



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CRIMINA APPEAL NO. 193 OF 2009**

**PATRICK KAMAU MWANGI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an Appeal from the conviction and sentence of Hon. ALEGO ATIENO (Senior Resident Magistrate) in Eldoret CMCR. No. 2425 of 2005 delivered on the 5<sup>th</sup> November 2009)**

**JUDGMENT**

The appellant, **PATRICK KAMAU MWANGI**, was charged with eleven counts of robbery with violence contrary to S. 296 (2) of the Penal Code. It was alleged that on the 11<sup>th</sup> April 2005 at Chemoset area along Kitale-Eldoret road in Lugari District, jointly with others and while armed with a pistol and two knives robbed Joseph Ndegwa Nduturi, Amina Mohamed, David Kipngeno Cheruiyot, Elizabeth Wangare, Josiah Karanja Ngatia, Joseph Cheptarus Kanguka, John Mwangi Waweru, Musoke Muliro, Charles Osemo, Francis Bunyali and James Musa Taboyo of their respective property which included money, mobile phones, a car-radio, shoes, log books, jackets, T-shirt, bag, umbrella, wallet and two note books. In the process, some of the victims were assaulted.

After the trial before the learned Chief Magistrate at Eldoret, the appellant was convicted on counts 10 and 11 and acquitted on the remainder of the counts. He was sentenced to suffer death on both counts 10 and 11. The learned Magistrate did not indicate whether the sentence on count 11 was to be held in abeyance on the authority of the decision of the Court of Appeal in **BORU & ANOTHER VS. REPUBLIC [2005] KLR 649**.

Be that as it may, the appellant felt aggrieved by the conviction and sentence and filed this appeal on the basic grounds that the learned trial Magistrate erred by relying on parade identification to convict him and by disregarding material contradictions in the evidence of prosecution witnesses. Further, the learned trial Magistrate erred in fact and law by rejecting his defence.

The appellant appeared in person at the hearing of the appeal and opted to rely on his written submissions to argue his case. The learned Senior Deputy Prosecution Counsel (SDPC), **MR. OLUOCH**, opposed the appeal on behalf of the respondent. In his submissions, the appellant contends that he was convicted and sentenced on evidence which was uncorroborated and contradictory and that the evidence of identification relied upon was insufficient, contradictory and amounted to mere dock identification.

The appellant contends that the identification parade was not properly conducted and that the exhibits were not positively identified as belonging to the complainants. The appellant also contends that the charge was defective as it did not agree with the evidence and that his alibi defence was disregarded

without good reason.

For all the foregoing reasons, the appellant prays that the appeal be allowed and he be set at liberty.

In opposing the appeal, the learned prosecution Counsel submitted that a robbery report was made and a road block was mounted by the police. In the process, a matatu was stopped. The appellant was found therein wearing wet clothes and appearing nervous. He was searched and found in possession of money and other items suspected to have been stolen from the robbed persons. The appellant was apprehended and later pointed out in an identification parade as having been among the robbers.

The learned prosecution Counsel contended that the prosecution evidence was based on identification and recent possession of stolen property. Therefore the appeal ought to be dismissed as the conviction was proper. On sentence, the learned prosecution Counsel correctly noted that the sentence on count 11 ought to have been held in abeyance.

In respect to the foregoing, the appellant indicated that the driver and turn boy of the matatu were not called as witness.

Having considered the grounds of appeal and the submissions by both sides, our duty is to reconsider the evidence and draw our conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In brief, the prosecution case was that on the material date at about 12.00 a.m., **P.C GEORGE MORARA (PW 1)** received a report that a bus belonging to Eldoret Express Limited on its way to Kitale had been commandeered by a group of armed people at a place called Chemoset and the passengers robbed of their property. He (PW 1) and his colleagues visited the scene and later mounted a road block manned by about ten (10) police officers including **IP KAZUNGU CHARO (PW 2)**. Between 7.00 a.m. and 8.00 a.m., a public service vehicle (matatu) Reg. No. KAB 826 S Nissan was stopped and inspected by the police officers. The appellant was found therein.

P.C Morara (PW 1) noticed that the appellant had wet clothes but did not give a satisfactory explanation of the wetness.

IP Charo (PW 2) noted that the appellant was uncomfortable with the instructions to alight from the matatu. Consequently, the appellant was suspected, searched and found in possession of two wallets, three handkerchiefs and cash amounting to over Ksh. 38,000/-.

The money was allegedly hidden in the appellant's underwear. Upon his arrest, the appellant took the police officers to a house in Huruma Estate Eldoret but found that his accomplices had already vacated the house. He was arrested and taken to the police station at Matunda where the ill-fated bus and the affected passengers were found. **P.C TOM NYAGUTU (PW 4)** and his colleagues from Matunda Police Station recorded statements from the passengers.

An identification parade was conducted by **C. IP ESAU OCHOROKODI (PW 5)**. He indicated that the appellant was identified by four of the identifying witnesses.

**C. IP JOSEPH MUSYOKA (PW 6)** the OCS Matunda Police Station investigated the case and thereafter preferred the present charges against the appellant. **JAMES MUSA NAPOYO (PW 3)**, **FRANCIS BONYARI ADAK (PW 7)**, **MUSOKE NABURU OMOLIRO (PW 8)** and **P.C JOSEPH CHEPTARUS KANGOGO (PW 9)** were among the passengers in the ill-fated bus.

James (PW 3) was robbed of his mobile phone, wallet, ATM card, a black leather bag containing about Ksh.50,000/-, pen, two note books, two bunches of keys, a mobile phone charger, sports shoes and a heavy jacket. He was injured during the robbery. Later, his stolen wallet and note book were recovered. He was told that a suspect had been arrested. He attended an identification parade where he identified the appellant as one of the robbers.

Francis (PW 7) was robbed of his Jacket, Ksh. 30,000/- and a brief case containing personal documents. His stolen property was not recovered but when he attended an identification parade, he identified the appellant as one of the robbers. Musoke (PW 8) did not identify any of the robbers but his money, mobile phones, shoes and jacket were stolen. Joseph (PW 9) was robbed of his mobile phone and money. He said that during the robbery he identified the appellant as one of the robbers.

When he was put on his defence, the appellant said that on the material night he went to Matunda to buy maize. He was a businessman in Eldoret dealing in maize. On arrival at Matunda Trading Centre he was taken to the home of one Mama Ciku where he found maize and agreed to buy it. As there were no gunny bags, the appellant indicated that he would bring a vehicle and the bags. Thereafter, he went and boarded a matatu heading to Eldoret. The matatu arrived at Moi Army barracks at about 7.15 a.m. and was stopped by police officers who carried out searches. He informed the police officers that he had Ks. 38,000/-. He was then referred to an inspector of police who referred him back to the first police officer. The two police officers conversed in a language he did not understand. They asked for something small or he would bear the burden. He declined to part with money which was for business. He was then told to sit on the grass and was hit on the mouth with a pistol by the police inspector. He bled from the head and was ordered to board a vehicle which took him to Matunda Police Station. His three handkerchiefs, wallet and other items in his possession were taken from him by the police. He was taken to his house in Eldoret where a search was conducted but nothing was recovered. He was taken to a forest on 13<sup>th</sup> April 2005 and tortured. On 14<sup>th</sup> March 2005 he was at the police station when he was told to participate in a parade in which he was picked out by three witnesses and told to sign some forms. He had not been told the purpose of the parade. He was taken to Court on 19<sup>th</sup> April 2005 and charged with the present offences. He demanded a return of his property including a wallet, three handkerchiefs and cash money.

In essence, the appellant denied that he was involved in committing the concurrent acts of robbery.

From all the evidence, we are satisfied that the prosecution proved the occurrence of the concurrent acts of robbery. Indeed, there was no dispute that the offences were committed against passengers travelling in a bus from Nairobi to Kitale. It was also not disputed that some of the stolen items were recovered after a matatu was stopped at a police road block and a search conducted in the vehicle and on the passengers therein. Also not disputed was the fact that the appellant was among the passengers in the matatu and that the recovery of the stolen items occurred a few hours after the fact.

With regard to the alleged identification of the appellant as having been among the robbers, we are of the view that conditions were difficult for a possible and proper identification of the offenders. The offences occurred in the hours of darkness inside a bus whose lighting conditions were clearly not known. Whereas, James (PW 3) indicated that the lights had been switched off, Francis (PW 7) and Joseph (PW 9) indicated that the lights were on but were switched off. Both PW 7 and PW 9 did not indicate clearly indicate at what juncture the lights were switched off.

Significantly, Musoke (PW 8) did not talk about there being lights in the bus. He implied that the only source of light were torches in possession of the robbers. He was not himself able to identify any of the robbers. We do not think that the direct evidence of identification adduced against the appellant was watertight and credible enough as to rule out the possibility of mistaken or erroneous identification. This being the case, the identification parade conducted by C. IP Ochorokodi (PW 5) was useless and an exercise in futility.

We find that the conviction of the appellant on the basis of the evidence of identification by James (PW 3) and Francis (PW 7) was not sound and proper.

However, the appellant's conviction on the basis of having been in recent possession of some of the stolen property was proper. This is because the property was recovered from the appellant a few hours after it had been stolen. The appellant did not give a satisfactory explanation of how he came by the property which included a wallet and note book belonging to James (PW 3). The note book contained contacts of his (PW 3's) friends. It could not therefore have been possible that the property found with the

appellant belonged to him as implied in his defence. It was clearly evident that the appellant was found in possession of stolen property for which he could not properly and credibly account. He failed to rebut the presumption that since he was found in possession of the stolen property, he must have been one of the robbers.

In the end result, we find no merit in the appeal which must and is hereby dismissed.

The sentence imposed by the learned trial Magistrate is hereby sustained. However, the sentence on count eleven (11) will be held in abeyance.

Ordered accordingly.

**J. R. KARANJA**  
**JUDGE**

**A. MSHILA**  
**JUDGE**

**[Delivered and signed this 15<sup>th</sup> day of November 2011]**