REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 78 of 2007

ALI ABDALLA MANENO…….....….APPELLANT
VERSUS
REPUBLIC…….……..……..……RESPONDENT
JUDGMENT

Ali Abdalla Maneno, the appellant, was charged in the Senior Resident Magistrate's Court at Kwale with the offence of robbery with violence contrary to section 296 (2) of the Penal code. He pleaded not guilty and the prosecution called six (6) witnesses in support of the charge. The Learned Senior Resident Magistrate, (**D. M. Ochenja**) found that a prima facie case had been made out against the appellant and placed him on his defence. After his defence, the Learned Senior Resident Magistrate, in a considered judgment dated 18th May, 2007, found the appellant guilty as charged and convicted him of the said offence. He was then sentenced to death. He was not satisfied with that decision and has appealed before us against both conviction and sentence.

The appellant was tried on the following particulars: **that on 11th April, 2006, at Waa Location in Kwale District within the Coast Province he, jointly with others not before the court while armed with dangerous weapons namely pistols, robbed Ali Rai Kigodi of cash Kshs. 129, 280/=, a national Identity Card and a driving licence and at or immediately before or immediately after the said robbery threatened to use personal violence to the said Ali Rai Kigodi (hereinafter "*the Complainant*").**

In his amended grounds of appeal, the appellant raised the following issues: that the charge was defective; that the evidence on identification was not positive; that the trial magistrate convicted him on conflicting evidence and that he failed to consider his defence.

During the hearing of the appeal, the appellant appeared in person and relied on his written submissions which had earlier been filed with the leave of the court. Those submissions were an elaboration of the said grounds of appeal.

Mr. Muteti, the Learned Senior State Counsel, who represented the Republic, supported the appellant's conviction and sentence contending that the robbery was staged in broad day light at 4.00 p.m. and the prosecution witnesses had sufficient opportunity to identify the appellant who was identified at the scene of crime and at a subsequent identification parade.

As the first appellate court, it is our duty to re-examine and re-evaluate the evidence upon which the appellant was convicted and reach our own independent conclusion bearing in mind that we neither saw nor heard the witnesses testify and should give allowance for that (see **Okeno – v – Republic [1972] EA 32).**

The facts giving rise to the charge against the appellant were briefly as follows:- the complainant, **Ali Rai Kigodi**, (PW 1), on 1st April, 2006 at 4.00 p.m., was driving his employer's motor vehicle registration number KAS 078 G-T canter, along Tiribe – Mombasa road when, near Calcium Factory, he saw two people one of whom waived him to stop. He slowed down and one of the persons jumped into the road and drew a pistol. He stopped the vehicle and the pistol-carrying person opened his door. At the same time, three other persons emerged from the bush and jumped into the vehicle and grabbed the complainant by the collar. In the driver's cabin, the complainant was with **Athman Halid**, (PW 3) and PW 5, PC **Lewa Nyale**. The attackers removed them from the cabin and put them in the rear of the vehicle. One of the thugs attempted to drive the vehicle but failed. The thugs then ordered the complainant to start the vehicle for them. He complied and was thereafter ordered to lie on the road. The thugs then drove off. He screamed for help and a good Samaritan who answered the distress called the police. They came and pursued the thugs. The appellant was arrested and the complainant picked him at a subsequent identification parade. The appellant was subsequently charged

as already stated.

One of the complainant's loaders **Athman Halid** supported the complainant's testimony that on the material day at the material time after a short distance from Calcium, two thugs jumped into the road and stopped the vehicle. One of the thugs pointed a pistol at the complainant who stopped the vehicle. They were then bundled at the back of the vehicle where PW 2 **Wilfred Ruwa**, another loader, was. The thugs unsuccessfully attempted to start the vehicle but failed. The vehicle was then started by the complainant. PW 3 and PW 2 rang the police but before the police arrived the thugs fled. The police then arrived and pursued the thugs ending in the arrest of the appellant. PW 3, like the appellant, identified the appellant at an identification parade subsequently mounted by the police.

PW 2, **Wilfred Ruwa**, gave similar testimony and, like PW 1, the complainant, he identified the appellant at the scene and subsequently at an identification parade subsequently conducted by the police. PW 4, Sgt. Michael Oduor was asked to take photographs of the vehicle which he took and produced at the trial. PW 5, PC **Lewa Nyale**, who had been given a lift in the said vehicle, gave testimony which was similar to that of PW 1, PW 2 and PW 3 regarding the attack.

PW 6, Cpl. **George Randu Nzae** was one of the police officers who received information of the robbery. He visited the scene in the company of other police officers and found the vehicle having been abandoned by the thugs. They pursued the thugs and got up with them at a place called Gitagi where they exchanged fire with the thugs. They then arrested the appellant in a house. He was pointed out by the complainant.

In his unsworn statement, the appellant testified that on the material day, he went to Kongowea for food stuff in the morning and returned home at 9.00 a.m. He then went to his farm where he stayed until 5.00 p.m. when he started going home. Before reaching his home, he was arrested. Police later took him to his home where they took his driving licence. Two identification parades were mounted to which he objected as the witnesses had seen him prior to the parade. He denied committing the robbery.

On the above evidence, the Learned Senior Resident Magistrate found that the offence of robbery with violence had been proved beyond reasonable doubt against the appellant. In convicting the appellant, the Learned Senior Resident Magistrate found that PW 1, PW 2, PW 3 and PW 5 positively identified the appellant at the scene of the robbery which offence was committed in broad day light and when the appellant was not disguised.

We have re-examined and re-evaluated the same evidence and indeed observe that the robbery was staged in broad day light at 4.00 p.m. However, the following deficiencies and conflict in evidence have caused us anxiety. The complainant **Ali Rai Kigodi** in his entire evidence in chief did not state that he was robbed of Kshs. 129,280/=. He acknowledged that he had not seen the appellant prior to the attack. He testified that the accused was arrested in his presence but it is clear from his testimony that the chase was not continuous. He did not indeed state at what time the appellant was arrested. He did not also expressly state that he pointed out the appellant to the police when they arrested him.

PW 2, **Wilfred Ruwa**, had also not seen the appellant prior to the attack. He testified that he took part in pursuing the robbers and the appellant was arrested in the bush. He, like the complainant, did not state at what time the appellant was arrested. Again it is apparent that the pursuit was not unbroken. Of significance, however, is his admission that they did not give the appellant's description to the police.
Athman Halid, PW 3, had also not seen the appellant prior to the attack and did not witness his arrest. According to him, the entire incident took about three (3) minutes. He told the court that he identified the appellant but did not explain how. He did not state that he described the appellant to the police prior to his arrest.

PC **Lewa Nyale**, PW 5, who had been given a lift by the complainant did not know the appellant prior to the attack. Although he testified that he took part in pursuing the appellant and the subsequent arrest, it is clear that the chase was broken. According to him as the chase was in progress the attackers disappeared in the forest before the appellant was subsequently arrested. He did not say at what time the appellant was arrested. But in cross examination he made this statement:

"We escorted you to the police station. ……I never recorded my statement on the very date. It was at night and that is why I never recorded my statement."
That statement suggests that the appellant's arrest may have been at night.

Finally, there was the testimony of PW 6, Cpl. **George Randu Nzae**. He joined the pursuing team and started trucking down the attackers who according to him had dashed *"into thickets"*. They caught up with the thugs and exchanged fire. They managed to arrest the appellant who had run into a certain house. He is the only witness who mentioned exchange of fire. In cross examination, PW 6 testified that PW 1 is the one who pointed out the appellant to them at the time of the chase. That was however not in consonance with the complainant's testimony. Of significance was his admission that although the vehicle was dusted for finger prints, the appellant's finger prints were not traced. PW 1,PW 2, PW 3 and PW 5 did not testify that the appellant wore gloves or other material which would prevent identification of

his finger prints.

The state of the evidence on the identification of the appellant was such that the prosecution felt had to be confirmed by identification at an identification parade. One was indeed mounted at which it is said the appellant was picked by the witnesses. Yet the police officer who conducted the identification parade did not testify. The testimony of PW 1, PW 2, PW 3 and PW 5 therefore remained dock identification. In **Fredrick Ajode Ajode – v – Republic [CR APPEAL NO. 87 of 2004] (UR)** the Court of Appeal rendered itself as follows:-

"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 by a properly conducted parade. It is also trite 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 accused and the police should then arrange a fair identification parade."

In this case although PW 1, PW 2, PW 3 and PW 5 said they identified the appellant at an identification parade, the police officer who mounted the parade did not testify. We also doubt that even if he had been called, his testimony would have lent weight to the evidence on the identification of the appellant. We say so because PW 1, PW 2, PW 3 and PW 5 did not testify that before the parade was mounted they gave a description of the appellant to the officer who mounted the parade. In the absence of such description it is our view that on the authority of **Ajode Ajode – v – Republic (supra)** the purported identification of the appellant by the said witnesses was not free from error.

As we have come to the conclusion that the identification of the appellant was not positive, we do not find it necessary to consider the rest of the complaints made by the appellant. We find the conviction unsafe and are unable to uphold it. We allow the appeal, quash the conviction and set aside the death sentence which was imposed on the appellant. We order that the appellant be released forthwith unless otherwise lawfully held.

Judgment accordingly.
DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF JULY 2010.

F. AZANGALALA
JUDGE

M. ODERO
JUDGE
Read in the presence of:-
The Appellant and Mr. Muteti for Republic.