REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 296 of 2007

VICTOR MWENDWA MULINGE……APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 2861 of 2006 in the Chief Magistrate's Court at Kibera – Mrs. C. Mwangi (CM) on 23rd January 2006)

JUDGMENT

1. The appellant herein **Victor Mwendwa Mulinge,** was tried and convicted for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code.** He was sentenced to suffer death as by law prescribed. He subsequently filed an appeal based on five grounds.

2. The learned state counsel opposed the appeal, urging that although there was only one identifying witness, the appellant and the said witness negotiated over the fare for the taxi services at about 5.30 p.m., in the light of day and that the two were together long enough to allow the witness to identify him. She therefore urged us not to interfere with the conviction or sentence, imposed upon the appellant by the trial court, because the identification was sound.

3. The assessment of the evidence by the learned trial magistrate was rather sketchy, and did not include a warning to the learned trial magistrate herself, of the danger inherent in basing a conviction on the evidence of a single identifying witness. We have therefore, analysed and re-evaluated the evidence on record to make our own findings and draw our own conclusions, in line with what was stated by the Court of Appeal in **NZIVO V REPUBLIC CR. APP NO. 81 OF 2003 [2005] 1 KLR PG 700**. In the stated case the learned Judges of Appeal, Tunoi, O'Kubasu and Waki JJA, held *inter alia* that:

"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence.

2. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

In re-evaluating the evidence we bore in mind that we did not have the advantage of seeing or hearing the witnesses as they testified.

4. On the first and second grounds of appeal which we have considered together, the appellant urged that the evidence of a single identifying witness upon which his conviction was based was not tested with great care, and the identification parade was a nullity and of no evidential value, since the appellant had been exposed through the media. The issues for consideration therefore, are whether upon testing the evidence of the single identifying witness with the requisite great care, it is sufficient to sustain a conviction against the appellant and whether the appellant's exposure in the media at the time of arrest, compromised his subsequent identification at the identification parade.

5. In our analysis of the evidence on identification, we revisited the often cited case of **Maitanyi v Republic Cr. App No. 60 of 1986 [1986] KLR pg 198**, to which the appellant referred us in his submissions. In the said case the Judges of the Court of Appeal Nyarangi, Platt, and Gachuhi JJA, summarised the points to ponder when considering the evidence of a single identifying witness, as follows:

"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction".

6. In the instant case there was no other evidence circumstantial or direct, to support the conviction against the appellant, beside that of the lone identifying witness. The appellant was not arrested at the scene of the robbery, and there were no recoveries made from him at the time of arrest. The case against him rested entirely upon the evidence of **PWI** Mr. Jacob Martin Okeyo Otieno, a Taxi driver ,who told the court that he operated the taxi business from Hurlingham near Shell Petrol Station, using motor vehicle registration No. KAP 526 L, make Toyota Corolla. We therefore warned ourselves of the need for testing with the greatest care, the impression received by **PWI** who is the lone identifying witness, at the time of the incident. We examined the conditions prevailing at the time of the identification, to establish whether they were conducive, for positive identification.

7. **PWI** testified that on 11th May 2003 at about 5.30 p.m. the appellant hired him to drive him to a Mamlaka road near Ufungamano, and instructed him to stop along the way to pick a friend of the appellant. At some unnamed junction the friend alighted and the appellant ordered **PWI** at gun point to move to the back seat. The appellant's friend got into the driver's seat and drove the motor vehicle to a spot, where they stopped the car, bound **PWI**'s hands and locked him in the boot of the car. From then on **PWI** could feel the motor vehicle moving but did not know where they were. At one point the car stopped for a while and then took off at high speed after some gun shots were fired. When the car finally came to a stop and he managed to extricate himself from its boot, he found that he was back at Mamlaka. He reported the robbery to the police.

8. From the analysis of the evidence on record we noted that **PWI** did not know the appellant prior to the robbery but that the observation of the appellant by **PWI** was neither fleeting nor obstructed. **PWI** testified that the appellant came to him and that the two of them spoke for about 10-15 minutes to agree

on the fare, the destination and the picking of the additional passenger, before they drove off together. The time was 5.30 p.m, and there was therefore light of day to aid in the identification. There was nothing and no one else to interfere with **PWI**'s observation of the appellant.

9. The evidence on record reflects that eleven days later on 22nd May 2003, **PWI** attended an identification parade from which he was able to pick the appellant. In his words **PWI** stated thus:

"It was after learning in the media that some arrests had been made and some arms recovered that I went to the parade. I accepted to go for a parade to identify if he was there the person I had picked.

When I went to the parade I never saw the person who hired me to take him to the alleged party. I clearly saw the person in the 2nd parade. The 1st parade did not have the person. The person who hired me is the 2nd person before court (points out the 2nd accused).

10. **PWI** testified that he gave a description of the person who hired him to the officer who questioned him, but that it was not captured in the written statement. He clarified that he did not write the statement by his own hand. We found no evidence that **PWI** picked the appellant out of the parade because he had seen his picture in any of the media. The four other persons who were accused together with the appellant were arrested in similar circumstances but were acquitted at the close of the trial because none of the witnesses identified them. It is our considered opinion that, if the identification and conviction were predicated on exposure in the media, they would all have been identified and convicted.

11. **PW2**, the officer who arranged the identification parade, testified that the appellant's advocate was present at the identification parade. The issue of any prejudice having been suffered by the appellant as a result of media coverage was not raised at the parade. Neither was it tested in the cross-examination of **PWI** and **PW2** or raised in the defence. We find therefore that raising it at this belated hour as a ground of appeal is an afterthought, and is meant only to exonerate the appellant from the offence.

12. On the third ground of appeal, the appellant urged that his alibi defence was not given due consideration by the learned trial magistrate. The learned trial magistrate did set out brief narratives of the events as stated by **PWI** on the prosecution side, and the appellant in his own defence. We have set out the evidence on **PWI** elsewhere in this judgment.

13. The appellant on the other hand, testifying on oath, told the court that on the 11th May 2003 he was in class at college with his girl friend from 4.30 p.m. to 6.30 p.m. The appellant was correct in submitting that the learned trial magistrate did not comment or express her opinion on the said alibi defence.

14. The learned trial magistrate however stated in her judgment that she had gone through **"the total evidence on record"** and she found that the evidence of **PWI** supported count 1 of the charges. Count 1 is the charge for which the appellant was subsequently convicted. The learned trial magistrate stated as follows:

"The court therefore is left with count 1 having been proved beyond reasonable doubt because I have no doubt that it having been during the day PWI could identify the person who hired him and later turned out to be a robber".

15. On the 4th ground of appeal, the appellant urged that the period he had spent in custody prior to conviction was not considered. He submitted that he was arraigned in court 21 days after his arrest. To this we point out that his remedy lay elsewhere as provided by **Section 72 (6)** of the Constitution then in force, and did not affect the findings in the case before us, or nullify the proceedings.

16. Finally on the 5th ground of appeal, the appellant urged that his rights under **Section 135 Criminal Procedure Code** were violated. **Section 135(3)** of the **Criminal Procedure Code** provides that:

"Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be

embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information".

17. This appeal stems from the trail in **CM Cr. No. 2861 of 2006** at Kibera law courts. There is no evidence in the proceedings before us that the proceedings in **CM Cr. 4442 of 2003** were brought to bear on the trial in **CM Cr. 2861 of 2006** or that they influenced the learned trial magistrate, in any way in reaching her conclusion.

18. After a careful analysis of the lower court record, the amended grounds of appeal, and the submissions of both the appellant and respondent we respectfully agree with the learned state counsel Miss Mwanza that the evidence which was adduced in the trial court against the appellant proved the charge of robbery with violence beyond reasonable doubt.

We therefore find that the appellant's appeal lacks merit and is dismissed accordingly.

SIGNED DATED and **DELIVERED** in open court this ***30th day*** of ***July*** **2012.**

F. A. OCHIENG
JUDGE

L. A. ACHODE
JUDGE