



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 156 OF 2009

PETER BORE WANJOHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal from the original conviction and sentence of H. N. Ndungu (Miss) Senior Principal Magistrate in the Nanyuki Senior Principal Magistrate's Court, Criminal Case No.593 of 2005 dated 7<sup>th</sup> July 2009)*

**JUDGMENT**

**Peter Bore Wanjohi** the appellant herein, was tried on a charge of robbery with violence contrary to Section 296(2) of the Penal Code. After undergoing a full trial, the Appellant was convicted and sentenced to suffer death. He is now before this Court seeking to upset the decision on appeal.

On appeal the Appellant put forward the following grounds in his petition:

0. *That the honourable trial court erred in law and in facts in relying on the evidence of the purported identification to found the appellants' conviction but failed to note that the same was obtained under unfavourable circumstances.*
1. *That the honourable trial court erred in law and in facts in failing to exhaustively weigh the credibility of the prosecution evidence.*
0. *That the honourable trial court erred in law and in facts in failing to note that the prosecution evidence was inconclusive or inadequate in the absence of some of the most crucial witnesses and poor investigations.*
0. *That the honourable trial court erred in law and in facts in failing to note that in the first place; the appellant was not arrested in connection with the instant charges.*
0. *That the honourable trial court erred in law and in facts in flawing the laid down legal principles when conducting the trial.*
0. *That the honourable trial court erred in law and in facts in failing to evaluate the appellant's defence alongside the crown evidence before reaching the decision to reject the same and the burden or onus of proof was unlawfully subjected to the appellant contrary to section 169 (i) C.P.C.*

Miss Ngalyuka, learned Senior State Counsel, opposed the appeal arguing that the Appellant was properly

convicted on sound evidence. It is Miss Ngalyuka's submission that the Appellant was recognized by the Complainant during the time of the robbery. The Appellant is said to be someone the Complainant has known for more than two (2) years. The learned Senior State Counsel further pointed out that the defence of alibi was considered and properly rejected by the trial court and that the trial magistrate complied with the provisions of *Section 200* of the Criminal Procedure Code.

Before considering the merits or otherwise of the appeal we wish to set out in brief the case that was before the trial court. The prosecution's case was supported by the evidence of four witnesses. **P.C. Francis Mururu Ngatuny** (P.W.1) told the trial court that on 3<sup>rd</sup> December 2004 at about 6.20 p.m., he boarded a matatu from Nanyuki town and alighted at Muthaiga Estate junction. He met five people who were armed with pangas and rungas. P.W.1 said, one of them ordered him to stop and surrender money and the mobile phone in his possession. Those people are alleged to have assaulted and even attempted to strangle him. P.W.1 claimed he recognized the Appellant whom he had known before having seen him in Nanyuki town that day. In the scuffle P.W.1 is said to have lost Ksh.21,000/=, National Identity Card, a mobile phone make Motorola, necktie, notebook, Bank Card for Cooperative Bank and his Police appointment card. The Complainant lost some of his teeth during the fight. A watchman is said to have assisted P.W.1 by taking him to Cottage Hospital where he was admitted for 18 days before being referred to Mathari Hospital for specialized treatment. Cpl. Julius Mugambi (P.W.3) stated that he received a call from Rosemary Kaparo (P.W.4), P.W.1's wife at 9.00 p.m. on 3<sup>rd</sup> December 2004 in which he was informed that the Complainant had been attacked by robbers at Muthaiga Estate and robbed of money and other properties. P.W.3 said he rushed to Cottage Hospital where he found P.W.1 in a semi-conscious state. P.W.3 visited the scene of crime where he recovered the Complainant's necktie, national Identity Card, Police appointment card, notebook and an iron bar. P.W.3 said he recorded P.W.1's statement when he regained his conscience. Later the Appellant was arrested for other robberies and that is when P.W.1 identified him as one of those people who attacked him. Dr. Butt (P.W.2) produced a medical report which confirmed that the Complainant suffered deep cut wounds, subdural haematoma in the brain. The complainant's injury was assessed as grievous harm. When placed on his defence, the Appellant denied the offence. He raised the defence of alibi, claiming he was in Athi River at the time of the offence. He claimed he had gone to visit his friend, Geoffrey Mwangi. The trial magistrate considered the case and came to the conclusion that there was sufficient evidence to link the Appellant with the offence. The trial magistrate believed the evidence of recognition by the Complainant and she disbelieved the alibi defence raised by the Appellant.

Having given in brief the background of this appeal, we now wish to consider the appeal. We have already enumerated the grounds of appeal. We critically considered those grounds and we think the appeal raises two main grounds namely:

- (i) There was no credible evidence to link the Appellant with the offence.
- (ii) The trial magistrate shifted the burden of proof to the defence.

We will start with the first ground which is to the effect that there was no cogent evidence to link the Appellant with the offence. We have critically considered the evidence of the four prosecution witnesses. It is the evidence of Francis Mururu Ngatuny, the Complainant, that he was attacked by five (5) robbers when he alighted at Muthaiga Estate junction on 3<sup>rd</sup> December 2004 at 6.20 p.m. In his evidence in chief, he alleged that he recognized the Appellant to be among those people who assaulted him before robbing him. In cross-examination, P.W.1 admitted that he cannot describe the alleged robbers but he went ahead to describe. He said one was tall and black, the other was neither tall nor short, one was wearing a T-shirt and track suit, the other wore a hat. He claimed the Appellant wore a yellow T-shirt and grey long trousers with sports shoes. P.W.1 stated that he recorded his statement with the Police on 3<sup>rd</sup> February 2005. He alleged he mentioned the appellant's name in the Occurrence Book. When referred to his initial statement he gave the Police, P.W.1 admitted that he did not give the description of the robbers. He also admitted that he did not mention the name of Peter. A critical analysis of the evidence of P.W.1 will reveal that he is not a consistent witness. Why for instance would P.W.1 claim that he mentioned the name of the Appellant yet the Occurrence Book clearly shows he did not give the names or the description of his attackers. The evidence of such a crucial witness cannot be trusted. The picture will

become clearer when the evidence of **Cpl Julius Mugambi** (P.W.3) is examined vis-à-vis that of P.W.1. P.W.3 claimed that he interviewed P.W.1 who told him that he was attacked by three robbers. He said P.W.1 mentioned the name of Peter, the Appellant herein. P.W.3 stated that during the course of investigations of other robbery cases, the Police managed to arrest the Appellant in connection with those robberies. Upon his arrest, P.W.3 said, he requested P.W.1 to confirm whether the suspect in Police custody (the appellant) was the Peter who had robbed him on 3<sup>rd</sup> December 2004. P.W.3 alleged that P.W.1 had recorded in his statement of 3<sup>rd</sup> December 2004 the name of Peter, the Appellant as his assailant. P.W.3 retracted that piece of evidence when the statement was read to him. He conceded that the Complainant (P.W.1) did not mention to him the name of Peter. P.W.3 revealed that the Appellant was arrested on 23<sup>rd</sup> January 2005 in connection with another case of robbery. It is only after the Appellant had been arrested that P.W.1 recorded his statement on 3<sup>rd</sup> February 2005. It is obvious from the evidence of P.W.1 and P.W.3 that the duo did not tell the whole truth in this saga. In our view their evidence cannot be trusted nor used to sustain a conviction. In **Ndungu Kimanyi =VS= R [1979] K.L.R. 282** the Court of Appeal stated as follows:

***“The witness in a 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 unreliable witness which makes it unsafe to accept his evidence.”***

We have come to the conclusion that we should not trust nor rely on the evidence of P.W.1 and P.W.3. In our view there was no reliable, cogent or credible evidence to place the Appellant at the scene of crime. Had the learned trial Senior Principal Magistrate critically analysed the evidence of P.W.1 and P.W.3 she would not have convicted the Appellant.

The second serious complaint raised by the Appellant is that the trial magistrate shifted the burden of proof to the Appellant. In her judgment at page 59, lines 6-8 the Learned Senior Principal Magistrate stated as follows:

***“I have taken great care not to shift or seem to shift the burden of proving his innocence to him, having taken such care, I still find that his defence has entirely no basis. He alleged to have been at Athi- River but has nothing to support that claim, not his friend whom he alleged to have visited and no travelling receipts.”***

It is obvious from the above excerpt that the learned Senior Principal magistrate shifted the burden of proof. Where an accused person sets up the defence of alibi, it is the duty of the prosecution to displace such a defence. The accused is entitled to just state that he was not at the scene of crime. It is not his duty to establish where he was. The prosecution is bound by law to prove beyond reasonable doubt by direct or circumstantial evidence that the accused was at the scene of crime and nowhere else.

In the end we allow the appeal. The Appellant’s conviction is quashed and the sentence of death set aside. The Appellant is hereby set free forthwith unless lawfully held.

***Dated and delivered at Nyeri this 10<sup>th</sup> day February of 2012.***

**J. K. SERGON**  
**JUDGE**

**J. WAKIAGA**  
**JUDGE**