REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 102 OF 2006 ***(CONSOLIDATED WITH CR. APPEAL NO. 103 OF 2006)***

[FROM ORIGINAL CONVICTION AND SENTENCE IN KITALE CRIMINAL CASE NO. 434 OF 2005 BY WILBRODA JUMA ESQ. AG. CM ON 2ND NOVEMBER, 2006]

JULIUS KIPKOROS KIRUI …….....…….} 1ST APPELLANT
JOSEPH KIBET TOO…….....…….} 2ND APPELLANT

VERSUS

REPUBLIC …….....…….....RESPONDENT

JUDGMENT

1. The appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal code. The particulars of the offence stated that on the 26th day of November, 2004 at Laini Moja, Kitale Township in Trans Nzoia District of the Rift Valley Province, jointly with others not before Court while armed with dangerous weapons namely pistols robbed **Gilbert Kwemoi Juma** cash Kshs. 277,000, one Nokia Mobile and one ATM Card all valued at Kshs. 285,000 and at or immediately before or immediately after the time of such robbery unlawfully threatened to shoot the said Gilbert Kwemoi Juma.

2. The appellants pleaded not guilty, they were tried by the Acting Chief Magistrate Kitale **Mrs. W. Juma** who found them guilty and upon conviction; they were sentenced to suffer death. Being aggrieved by the conviction and sentence, they have appealed and in their petitions of appeal they raise several grounds as follows:-

*1. **THAT** the learned trial magistrate erred in law and fact in making a finding that the identification by recognition of the appellants was sufficient and free from error.*

*2. **THAT** the learned trial magistrate erred in law and fact in failing to find that the evidence of identification of the appellant was weak, contradictory and unreliable.*

*3. **THAT** the learned trial magistrate erred in law and fact in failing to find that in the circumstances of the case, the failure to hold an identification parade and failure to call the arresting officer to testify at trial was fatal to the prosecution case.*

*4. **THAT** the learned trial magistrate erred in law and fact when she relied on dock identification by PW3 as corroborating the testimony of PW1 on identification of the appellants.*

5. ***THAT*** *the learned trial magistrate erred in law and fact in failing to find that the alibi defence raised by the appellant had not been displaced by the prosecution.*

6. ***THAT*** *the learned trial magistrate erred in law and fact in failing to find that failure to call the state officer to whom the appellant was attached as body guard and driver left gaps in the prosecution case which could only be resolved in favour of the appellant.*

7. ***THAT*** *the learned trial magistrate erred in law and fact in failing to find that the alleged vehicle KAJ 591H used in the commission of the offence was not owned by nor in possession of the appellant at the time of the offence.*

8. ***THAT*** *the learned trial magistrate erred in law and fact by shifting to the appellant that the burden of proving that at the time of the offence, the motor vehicle KAJ 591 H was owned by a different person and not the appellant.*

9. ***THAT*** *the learned trial magistrate erred in law and fact by relying on opinion and speculation not supported by evidence adduced to conclude that there was error-free identification of the appellant.*

10. ***THAT*** *the learned trial magistrate erred in law and facts by relying on speculation totally disregard the defences of the appellant.*

11. ***THAT*** *the trial magistrate erred in fact in failing to find that the investigations were incomplete and poor leaving numerous doubts in the prosecution case that could only be resolved in favour of the acc*used.

12. **T*HAT*** *the trial magistrate erred in law in disregarding the case law relied on by the appellant in his submissions which case law overwhelmingly favoured the acquittal of the appellant.*

13. ***THAT*** *the judgment, conviction and sentence of the appellant was against the evidence adduced at trial.*

3. This appeal was not opposed by the State*;* ***Mr. Onderi, learned*** *Senior Principal State Counsel submitted that the appellants* were arrested more than a month later over a completely different offence in which the complainant was called **Njoroge.**

According to the evidence of PW1, which is also captured in the judgment of the learned trial magistrate, when the complainant was giving his first report to the Police, he indicated that the people who had robbed him were in a motor vehicle registration No. KAJ, but when the OB was produced in court, it is apparent no registration number was given.

The complainant merely described the motor vehicle as greenish while PW3 described the same motor vehicle as grayish. The appellants were arrested because they were seen driving in a motor vehicle which was allegedly involved in a robbery which evidence should have been taken with the defence by the appellants. The 1st appellant produced a sale agreement that showed he had purchased the motor vehicle two days after the robbery.

4. According to the State, there was doubt on whether the appellants were the ones who were in possession of the motor vehicle at the time of the robbery or the previous owner of the motor vehicle.

Furthermore, during trial, Section 200 (3) was not complied with. The defence counsel requested that **PW 3 Fredrick Omedi** be recalled. This request was repeated on 24th February, 2006 when **W**. **Juma, SPM** took over the matter from **Mrs. Wandere, Ag. SPM** who had previously handled the case and she had taken the evidence of six prosecution witnesses. This witness was never recalled, thus the conviction of the appellant is not safe and it should be allowed.

5. This being a first appeal, this court is mandated by law to reconsider and re-evaluate the entire

evidence and the judgment of the trial court and arrive at its own independent determination on whether or not to uphold the conviction. However, this court should always bear in mind that it neither saw nor heard the witnesses and give duel allowance for that. See the case of **Njoroge vs. Republic [1987] KLR 19.** We briefly set out in summary the evidence that was before the trial court which led to the conviction and sentence of the appellant.

Briefly summarized, it was the prosecution's case that **Gilbert Kwemoi Juma** PW1, the complainant in this case was hijacked on 26th November, 2004 at about 11 am just as he alighted from a motor cycle near Laini Moja by two people who posed as police officers. He testified that two people accosted him and pretended that they were police officers, they hijacked him, handcuffed him, bundled him in a car and after driving for a distance, they assaulted him and robbed him of Kshs. 225,000 being the proceeds from the sale of his maize. PW1 had sold a consignment of maize a while ago; he had gone to the bank and cashed the payment cheque.

6. While on the way from the bank he was hijacked, the assailants also forced him to give them his ATM card and PIN number, and after subjecting him to a lot of physical and mental torture, the robbers threw him out of the vehicle and drove away. The complainant said he recorded a statement at Moi's Bridge Police station and also at the Kitale Police Station. He said that the motor vehicle which was used to rob him was registration no. was KAJ 561H. It is however not clear from the complainant's evidence whether any money was withdrawn from his ATM Card. We believe it is for this reason, that counsel for the appellants challenged the information contained in the charge sheet on the grounds that the particulars of the charge sheet are not supported by the evidence.

Further evidence by PW1 stated that on 13th January 2005, (note he was robbed on 26th November, 2004) in the company of a friend called **Njoroge** who was also a victim of a separate robbery, they both went to Cherangani police station and as they were preparing to leave, they came across the motor vehicle that the complainant said was used to rob him. That motor vehicle had been used to rob another victim.

7. The motor vehicle and its occupants who were armed with pistols. The 1st appellant was disarmed by members of the public and the two suspects were taken to Kachibora Police station. A search was carried out and an identification parade was carried out although PW1 said that he had already recognized the appellants when they robbed him.

We are in agreement with both counsel for the appellants and also the State, that the investigations in this case left a lot of gaps that ought to have been resolved in favor of the appellants. For example the learned trial magistrate accepted that the identification parade that was conducted for PW1 was useless. However **PW3, Fredrick Obedi** who testified that he had carried PW1 in his bicycle and as the complainant was alighting from the bicycle, PW3 told the court that he saw him being attacked and he was able to identify the 1st appellant.

8. The circumstance under which the arrest of the appellants was carried out is not clear. PW1 testified that they had gone to Cheragani Police Station with **Njoroge** regarding another robbery when the appellants happened to have been spotted committing another offence and they were apprehended by members of public and then rearrested by Inspector **Thomas Nyakundi PW7**. It was crucial for PW3, who was not present when the arrest was carried out to identify the 1st appellant at an identification parade in order to test the accuracy of his evidence. PW3 identified the 1st appellant on the dock which is worthless as it was held in the case of: - **Kamau Njoroge Vs Republic [1982 – 1988] 1 KAR 1134** where the court of Appeal held that:

"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded a properly conducted identification parade. It is also trite law that before such a parade is conducted and for it to be properly conducted a witness should be asked to give the description of the suspect and the police would then arrange a fair identification parade."

9. There is no indication in the entire evidence that PW3 gave the description of the assailants that he saw

hijack PW1 to the police. After Mrs. Wandere - SRM was transferred, this case was taken over by **Mrs. W. Juma CM,** an order was made to recall this witness but he was never recalled. Due to the prosecution's failure to recall PW3, we are of the opinion the evidence of PW3 should never have been relied on by the trial court. On closer examination of the evidence by PW1, he said that he was able to recognize both the appellants after they were apprehended more than a month later.

The circumstances under which the appellants were arrested are not clear from the evidence; it is only PW1 who seems to have been at the scene where the two were arrested. PW1 states that he was with one **Njoroge** who was also another victim of robbery and it is in the cause of investigating the robbery against **Njoroge** that PW1 came face to face with the appellants and they were arrested by members of the public. None of those members of public testified and even the so called **Njoroge** was not called as a witness.

10. The evidence of PW1 has also to be examined against the defence by the appellants who claimed that they were police officers and they were lawfully issued with firearms, this was confirmed by the evidence of **PW6, Sergeant Langat**. The appellants claimed that they were arrested merely on suspicion while they were doing their own things. The 1st appellant also produced a sale agreement to show that he had bought the motor vehicle two days before the robbery. The prosecution did not investigate the authenticity of the sale agreement as that would have revealed the movements and control of the motor vehicle on the material day. Moreover, the 2nd appellant claimed that he was on duty on the material day as a police officer where he worked as an Administration police officer. This defence of **Alibi c**ould easily have been confirmed if evidence was called from his duty station to contradict or confirm that the **Alibi**.

11. We are satisfied that this conviction was solely based on the testimony of PW1. According to the principles set out in decided cases, the trial court needs to be cautious when basing a conviction on the evidence of a sole witness; it is recommended that evidence must be corroborated by other circumstantial evidence. See the case of:-

RORIA V REPUBLIC [1967] E. A. 583the predecessor of this court stated:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness and as LORD GARDENER, L. C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

"there may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity"

"that danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this Court to satisfy itself that in all circumstances it is safe to act on such identification."

12. Due to the above fundamental flaws which we have identified from the prosecution witnesses we are in agreement with Mr. Onderi that the conviction and sentence of the appellants is not safe. We accordingly quash the conviction and set aside the sentence unless the appellants are otherwise lawfully held, they should be set at liberty forthwith.

Judgment read and signed on the 6th May, 2011.

M. KOOME –J
F. AZANGALALA - J

Judgment read and signed on 13th April, 2011.

M. KOOME
JUDGE