was arrested at the Hospital reception and that

he went with the appellant to the ward. He also denied that he was told by the receptionist that the patient whom the appellant had gone to discharge had been discharged on 19th November 2008. Apart from searching the appellant he did not question any other member of the public to confirm whether the appellant had the vehicle. Shown the documents which the appellant had, he stated that the discharge was dated 24th November 2008 while the date of arrest was 21st November 2008 and that the patient left on 24th December 2008. According to him the appellant never showed him the said documents. PW7, **CPL John Wanyonyi** was the investigating officer and according to him in PW1's statement he stated that the customer was slender, tall with fair complexion.

In his unsworn statement, the appellant stated that on 15th November 2008 he admitted his wife at Kijabe Hospital in Limuru West Constituency where she was diagnosed with Pelvic Rapture and was admitted and was expected to undergo a C-Section set for 19th November 2008. He arrived early that morning and was told it would be conducted later in the day and he went back to his daily chores. At 6.00pm he went back and she was taken to the theatre at 8pm and he went back home. He later came back to the Hospital. On 20th November 2008 at 9.00am he was told that he had a baby boy delivered at 10.30pm the previous night and he named him **Sadiq Lola**. After seeing both the child and the mother he went home and on 21st November 2008 when he visited at 6pm he was told she had already been discharged and he started the discharge procedures and although by 7.30pm he was through, the Hospital refused to release her in the darkness and he was told to pick her the following day. He came back at 7.15am and went to the reception and after 15 minutes the patient was called. However four policemen arrived and asked him to identify himself which he did and the receptionist confirmed that he had gone to collect his patient and escorted them to the ward but the police told him to get out as he was a suspect. When he refused to move out he was overpowered, taken out, tied and placed in a vehicle and taken to Uplands Police Station where he was booked for 30 minutes. He was thereafter taken to Kabete Police Station where he met 5 men one of whom said "*Ni yeye*" and he was placed in the cells. He was later charged after 6 days.

In her judgement the learned trial magistrate was of the view that this case was not a case of one time identification since after the first encounter which was sufficient for PW1 to identify the appellant, the appellant and PW1 drove together to Muthiga. Although it was night the learned trail magistrate was satisfied that PW1 had sufficient time to see the appellant notwithstanding the fact that he may not have described him in the OB. To the trial magistrate, the circumstances of identification were ideal and conducive to a proper identification of the accused which identification was strengthened by the holding of the identification parade at which the appellant was identified without much difficulty. Apart from this the learned trial magistrate found that the appellant's guilt was further confirmed from his conduct during his arrest. She found that the place and the circumstances under which the appellant was arrested did not detract from the evidence adduced by the prosecution. The learned trial magistrate hence found that the prosecution proved its case against the appellant beyond reasonable doubt and found the appellant guilty and convicted him accordingly.

As was held by the Court of Appeal in **Samuel Karanja Kuria vs. Republic [2011] eKLR**, as the first appellate Court we are aware of our duty which duty although has been restated many times, we consider it all the same useful to set out here lest we forget such an important appellate duty which has over the years served as an important step in the administration of justice by the Court. In our view the discharge of the duty ensures that the quality of appellate justice is enhanced and maintained. Thus, we have a duty to reconsider the evidence which was before the superior court, evaluate the evidence and draw our own conclusions and at the same time give due allowance for the fact that we have neither seen nor heard the witnesses – see **Ogeto vs. Republic [2004]2 KLR 14**.

The first ground of appeal raised by the appellant was that the Learned Trial Magistrate erred in law and fact by relying on the evidence of PW1 (the complainant) on the issue of identification which was false. First and foremost, it is important to note that in this case, PW1's evidence was that he was with the appellant when they were negotiating. They then embarked on the journey and along the way PW1 became suspicious of the appellant's conduct and hence stopped at a road block and reported the matter to the police manning the road block. Although the appellant sat on the back left seat of the vehicle, the fact that PW1 became suspicious of him along the way and even reported the matter at the road block is a

clear indication that PW1 developed interest in knowing the kind of passenger he was carrying. According to him he was able to clearly see the appellant when he was being searched at the road block. As was held by the Court of Appeal in **Nathan Kamau Mugwe vs. Republic [2009] eKLR:**

"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.... 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."

It is our view that a witness ought to describe the attackers in the first statement as this would avoid the allegation that the witness identified the accused based on the features which the witness saw later on and to show by which way the witness would be able to identify his attackers thus going to the credulity of the evidence. The approach on issues of identification was emphasized in the case of **Francis Kariuki Njiru & 7 others vs. Republic Cr. Appeal No. 6 of 2001 (UR)** where the Court of Appeal stated:

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:

> ***"…….It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."***

However as was held in **Nathan Kamau Mugwe vs. Republic [2009] eKLR** (supra):

"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. On the failure to produce the car taken away from James, nothing can turn on that. The photographs of the car taken by the police were produced and there was no complaint by anyone that the photographs were not a true representation of the car. Other items such as money were stolen and were never recovered. We find no substance in the complaint with regard to the car. 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."

Having considered the evidence on record and the period that the appellant and PW1 were together and the opportunity that PW1 had with the appellant we are satisfied that PW1 had ample opportunity to identify the appellant.

The second ground is that that the Learned Trial Magistrate further erred in law and fact by failing to observe that the identification parade was improperly conducted under ill-motive. The prosecution produced the identification parade form as exhibit 2. At page 3 of the said form there is a signed indication that the appellant consented to the parade being conducted and did not see the need for a friend or solicitor to be present. At this point we wish to pose and wonder why the said form has never been amended to reflect the reality in this country where we do not have solicitors. After the parade the appellant's comments were that the parade was fairly conducted. He did not denounce this statement. We therefore do not understand the appellant's complaint that the parade was improperly conducted.

It was further contended that Learned Trial Magistrate further still erred in law and fact by failing to observe that this is a case of single identification evidence and was not proved beyond reasonable doubt. 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. (See ***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 ***(See Maitanyi vs. Republic [1986] KLR 198).*** We have however found that the circumstances of this case favoured credible identification of the appellant. It is correct that this was a case of identification by a single witness. Even if it was true that the learned trial magistrate failed to observe that this is a case of single evidence, that alone would not have been necessarily 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."

The fourth ground of appeal was that the Learned Trial Magistrate erred in law and fact by failing to observe that the appellant was not arrested in the circumstances alleged by the prosecution. In support of his case that he had gone to discharge his wife from Kijabe Hospital on 22nd November 2008 when he was arrested, he relied on a discharge summary purportedly from the said Hospital. According to the said document, the date of admission which had some alteration indicated 14th November 2008 while the date of discharge was 24th November 2008. The date of leaving was however 24th December 2008. As was stated in **Ndung'u Kimanyi vs. Republic [1979] KLR 282**:

"A witness in Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".

See also **Alicandioci Mwangi Wainaina vs. Republic Criminal Appeal No. 628 of 2004** and **David Kariuki Wachira vs. Republic [2006] eKLR.**

Considering the evidence of the prosecution as well as that of the appellant we are convinced that the evidence presented by the prosecution was believable as opposed to that of the appellant whose evidence was supported by documents which did not corroborate his case. We also agree with the finding of the learned trial magistrate on the appellant's alibi that the appellant had ample time to depart from the said Hospital to Nairobi.

With respect to credibility and contradictions in the prosecution case, whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.**

As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."

We have ourselves re-evaluated the evidence on record and we are unable to agree that there were any material contradictions in the prosecution evidence which would justify this court interfering with the decision of the trial court.

On the issue of the failure by the trial court to consider the unsworn evidence of the appellant, as indicated elsewhere in this judgement, this is a first appeal and this court is enjoined to subject the evidence to a fresh scrutiny and arrive at this own decision taking into account its limitations as opposed to the trial court. We have considered the evidence and the case for both the prosecution and the appellant and we have come to the conclusion that the conviction of the appellant was safe and we have no reason to interfere therewith.

Accordingly we find no merit in this appeal which we hereby dismiss.

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:

The Appellant

Ms Kithukii for State