REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 96 of 2007

JOHN MBURU KARANJA……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.1834/2005 by Hon T. M. Matheka Senior Resident Magistrate, dated 31st May, 2007

JUDGMENT

Once again we note that the learned trial magistrate in her judgment sentenced the appellant to suffer death in each of the three counts charged. We repeat as has been repeated before both by the Court of Appeal and this court that such a sentence is illogical and serves no purpose. Having convicted the appellant, the learned trial magistrate ought to have passed death sentence in one count and ordered to be held in abeyance the sentence in the others two counts.

Having made those observations, we turn to consider the appeal itself. The appellant was jointly charged with two others with three counts of **robbery with violence** contrary to **section 296(2) P.C**. and alone with **handling stolen goods** contrary to **section 322(2)** of the **Penal Code.**

It was the prosecution case that on the night of 25th June, 2005 the appellant and the two others at Maili Tisa Bahati Nakuru, armed with dangerous or offensive weapons, namely, pangas, jointly robbed **Godfrey Mungai Karemi**, (the complainant in count 1), **Elly Mullo Owidhi** (the complainant in count 2) and **Titus Otieno** (the complainant in count 3) of assorted personal items including cash, mobile telephones, shoes, mobile telephone chargers, padlocks and wrist watch. That in the course of or immediately before or immediately after the appellant used person violence to the complainants. The appellant's co-accused persons at the trial were acquitted for lack of evidence. The appellant was similarly acquitted for lack of evidence in respect of the alternative charge of handling stolen goods.

Upon conviction on the count of robbery with violence, as we have noted, the appellant was sentenced to suffer death (in the three counts). Being aggrieved he has preferred this appeal challenging the lower court's findings, on the grounds of identification, the manner the identification parade was conducted and the treatment of his defence by the learned trial magistrate.

Before we consider these grounds, we remind ourselves of our cardinal role in this appeal, being the first appeal, that we are bound to analyse afresh the evidence on record in order to come to our own independent conclusion bearing in mind that we did not see the witnesses. **Titus Otieno, P.W.1** (Otieno) testified that at 1a.m. on 25th June, 2005, he heard a knock from the door of his house. He opened and a stranger entered demanding money and a phone. The stranger who he identified with the aid of electric light as the appellant took the phone, make Motorolla Talk About from the table and cash Kshs.1,000 from the witness's trousers. The stranger was armed with a somali sword and whip. He was alone. A few days later items believed to have been stolen were recovered and Otieno was able to identify his phone and

watch. An identification parade was conducted upon three suspects being arrested and the appellant was picked out by Otieno.

The complainant in the second count (Elly Mulo Owidhi) (Elly) was also robbed on the same night at more or less the same time as Otieno (at 1a.m.) while sleeping in his house by a single robber. The robber who was armed with a whip and a somali sword struck him and demanded and took his mobile telephone, make *"Shado"* and Kshs.14,000.00. The robber left. Elly confirmed that he identified the robber as the appellant with the aid of electric light. At an identification parade conducted after the arrest of the suspects Elly identified the appellant. Again according to Elly, the robber was only alone.

Godfrey Mungai Karemi (P.W.1), the complainant in the 1st count (Mungai) was also robbed at 1a.m. on the same night as the other two complainants. In Mungai's case, he was robbed by three people. They stole four (4) mobile telephones, mobile chargers,shoes and a padlock. He too was only able to pick out the appellant in the identification parade.

The robberies were reported and police began investigations. **P.W.4, P.C. Patrick Lewei** and other officers in the course of investigations laid an ambush on the night of 29th June, 2005 at a certain house following a tip-off. The raid netted the three suspects including the appellant and several items believed to have been stolen. Some of the items were identified by the complainants as theirs. An identification parade was conducted by **P.W.5, Chief Inspector Julius Nzomo** only in respect of the appellant and only Mungai identified the appellant.

In his unsworn defence, the appellant recalled how he was arrested on the morning of 28th June, 2005 as he waited at the stage to board a *matatu* to his place of work. Two other suspects had been arrested already. He was informed that he was arrested for not carrying an identification card. Two days later while still in police custody he was shown two men and asked if he knew them. He did not know them but the following day an identification parade was conducted where the same men were asked to identify him. He denied involvement in the robbery.

We have considered the evidence presented by both the prosecution and the defence. There is no doubt that the threecomplainants were robbed of their personal effects, on the same night and at more or less the same time.

In the case of Otieno and Elly, the robber was alone while Mungai was robbed by three men. The sole issue for determination is whether the complainants were robbed by the appellant or in respect of Mungai whether the appellant was part of the gang that robbed him. It is an issue of identification.

The prosecution case is that the appellant was identified by the complainants at the scenes of the robbery and also subsequently picked out at an identification parade.

We are alive to the requirement of the law that evidence of identification must be weighed with the greatest care and further that it is our duty to inquire into the circumstances of such identification, namely whether the incident was at night or during the day; if at night, the nature of lighting if any, the physical features of the suspect, the size of the room or compound, the proximity, the brightness of the light and the time span spent with the suspect This inquiry is done to avoid error in identification and it does not matter that the witness was honest as he could have been genuinely mistaken. Those are some of the standards set by the Court of Appeal in **Maitanyi** Vs. **Republic** (1986) 2KLR 75.

Bearing in mind the foregoing strictures, can it be said that the complainants identified the appellant. The robbery took place atnight (at 1a.m.). The complainants confirmed that they had slept and were only woken up by the robber(s). The appellant was not known to the complainants. The complainants were also unanimous that they were robbed by a person (and in the case of Mungai - persons) wearing caps, either to conceal their identity or to impersonate police officer(s).

This is how Otieno described the events of that night in relation to identification of the appellant:

> **"He came when the light was on. It was electric light…… I had never seen him before that incident. My house is one roomed. He stayed for about 3 minutes. An identity (sic)**

parade was conducted and I was able to identify him……..I stood near him when he came to my house."

In cross-examination, the witness went on thus:

"The person had leather jacket and jungle cap. It had covered the head but not the face. It took 3 minutes in the robbery (sic) ……I reported to the police and recorded statements……..I managed to identify him. He was a huge and tall man…….Latter I attended an identification parade…….Accused 3 was the tallest of all of them. It is not his height that made me identify him but because I recognized him."

Accused 3 is the appellant in this appeal. Although Otieno gave evidence that he participated in an identification parade, no evidence was led by the police officer who conducted it. The only evidence in support of count 3 in so far as identification is concerned is as we have set out above. It is our considered view that that evidence is consistent and credible. We have taken into account the fact that the robbery took place in a one roomed house, there was sufficient electric light; the incident lasted some three (3) minutes; Otieno gave the description of the appellant to the police that was confirmed by the learned trial magistrate to conform with the description. The robber wore a cap but that alone did not cover his face and true identify.

The appellant was armed with a Somali sword and a whip which are in our view offensive or dangerous weapons or instruments. He robbed Otieno of cash Kshs.1,000, a watch and a mobile telephone. That constitutes **robbery with violence** as defined in **section 296(2)** of the **Penal Code.**

We turn to the robbery charge in count 2. The complainant, Elly Mullo Owidhi was also robbed at 1a.m. by a lone robber, who was armed with a Somali sword and a whip. The robber struck Elly with the whip. On identification, we reproduce what Elly stated in the court below:

"I am a shopkeeper……..I slept at the back of the shop……..There was electricity. Outside the security light is there and it was on. In the house the light was also on. I put it on. I put it on when I went out. When this person pushed me into the house, we stayed for about 20 minutes…….. That time I was facing him. His face was not covered. The cap was folded on the forehead so his face was seen. I had not known him before but I was able to see his appearance.

In cross-examination by the appellant, Elly said;

"…….I told him where the money was facing each other. He never told me to put off the light."

The circumstances described above shows clearly that there was light in the room where Elly was robbed, he saw the robber's face despite the cap, the robber spent considerable time with Elly (20 minutes), and at one point faced each other. The robber also returned a second time. We are persuaded by this evidence that the appellant was clearly identified. The appellant armed with a somali sword and a whip, dangerous or offensive weapons or instruments, stole a mobile phone and cash from Elly and struck Elly with a whip. That constitutes **robbery with violence** in terms of **section 296(2)** of the **Penal Code.**

Although Elly participated in the identification parade and maintains that he was able to pick out the appellant, no evidence was tendered by the police officer who conducted the parade. But like in the case of Otieno (the complainant in count 3), the parade was superfluous in view of the overwhelming evidence of identification.

Finally, the evidence of identification by Mungai (the complainant in count 1) was that he was robbed by 3

people. He is
also a shopkeeper in the same area as Elly. He spent the night in question in the shop. The electric light in the room was on. According to him, the appellant had a jungle hat while his accomplice had a black hat; that the appellant had a somali sword; that the incident took more than 15 minutes although in cross-examination, he stated that the appellant was with him for almost thirty (30) minutes. The shop has two electricity bulbs – one in the shop itself and another in the room where the robbery took place.

Mungai was also able to identify the appellant at the identification parade. The procedure at the parade was proper and is not in our view vitiated by the participation of the appellant's co-accused who was not known to Mungai. The parade was in respect of the appellant only. Once again from this evidence, we are satisfied that the appellant was positively identified and the offence charged in this count proved.

The appellant alone, and in the case of the Mungai, (the complainant in count 1), with others, set out on the night of 25th June, 2005 to commit a spate of robberies in Ahero Maili Tisa Bahati. The robberies were executed in a similar manner. The appellant was dressed in the same clothes and wore the same hat during the three robberies.

We find no error in the finding of the learned trial magistrate that the prosecution proved the three counts against the appellant beyond any reasonable doubt. We confirm the conviction and sentence in the first count but order that the sentence in counts 2 and 3 will be held in abeyance. This appeal for these reasons is dismissed.

Dated, Signed and Delivered at Nakuru this 19th day of February, 2010.

D. K. MARAGA
JUDGE

W. OUKO
JUDGE