



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
(Coram: Ojwang & Odero, JJ.)  
CRIMINAL APPEAL NO. 98 OF 2007

-BETWEEN-

PETER KARIUKI NDWIGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Being an appeal from the Judgment of Ag. Senior Principal Magistrate Mrs. B.T. Jaden dated 13<sup>th</sup> June, 2007*

*in Criminal Case No. 3452 of 2005 at Mombasa Law Courts)*

**JUDGMENT**

The appellant faced a charge of robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya): the allegation being that he, while in the company of others not before the Court, on **28<sup>th</sup> August, 2005** at General Post Office in Mombasa, and while armed with pistols, robbed **Juma Salim Saria** of a motor vehicle, Registration No. GK AO43D, Toyota Corolla 110, silver- metallic, valued at Kshs.1.2 million, and at or immediately before or immediately after the time of such robbery, used actual violence to the said **Juma Salim Saria**.

In coming up to her final findings, the learned magistrate thus considered the evidence:

**“The accused has been identified by the complainant. The circumstances of the identification make it clear that he saw the accused well. The area was lit. The dent on the forehead, facial and general appearance of the accused, were all pointed out by the complainant .... The complainant and the accused did not know each other before. The question of ... malice does not arise. The defence is therefore, in the view of this Court, not believable .... It is the duty of the prosecution to prove their case beyond reasonable doubts. This has been done. The defence raised does not cast any reasonable doubts on the prosecution case .... I find the accused guilty as charged and convict him accordingly.”**

In his amended grounds of appeal, the appellant states as follows:

- (i) *there had been no positive identification of him as a suspect;*
- (ii) *the trial Court failed to consider the fact that the identification parade was not conducted fairly;*
- (iii) *the trial Court failed to take into account the fact that his arrest bore no relation to the instant case;*
- (iv) *the case “was poorly investigated”;*
- (v) *the trial Court arrived at its finding “through [a] fundamental misdirection”;*
- (vi) *the prosecution case was not proved beyond all reasonable doubts;*
- (vii) *the Court failed to consider the defence evidence.*

The substance of the appellant’s case was made in a set of pre-written submissions. He submitted that since “*the [robbery] incident took less than a minute*”, “*how could [the complainant] have [had] ... ample opportunity to have a [graphic picture] of the whole episode?*” The appellant submitted: “*It should be considered that the duration of observation was very short; definitely he was scared ....*”

Of the entire prosecution evidence, the appellant wrote: “*... I wish to conclude that the prosecution evidence of all witnesses was at best sketchy and inconclusive ....*”

Learned counsel **Mr. Onserio**, for the respondent, contested the appeal, and urged from the evidence, that during the robbery, the appellant had a pistol, which he held to the complainant’s head; the motor vehicle in which the incident took place was then stationary; the *locus in quo* was well-lit, lights being security lights, and others installed in neighbouring buildings. The appellant, at the time, subjected the complainant to orders demanding certain courses of action, and this is the time the complainant was able to observe his face which was unmasked; the complainant was able to describe the scarred features of the appellant’s appearance; he was also able to identify the appellant at the identification parade.

**Juma Salim Saria** (PW1), a driver employed at the Ministry of Home Affairs and National Heritage, on the material date, at 8.20 p.m., drove to the General Post Office bus stage, for the purpose of picking up Government staff and dropping them at their places of work. PW1’s crucial initial evidence runs thus:

**“When I stopped the motor vehicle at GPO and even before I switched off the [engine] three men approached me from the driver’s window. A pistol was placed against my head on the right side, near the ear. I was ordered not to switch off the [engine] but leave the ignition key on .... I lifted my hands to surrender and started getting [out of] the motor vehicle. One of the attackers said I remain in the motor vehicle and move to the front passenger seat. I did as instructed. The man with the pistol sat at the back left seat and another one to the right. One of them took ... the wheel and drove off.”**

After robbing PW1 of his various items, the suspects released him to go; and he was later called by the police to identify his motor vehicle which had been vandalized and abandoned in an open field.

PW1 was later invited to an identification parade at the police station, and he identified the man who had held the pistol to his head, at the material time. At the time he had attempted to exit from the motor vehicle, PW1 had stood face-to-face with one of the suspects the one with the pistol. It was PW1’s evidence that “*[the] GPO area is well lit, with [electric] lights from GPO, Bima Towers and neighbouring buildings*”. The man with the pistol is the one who had ordered PW1 to get out of the motor vehicle, and PW1 did look at him “*when he gave [the] instructions*”. Of the man with the pistol,

PW1 said:

**“[He] had something like a dent on his forehead, on [the] right side. This man is the accused. That is the dent.... I also had seen [the] face of the accused and his general appearance.... The accused was wearing an ‘Odinga’ style of head-cap at the material time, but the dent on his forehead was not covered by the head-cap. I saw the dent again at the time of identification .... The accused also talked at the parade, and I could recall his voice.”**

**Inspector Sang** (PW2) is the one who conducted the identification parade; and he testified that the parade was properly conducted, and that PW1 came and identified the appellant herein.

**Police Constable Kibwana Baya** (PW4) gave evidence that some two hours after the material incident, another robbery was reported to have taken place at Nyali Cinemax, with one person being shot dead: and the description of the robbers was in agreement with that of the robbers in the material incident; moreover, PW1’s motor vehicle which had been stolen, was exactly the one used by the robbers of Cinemax. The police used mobile phone data of the Cinemax casualty, and came to identify the appellant herein as the common suspect.

The motor vehicle in question was found abandoned at Tononoka on the following day. PW1 had, in the meantime, given to the police the *“description of a tall slim man with a scar on the forehead”* – and *“that is the said scar which looks like a dent on the hair-line at [the] forehead of the accused”*.

On cross-examination, PW4 thus said:

**“Yes, the complainant described you. No, I did not [record] that description in my statement. Yes, the GK motor vehicle was involved in the Nyali Cinemax robbery. The GK motor vehicle was silver in colour .... We suspected [the] same motor vehicle was used in both robberies because the description of the motor vehicle and the robbers was tallying.”**

The appellant herein gave sworn evidence, saying that police had gone to his shop in Mtwapa on **4<sup>th</sup> September, 2005**, found him charging a mobile phone, and arrested him for reasons unknown to him. The appellant, upon being asked by the Court, said he had no intention of calling any witness, nor did he wish to collect anything from his kiosk as part of the evidence he had given. On cross-examination, the appellant said:

**“I don’t know why PW1 gave evidence blaming me”.**

The record shows no negative impression of the candour or demeanour of the prosecution witnesses: and this is a relevant background to our analysis of the evidence on the merits.

Judging from the details of the evidence, from the trial Court’s assessment of the same, and from the contentions of the appellant, it is clear to us that this is a matter to be decided essentially on the basis of our perception of the evidence.

We find no evidence that, as the appellant contends, the case “*was poorly investigated*”; we find no misdirection on the part of the trial Court, in its findings; we do not agree that the trial Court failed to consider the defence evidence; we do not agree that the two robbery incidents separated by barely two hours, on the material night, were unrelated, in the individual actors and in the means used to facilitate the same; we have found no evidence of any impropriety in the conduct of the identification parade; we do not agree with the contention that a positive identification of the appellant herein was not achieved; it is not true, in our opinion, that the proof effected by the prosecution did not go to a level beyond reasonable doubts.

PW1’s evidence is crucial; he had clearly observed and retained in his senses the visage of the appellant herein; he gave the account to the Police; and he verified those very features when he identified the appellant at the identification parade; he accurately identified the appellant as one of the suspects of the material night.

We hold that the trial Court properly assessed the evidence, and came to the only correct finding.

We dismiss the appeal; uphold the conviction; affirm sentence as imposed by the trial Court.

**Orders accordingly.**

**DATED and DELIVERED at MOMBASA this 12<sup>th</sup> of April, 2011.**

.....

**J.B. OJWANG**

**JUDGE**

.....

**M. ODERO**

**JUDGE**