REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU Criminal Appeal 194 of 2008

PATRICK NYAGA MURATHA..... APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment and conviction by P. Ngari Esq. Senior Resident Magistrate in Chuka Senior Resident Magistrate Criminal Case No. 713 of 2008)

JUDGEMENT

The Appellant was charged with the offence of robbery with violence contrary to the provisions of Section 296(2) of the Criminal Procedure Code, (Cap 63 Laws of Kenya). The particulars of the charge were that the appellant on the night of 16th -17th of June 2007 at Njuri area in Meru South District of Eastern Province jointly with others not before court while being armed with dangerous weapons, namely a panga, torches, metal bars and rungus, robbed Beatrice Kirinya cash Ksh.26,000/- and other items stated in the charge sheet and that at or immediately before and immediately after the time of such robbery used personal violence on the said Beatrice Kirinya.

The Appellant was tried and found guilty as charged and was sentenced to death as provided by the law. The Appellant has appealed to this court both against the conviction and sentence. The appeal was urged before us by Mrs. Ntarangwi learned counsel for the appellant while Mr. Kimathi, learned State Counsel argued in opposition to the appeal.

The Petition of Appeal dated and filed on 27.10.2008 raised six (6) grounds of appeal which were in essence argued, by Mrs. Ntarangwi as grounds 1, 2 & 6 and then other grounds 3,4 and 5. In our view the appeal raises essentially one point of law detailed into two issues namely;

> ***(1) Whether the trial magistrate erred on a point of law and fact in failing to test and to properly examine the evidence of an identification and in finding that the appellant was properly identified as one of the robbers who committed the offence of robbery with violence against the complainant and;***
>
> ***(2) Whether the trial magistrate erred on a point of law and fact in basing the conviction of the appellant solely on identification of a single witness who was P.W.1 and whether the evidence of P.W.1 was unsatisfactory and unsafe (to found conviction);***

On the first issue, Mrs Ntarangwi contended that the offence was committed at night. It was not possible for the

witness, P.W.1, who was also the complainant to identify the appellant. The circumstances for such identification were not favourable. The time was 9.00 p.m. the incident took place along the road at an area called Njuri. There was no light, electricity, moon or otherwise. Mrs Ntarangwi also contended that it was in the circumstances unsafe to rely on the evidence of a single witness identifying an accused person. Counsel relied on several authorities in support of her contention that the appellant was not conclusively and positively identified by the witness (P.W.1), and that the prosecution had therefore not proved its case beyond reasonable doubt as is required in all criminal matters.

In **Roria vs the Republic [1967] E.A. 583** the court relying on the case of **Abiolla bin Wendo & another vs Republic** [1953] EACA 126, a band of Maasai warriors had raided a Manyattaa and one person was killed. The appellant was charged and convicted of the murder of the deceased. The trial court relied upon the evidence of one witness, the wife of the deceased who had identified the appellant in an identification parade **as either the person who killed her husband or passed close to her when entering the Manyatta.** The wife was in the Manyatta at the time of the raid. The trial judge in disagreement with the assessors who unanimously agreed that the appellant was a stranger to the witness, and that the condition under which she thought she saw the appellant at the raid were unfavourable to accurate identification.

The court held:

> ***"that while it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it was not safe to do so".***

In **Abdallah Bin Wendo Sheh bin Mwambere [1953] E.A.CA 166** the appellants were convicted of the murder of a plantation watchman on a very dark night, a third accused was acquitted. The trial judge convicted the appellants finding it safe to accept the evidence of one Man Magondo, as to their identity although no one else in Magondo's party was able to identify anyone. The trial judge also relied on the evidence relating to a police dog. The Court of Appeal for Eastern Africa held-

> **(1) Although subject to certain exceptions 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 such a witness respecting the identification, especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence, circumstantial or direct, pointing to guilt is needed, and,**
>
> **(2) Where police dogs are used to supply corroboration of an identification of a suspect, it should be accompanied by the evidence of the person who trained the dog and can describe the nature of the test employed**.

On this latter point the Court of Appeal for East Africa came to the same conclusion in the cases of **OMONDI VS REPUBLIC [1967] E.A. 802(K).** The Kenya Court of Appeal has come to same conclusion in **KENNEDY MAINA vs REPUBLIC** (Court of Appeal at Nakuru Criminal Case No. 14 of 2005)

In **Jackson Kimathi Marete vs Republic** (**Court of Appeal at Nyeri Criminal Case No. 3 of 2001**) the court held **that where the conviction of an accused person is predicated an eye witness identification evidence in that regard must conclusively show that the conditions favouring his correct identification were satisfactory**.

The decision of the Court of Appeal in **Mbae Maijani** and **Timothy Kimani vs Republic** (Court of Appeal at Nyeri Criminal Appeal Nos. 306 and 305 of 2006) also turned upon the question of evidence of the use of a police dog

said to be worthless unless the dog handler is called to testify as to its training and what it is intended to achieve and how it is achieved.

As indicated at the commencement of this judgment the appeal was opposed by Mr. Kimathi, learned State Counsel. His contention is that the appellant was conclusively and positively identified, that there was adequate and conclusive evidence upon which to convict the appellant, and that we should uphold that conviction.

The duty of this court as a first appellate court has been reinstated in numerous cases by the Court of Appeal. Today we refer to the decision of Platt and Apaloo JJA and Masime Ag. J. in the case of **GABRIEL KAMAU NJOROGE vs REPUBLIC (1982 -1988) KAR 134** where that court held:-

> ***"It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision both on the question of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions bearing in mind always that it has neither seen nor heard the witnesses and make allowance for this".***

In this case the challenged evidence is that of P.W.1, that she was the only one who identified the appellant, that it is unsafe to base a conviction on the evidence of a single witness without corroboration, that the evidence of a police dog could not be relied on without the handler of the dog being called to testify to the training of the dog, and above all the circumstances were unfavourable for positive and conclusive identification.

In matters of identification the real critical evidence is whether the circumstances were conducive to the identification of the appellant. If the circumstances were such that the accused could be positively and conclusively identified, then there is no need for an identification parade. An identification parade is held to clear any doubts from the mind of the complainant and indeed the prosecution. In this case there are in fact two scenes or scenarios. The first is the scene of the robbery and the second is the identification parade.

The scene of the robbery is described by both P.W.1. Beatrice Kivinya Peter, also the complainant and by P.W.2 (George Mutethia), the driver of a matatu motor vehicle registration No. KAX 208G. P.W.2 described the scene of the robbery. He was on his way from Nairobi to Meru. ***"On reaching Thuchi River a sharp object pieced my two right tyres both from and rear, the vehicle leaned one side. I moved for some time and stopped on the left side (i.e. of the road)".***

That is the normal reaction of any experienced driver. P.W.2 then described the next stage of his reaction. He alighted and confirmed his suspicion. He decided to remove both tyres, and replace one with the spare he had hoping to get another from any one of his colleagues going or coming from the opposite direction. This did not happen. As he removed one tyre, he had a gunshot he stopped dropped the jack and jumped in front of the vehicle. Someone held him by his shirt and it got torn. Yet another person appeared and with that person he tangled and rolled over the road barrier, but he was overpowered by that person who also had a torch, and a over his head and removed P.W.2's national identity card, mobile phone, PSV badge and money and left him.

P.W.2 testified that when he recovered from his shock his attackers had disappeared (into the darkness), and when

he went back to the vehicle his passengers who had scampered after the attack started reappearing from the bush, they were never rescued by any on-coming vehicle, and his passengers goods were lost. P.W.2 testified that he had put on the parking and the indicator lights before starting to change the tyre.

The passengers told him that they had been robbed but he himself did not see the persons who attacked him. ***"I did not see the person who attacked him. I only saw two people at the time. I did not know them or see the things that pricked the tyres"***.

In cross examination by the appellant P.W.2 confirmed his evidence in-chief regarding the shot and the lights**.** ***"I put on the parking lights. It was dark inside the vehicle. I heard the gun shots at the time I wanted to remove the wheels"***.

Let us again visit that scene as seen by or in the eyes of P.W.1 on reaching Thuchi (Not Njuri), the driver stopped on the road and told the passengers that the vehicle's two tyres were punctured (not purchased) there were several passengers besides the driver. The driver started removing the tyres. P.W.1 asked the driver why he was removing the tyres in the darkness. The driver informed her that he had only one spare tyre but he hoped to get help from another vehicle coming from Nairobi. While the driver was removing the tyre P.W.1 remained in the car with another girl with her. *"**In a flash of a second I heard a gunshot and hid my bag in the seat. The sliding door, the boot door and the front light were open and all the lights were on.**"*

In that flash of a second P.W.1 testified, she lifted her head heard and saw the person at the door and he demanded for mobile phones and money. At the time we exchanged words, and I kept saying I didn't have any money and he kept demanding. The man checked inside and demanded for more money threatening to kill us - speaking in Kiswahili and armed with a club, metal rod and a panga. P.W.1's companion gave in to the robbers demand and handed over her bag but the appellant kept on demanding for money from her and P.W.1 persistently refused to part with any money. At an opportune moment with the light from an oncoming vehicle (lorry) P.W.1 grabbed her bag and dashed out for her short lived freedom. She was followed by two of the attackers including the appellant who clobbered her back with a club and pulled her back on the road threatening her with rape unless she gave out money. P.W.1 and her companion were saved by the lorry which had at first refused to stop, but came back later.

Inside P.W.1's bag were her Co-operative Bank ATM Card, Police Sacco ATM Card her Police Identification Card, Kenya Airways Ticket, sh.20,000 a Card Holder and Wallet and Lipstick. These were items which were recovered by P.W.3 No. 231338, IP Jeremiah Musyoki. P.W.3 testified that he and 15 of his colleagues walked for more than 1 ½ KM tracing the movements of the Appellant with the help of a tracker dog.

> ***"We had prompted spot lights which enabled us to see foot prints. We walked for 1 – 2 KMS to accused home from the scene of the robbery. We followed the handler when tracking accused in the dock. Accused was not known to me before."***

In cross examination by the appellant P.W.3 testified:-

> *"I was the one in-charge of the operation. The dog handler was under my charge and we followed him to your home. The police dog was following the scent. The scene was not described and the police dog was able to pick out the scene".*

And in re-examination, P.W.3 testified ***"I linked the clothes to the scene as they laid on the ground before jumping on the victim".***

P.W.4 was No.218014 C.I. John Kipyegon the officer who conducted the identification parade. In cross examination by the appellant, P.W.4 testified as follows:

> *"Identification parades are conducted to clear away doubts as to who committed the offence, the complainant never talked to me. I only explained to her about the procedure of the conduct of the parade. She identified you by touching. The parade members only gave me their addresses but not their occupation."*

Earlier in his evidence in-chief P.W.4 stated that he explained to the appellant his rights to call a friend or a lawyer (solicitor) and the appellant informed him (P.W.4) that he had none and signed the parade form thereby acknowledging that he, the appellant, was satisfied by the manner in which the parade was conducted.

In re-examination by the prosecution, the appellant testified that he was satisfied with the conduct of the parade and signed the parade form.

After the prosecution evidence the trial court found that the prosecution had made a prima facie case in support of the charge of robbery with violence, and put the appellant upon his defence, and explained to the appellant his rights under Section 211 of the Criminal Procedure Code to give sworn evidence and be subject to cross examination and call evidence of witnesses or make an unsworn statement and be not subject to cross examination. The appellant chose to give sworn testimony as D.W.1.

The Appellant denied being involved in the robbery on the night of 16.06.2007. He testified that he had in the early part of the night gone to assist a neighbor to harvest some honey and had just returned from the said exercise, taken a bath and retired to bed. The appellant testified that no sooner had he gone to bed than when he had a bang on the window by people who identified themselves as Police Officers. One of the officers was the DCIO Meru South. He was arrested and taken to the Police Station and was booked in the cells. The Police also took away his clothes. He confirmed that he was later identified by P.W.1 of which he said he complained to the Parade Officer.

In cross-examination he denied committing the offence for which he was charged. He testified that he knew the complainant they were both Police Officers at Meru Police Station. He was the Station Driver, while she was in petty crime. He testified that he had no differences with P.W.1.

D.W.2 was Esther Syokau, the wife of the appellant, and also a school teacher. Her testimony was that she had been with her husband the appellant the whole day and that she was surprised to hear that he had been arrested over a robbery in the area. She testified that the appellant had differences with the assistant chief with whom they had vied for the position of assistant chief.

That was the evidence from the prosecution side, and the Defence.

The law on the number of witnesses required to prove a fact is laid down by Section 143 of the Evidence Act

(Cap 80, Laws of Kenya). The subsection provides that no particular number of witnesses, in the absence of any provision to the contrary is required for the proof of any fact. Judicial precedent however teaches us that whereas it is legally possible (as provided by the said Section 143) to convict on the uncorroborated evidence of a single witness identifying an accused person, the court should be both cautious and wary in doing so. **(Robia vs R.** *(supra).*

In **Abdala bin Wendo & Another vs R.** (supra), the court said:-

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule 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. In such circumstances what is needed is the other evidence whether it be circumstantial or direct, pointing to the guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

As stated already, the critical issue in matters of identification is whether the circumstances for correct identification were conducive or favourable for positive and conclusive identification of the appellant. We have described in some detail three scenarios which complement each other and go to show that the appellant was positively and conclusive identified by P.W.1, the single witness.

Emphasis was put by counsel for the appellant that the robbery or incident took place at night. That is accepted, but night alone is not a complete bar to identification of an attacker, there is the question of what part of night it was. If it was late night for instance, the chances are that the attackers had chosen their time well. The travelers or passengers in a bus or matatu would be tired and therefore asleep. If a journey is short from Nairobi to Nyeri or Meru as in this case and the time is barely 8.00 p.m. (in the night) the night is said to be early or young, and the passengers would be expected to be both awake, and alert to their surroundings.

Besides the night being early, and the passengers being awake and alert to their surrounding, there may be light from a cloudless sky, moon light, there could light from a torch, an on-coming vehicle. All or some of these circumstances and sources of light could be present, but if the attackers and victim are a distance apart, it is not likely that the victim will easily identify the attacker. So the other circumstance to be taken into account regarding conclusive identification is the proximity of the attacker to the victim.

In this case, the scene is that of a parked vehicle with parking lights on and hazard lights flickering. The vehicle is a mini bus what is popularly called "**matatu**" with a sliding door enabling passengers to board and alight without using the front passenger door or cabin door. There are two passengers seated at the back or middle seat of the matatu. A robber fires in the air, the other passengers scatter and ran away from danger. The two passengers are trapped. The robber appears by the sliding door. He demands money and other valuables from those passengers. Where is the robber likely to stand?

According to the evidence of P.W1. the attacker, that is the appellant stood by the sliding door and demanded the victims' valuables, and being ladies, threatened them with the worst possible violation of their person, rape. What is the

victim likely to do when all those menaces and threats are made against her? Is she likely to be looking on the floor of the vehicle for inspiration on how to escape or on the way and face of the robber?

In our view, and in light of the evidence of P.W.1 the victim, she was looking straight at the robber and when she got an opportunity she dashed out in search of freedom, even if short lived, like in this case. The appellant caught up with her and as they struggled the appellant over powered her, took her handbag and proceeded to empty it of its contents, cash, ATM cards, cell phones air –ticket leather bag etc and disappeared into the darkness.

With the aid of a tracker dog under the command of P.W.3, IP Jermiah Musyoki, the appellant was traced to his home *"**where the dog stopped**"* and where were recovered a wet and muddy trouser and shoes for which the appellant gave no satisfactory explanation. Harvesting honey is a delicate exercise. It would not involve the mudding and wetting of trousers and shoes. The wet and muddy trouser are consistent with struggle and roll-over by the appellant over the P.W.1.

It would of course have been useful to have the dog handler come and testify as to the dog's training. It is however clear to us that once dog, took the scent from the location of the robbery it did not stop until the scent brought the handler and P.W.3 to the house of the appellant thus making the appellant the primary suspect in the robbery of P.W.1.

If there was any doubt linking the appellant with the robbery that doubt was dispelled by the identification parade at which P.W.1 identified the appellant as her attacker thus dispelling any lingering doubts that could have been attributed to poor lighting of the parked motor vehicle. We are satisfied that the Identification parade was conducted in terms of the Force Standing Orders on conducting such parades. We are also satisfied that the appellant signed the parade forms voluntarily. Being himself a Police Officer he knew what he was doing and could very well have objected if there was anything wrong in the conduct thereof.

We are also satisfied that evidence of P.W.3 sufficiently complements and corroborates that of P.W.1 that the appellant was the person who attacked and robbed P.W.1.

We are unable to accept the appellant's evidence and that of D.W.2, his wife. The evidence merely states that the appellant was at his house during the alleged robbery. It does not in our view displace the cogent and believable evidence of the prosecution.

In the upshot, we find and hold that the learned trial magistrate came to the correct decision. We confirm the judgment and conviction and sentence of the lower court and dismiss the appeal herein. It is so ordered.

DATED, DELIVERED AND SIGNED AT MERU THIS 16 DAY OF April 2010

MARY KASANGO

JUDGE

M. J. ANYARA EMUKULE

JUDGE