REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NUMBER 298 OF 2012

(From original conviction and sentence in Kiambu Chief Magistrate's Court Criminal Case No. 1685 of 2011, C Oluoch, (Mrs) PM on 8th November 2012)

JOHN MWAURA WAMUTI ……..……APPELLANT

VERSUS

REPUBLIC…….....…..……...….RESPONDENT

JUDGEMENT

The appellant in this appeal, **John Mwaura Wamuti**, was charged in the Chief Magistrate's Court at Kiambu in Criminal Case No. 1685 of 2011 with seven counts of Robbery with Violence contrary to section 296(2) of the ***Penal Code*** and he was convicted thereon and sentenced to life imprisonment. The facts of the case were that the appellant on the 28th day of July 2010 along Village Inn road in Kiambu within Kiambu County jointly with others not before court, while armed with pistols robbed **Michael Wayoike Kabera** of his motor vehicle registration number KBD 514F a Toyota Hiace Matatu valued at Kshs.1.25 Million, Nokia 1112 Mobile phone valued at Kshs.3,000/= and cash Kshs.180/= all valued at Kshs.1,253,180/= and at or immediately before or immediately after the time of such robbery used personal violence to the said **Michael Wanyoike Kabera**.

The appellant being aggrieved by the said conviction and sentence preferred this appeal on the following grounds:

1. **That, the learned trial magistrate erred in law and fact in holding evidence before the trial court as to identification of the accused person (appellant) was beyond reasonable doubt and inadequate to support a conviction of the appellant.**
2. **That, the learned trial magistrate erred in both law and fact by basing her conviction on extraneous evidence which had not been by either parties.**
3. **That, the learned trial magistrate erred in both law and fact in applying the wrong standard of proof required in a criminal case of this magnitude.**
4. **That, the learned trial magistrate erred in both law and fact by shifting the burden of proof to the appellant.**
5. **That, the learned trial magistrate erred in both law and fact by convicting the appellant on uncorroborated and unreliable evidence.**
6. **That, the learned trial magistrate erred in both law and fact by rejecting the appellant's defense without assigning any good reason for so doing.**
7. **That, I pray to be present during the hearing of my appeal so that I may add some more grounds of appeal.**

The evidence upon which the appellant was convicted was as follows. PW2, **Michael Wanyoike Kabera**, a driver employed by PW1, **Joseph Kaguongo Munene**, was driving PW1's motor vehicle registration no. KBD 514F Toyota Hiace Matatu at about 5.30pm when at Kiambu Stage in Nairobi he was approached by the appellant with a request to hire his vehicle to ferry people to a funeral after failing to locate a person by the name **Njau** whom he was looking for. The following day he received a call from the appellant and in the company of a conductor named **Jackson** picked the appellant and another person for the said trip. At Starehe Girls five people appeared one of whom hit him with a gun while the appellant pointed a gun at his head. They attackers then drove the vehicle to a farm tied them and left them there. They managed to untie themselves and reported the matter to the police station where they recorded their statement. According to him, he could identify the appellant and described what he was wearing. He was later called to an identification parade where he identified the appellant from his head and the gap in his teeth. The vehicle was however not recovered. According to him the appellant had given him his number and called him at night and in the morning. Referred to his statement PW2 stated that he indicated the appellant's description as tall, slim, a bit light and had his upper teeth protruding. He however did not mention the gap. Although he saw part of the gang when they were escaping he did not inform members of the public for fear of being harmed. He however admitted that he was called to identify the appellant almost one year later but was told there were no recoveries. According to him the robbery occurred at about 8.30 am. The conductor, **Jackson Kangari Waiganjo**, testified as PW3. He corroborated the evidence given by PW2 save that he was robbed of Kshs 500/- and he could not identify the attackers since he was loading passengers and it was rush hour and the passenger sat in front while PW3 sat at the back. According to him the appellant boarded the vehicle alone at the stage and when he was joined by 5 people later they were six. All the five however sat in front making a total of 8 people in front. He was unable to identify the appellant in the parade.

PW4, **Cpl Peter Indeche Ngoyani** was the Investigations Officer. According to him the conductor was robbed of a Nokia phone valued at Kshs 3,000/- while the driver was robbed of Kshs 180/- as well as the vehicle. He engaged the services of an informer who gave him the names of the suspects as **John Mwaura Wamuti**, **Sarif Kanja Musela** and **Omondi** who had been remanded in custody at Central Police Station, Nairobi. He went there and confirmed that one of them was the appellant herein who had been charged with preparation to commit a felony but were acquitted on 14th July 2010. Based on the information from the said informer he arrested the appellant on 10th August 2010. He later carried out an identification parade on 14th August 2010 at which the appellant was identified from his gap and complexion. In cross examination he admitted that the descriptions of the suspect were not given in the OB although they were recorded in the statements as small, thin and a bit light. According to him the appellant was identified from the gap and appearance when he was told to open his mouth as his teeth do not protrude when his mouth is closed. The Court noted that the appellant had a gap in his teeth which slightly protruded. The identification parade was conducted by **John Papai Oboi**, PW5 who testified the witness identified the suspect by touching him after which the suspect said he was satisfied with the parade. According to him three of the parade members had gaps. The 1st witness was **Michael Wanyoike Kabera** while the 2nd witness was **Jackson Karugari Waiganjo** who was able to identify the appellant.

In his unsworn statement, the appellant stated that on 10th August 2011 he took his milk to the buying centre and at about 7.30 am he heard his wife quarrelling with a worker who was assisting him. His wife then received a call and informed him it was from her people. At about 9.00 am he saw a taxi with some two visitors whom he served tea after which the visitors told him his father was in Kiambu and wanted him. He was then taken to the DCIO's office where he was urged to agree with the suggestion that he be moved to Kiambu on the threat that trump up charges would be brought against him after which he was locked up in the cells. He was later charged. He also heard his sister discussing the issue of him being helped to pay for the stolen vehicle.

In her judgement the learned trial magistrate appreciated that the only evidence relied on to implicate the accused person was that of identification and that in such circumstances, the evidence should be watertight to justify a conviction. She further appreciated that the only identifying witness was PW2. After considering the evidence the learned trial magistrate was satisfied that identification of the accused person was free from error and that the parade was properly conducted. The court considered the

appellant's defence and found it improbable and proceeded to convict the appellant and sentence him to life imprisonment.

This being the first Appellate Court to consider this Appeal, we are expected to subject the evidence tendered in the subordinate court to fresh and exhaustive evaluation so as to reach our own findings and conclusion as to the guilt or otherwise of the Appellant. In doing so we must be alive to the fact that we did not have the opportunity or privilege of hearing and watching the witnesses as they testified. See **Okeno vs. R [1972] EA 32.**

The offence in question took place on 28th July 2010. The appellant was however arrested on 10th August 2011 which was over one year later based on the information given by an informer. We are aware of the Court of Appeal decision in **Patrick Kabui Maina & Another vs. Republic (1986) KCA 889** wherein it was held:-

> **"…..If any accused is arrested on the strength of an information given by an informer and he is not put in the witness box to testify in chief and be cross-examined, such evidence should be disregarded ……."**

As correctly appreciated by the learned trial magistrate the only evidence of identification of the appellant was the evidence of PW2. According to his evidence he was approached by the appellant who wanted to hire his vehicle and the next day. On the first day the appellant was in a suit and had clear spectacles and he identified him well. The two exchanged contacts and the appellant called him later at night and the following day. According to him the following day when they met the appellant who was in company of another person, was wearing a jacket and a cap. They drove with the appellant in front together with PW3 while the other person sat behind them. Here the evidence of PW2 was at variance with that of PW3 who testified that when they picked the appellant the next day the appellant was alone. According to PW2 the appellant was bald headed and had long teeth with a gap. These features according to the witness were noted on the day he saw the appellant though the statement only mentioned the features as slim, a bit light with protruding teeth without mentioning the gap and the bald head. These features i.e. the gap and bald head are in our view important because according to PW5, PW2 identified the appellant from the gap. This was confirmed by PW2 in cross examination where he said that he identified the appellant from the head and a gap. That the appellant was identified from the gap was similarly confirmed by PW4. However, the descriptions which were given in the statement were small, thin and a bit tall.

In **Kariuki Njiru and 7 Others vs. Republic Criminal Appeal No. 6 of 2001**, 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…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"**

Similarly in **Mohamed Elibite Hibuy & Another vs. Republic Criminal Appeal No. 22 of 1996**, the same Court held:-

> **"If (sic) 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 particularly to the police at the first opportunity. Both the investigation officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omissions of evidence of this nature at investigation stage or at the time of prosecution 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 of his**

evidence."

In this case the incident took place one year before the appellant was arrested and the identification parade was conducted. Whereas we do not hold that after such period a proper identification would be impossible, we are of the view that the requirement that 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 becomes even stricter since it is only natural that human memory tends to fade as time goes by.

Although there were submissions with respect to the issue of the language used and the defect in the charge sheet, these were not the grounds of appeal. We however note that the issue of language ought to have been raised at the first opportunity available. With respect to the alleged defect in the charge sheet 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."

To conclude this judgment therefore, we have considered the fact that the appellant's conviction rested on the identification of a single witness one year after the incident and that there was no satisfactory evidence that the said witness noted the features which would help him and which did help him identify the appellant after such a long lapse of time. We have also considered the fact that the informer on whose information the appellant was arrested was never called as a witness hence we cannot tell on what basis the appellant was arrested.

In the premises we find that the appellant's conviction was unsafe. We accordingly set aside the appellant's conviction, quash the sentence and order that he be set free forthwith unless otherwise lawfully held.

Judgement accordingly

Judgement read, signed and delivered in open court this 3rd day of December 2013.

F N MUCHEMI

JUDGE

G.V. ODUNGA

JUDGE

In the presence of:

Mr Malesi for State

Appellant present in person