



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 275 OF 2009**  
*(From original conviction and sentence in Criminal Case No. 1109 of 2008 of the Principal Magistrate's Court at Nyahururu)*

**ZAKAYO KARIUKI KAMAU.....**  
.....**APPELLANT**  
**VERSUS**  
**REPUBLIC.....**  
.....**RESPONDENT**

**JUDGMENT**

The Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code (*Cap. 63, Laws of Kenya*).

The particulars of the offence were that on the 29<sup>th</sup> May 2008 at about 7.30 p.m. along Subukia Nyahururu Road, Muereri Junction, jointly with others not before the court being armed with dangerous weapons, namely pangas and rungas robbed James Kariuki Chege a motor vehicle registration number KAP 632Q make Nissan Matatu, cash money Shs 500/= a mobile phone make Nokia 1108, badge and PSV licence all valued at Ksh 504,500/= and at the time of the robbery threatened to use actual violence to the said James Kariuki Chege.

The Appellant was on the evidence found guilty and was convicted and sentenced to death as by law provided. Being aggrieved with the lower court's verdict the Appellant has appealed to this court on four grounds which are set out in the Appellant's Petition of Appeal (*wrongly entitled Memorandum of Appeal*). The grounds were -

(1) *THAT the pundit trial magistrate erred both in law and fact when he based and sustained a conviction and sentence on the evidence of identification by recognition yet failed to find that the same was not supported by a cogent and prompt FIRST-REPORT.*

(2) *THAT the learned trial magistrate erred both in law and fact when he relied on the evidence of a sole witness to convict yet failed to warn himself on the dangers of relying on such evidence (single testimony).*

(3) *THAT the pundit trial magistrate erred in law and fact when convicting yet failed to observe that the prosecutions case was not proved to the required standard due to lack of exhibits and essential witnesses.*

(4) *THAT the pundit trial magistrate erred both in law and fact when he rejected my plausible defence contrary to section 169(1) of the Criminal Procedure Code.*

In our view these grounds of appeal raise one basic substantive issue whether the Appellant was identified by recognition and whether the trial court warned itself on the dangers of relying upon the evidence of a single witness. These two issues are covered by grounds 1 & 2 of the Petition of Appeal, and the answer to them will also answer ground 3 of the said Petition. Ground 4 of the Petition is a

procedural issue, whether the learned magistrate's judgment conformed with the requirements of Section 169(1) of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*).

In order to answer the basic issues outlined above, it is our duty as the first appellate court to examine and re-evaluate the evidence before the lower court in order to arrive at our own findings and draw our own conclusions.

It was the evidence of PW1, James Kariuki Chege (*the complainant*) a matatu conductor of motor vehicle registration number KAP 632Q which plies the Nyahururu-Nakuru route that after dropping his passengers at Subukia Trading Centre, he took his son, and as is his routine, he escorted the driver to his home at a place called Mwireri.

However when the driver alighted, he was accosted by some people who ordered him at gun point to get back into the vehicle which the driver did. The Appellant's accomplice came to the driver, who was PW1, and ordered him to switch off the engine and step out.

PW1 testified that on stepping out the Appellant and his accomplice robbed him of his mobile phone Nokia 1108, Kshs 800/=, PSV and conductor's badge. After robbing him, the Appellant and his accomplice told him to start engine but the engine could not start as it had a battery problem.

So the Appellant ordered him out of the vehicle and they both went in front of it, and PW1 saw him clearly from the head lights which were on.

It was also the evidence of PW1 that one of the robbers managed to jump-start the vehicle, and the other robbers took control and drove it towards Nyahururu. However upon realizing that they had abandoned one of their accomplices behind at (*Mwireri junction*), the Appellant applied emergency brakes and the passenger door got stuck. The Appellant and his accomplices removed it and threw it down.

PW1 got opportunity to jump out when the vehicle slowed down at Mwangaza Junction. PW1 fell on the tarmac woke up and hid briefly in a maize plantation, observing how his vehicle had gone. PW1 stopped a motor bike and reported the matter to Subukia Police Station.

The motor vehicle was later found abandoned and PW1 telephoned the driver who had sought refuge in a nearby homestead. A panga was recovered in the vehicle.

It was also the evidence of PW1 that on the next day (30.05.2008), the Appellant was seen within Subukia Trading Centre and PW1 alerted his workmates who helped to arrest and escort the Appellant to Subukia Police Station. PW1 testified that the Appellant switched off his cell-phone immediately he was arrested and was affirmative that he saw the Appellant clearly through the head lamps which were on. He knew the Appellant well, as he was his neighbor, and that it was the Appellant who had the gun.

In cross-examination, by the Appellant, PW1 reiterated that the Appellant was his neighbor, they went to school together. The Appellant had taken PW1 to the front of the vehicle, the Appellant had also taken and wore PW1's cap in order to disguise himself, he confirmed that he (PW1) had recorded in his statement that he had recognized the Appellant. The vehicle was found following its tracks as it had rained.

PW1 also testified in cross-examination that some "*boda boda*" people brought to him his conductor's badge, but he did not ask them where they found it from - as he (PW1), knew the Appellant had robbed him.

PW1 denied the suggestion by the Appellant that the family of PW1 had a grudge against him arising from a bicycle accident in 2004 when the Appellant allegedly hit the sister of PW1.

PWII's evidence corroborated that of PW1, except that PWII was categorical that he did not know or recognize any of the three assailants. PWII testified also that his attempt to flee with PW1's son was short-lived, when the vehicle stalled at a place called Mwangaza and something like a gun was placed on his head, but the appellant's action were interrupted by the appearance of people coming from a video shop, and the thugs fled.

Significantly the Appellant did not cross-examine PWII.

PWIII a scene of Crimes Officer photographed motor vehicle registration number KAP 632Q because it was involved in a case of robbery along the Nyahururu-Subukia road.

PWIV testified that he rushed from his house when summoned by the Report Office personnel that there had been a robbery. He found the complainant (PW1) who informed him that he had identified one person who came from his village.

PWIV testified that they left the station, tracked and found the vehicle abandoned at Mihango's area, but the driver and PW1 son were not in the vehicle. They searched and recovered a panga, also recovered was the driver's (PWII cell-phone).

PWIV testified that he and a colleague were in a vehicle from Nakuru on 30<sup>th</sup> May 2008, when he found members of the public who had blocked the road, and were chanting "*choma yeye*" - "*lynch him*". PW1 the complainant who was at the scene explained that they had caught the person who had robbed him the previous night. PWIV testified that he rescued the Appellant and charged him after investigations.

In cross-examination by the Appellant, PWIV reiterated his testimony, that a panga was found in the vehicle - but could not say to whom it belonged. He also confirmed that PWII's cell-phone which was hidden under the seat of the vehicle was recovered but the complainant's (PW1's) cell-phone was stolen, that PW1 jumped out of the vehicle and sustained bruises, and had described the Appellant as short and dark and hailed from Mihango area, and knew the Appellant as Kariuki, and PW1 also caught the Appellant. Although no weapon was found with the Appellant, PWIV found the Appellant "**almost being lynched and had his phone taken in order to trace the Appellant's accomplices.**"

Despite the Appellant's submissions that he was framed up, that none of the touts who helped in his arrest were called, that one of the person's arrested with him was made a prosecution witness, but was never called as a witness, the court found that the prosecution had established a prima facie case, and the appellant was put on his defence. The Appellant opted to give an unsworn statement, and called no witness.

The Appellant gave a long statement describing his activities from 24<sup>th</sup> - 29<sup>th</sup> May 2008, how he was helping his mother to harvest potatoes, and had on 30<sup>th</sup> May 2008 gone to Subukia Trading Centre to hire a tractor when he was confronted by the complainant, and Police men who took him to the Police Station and had him charged. The Appellant contended that he was framed up because of a family grudge with the complainant's family after he allegedly hit PW1's sister while riding a bicycle and fled.

#### **ANALYSIS OF EVIDENCE**

The issue we set out on the outset was whether the Appellant was sufficiently identified by recognition by PW1, and whether the trial court warned itself of the danger of convicting an accused upon reliance on the evidence of a sole or single witness.

It was the testimony of PW1 that he knew the Appellant well. **Firstly** they are neighbours in a village called Mihango. **Secondly** they were in school together. **Thirdly** in his first report to the Police (PWIV), PW1 told the Police that he identified the person who robbed him of motor vehicle registration number KAP 632Q, cash money - Sh 500/=, a cell-phone make Nokia 1108, a badge and PSV licence. **Fourthly**, PW1 clearly said that he saw the Appellant with the aid of front-lights when PW1 was told to start the vehicle and it failed and was told to alight and they went in front of the vehicle with one of the robbers whom he recognized as the Appellant when the lights of the vehicle which were switched on illuminated him.

It is only PW1 who recognized the Appellant. PWIII expressly stated that he did not recognize any of the robbers. The evidence of identification was therefore of one witness. Section 143 of the Evidence Act, (*Cap. 80, Laws of Kenya*) provides that no particular number of witnesses is, in the absence of any provision of law to the contrary, required for the proof of any fact. In other words, even one witness may prove a fact in issue, in this case recognition of the Appellant.

Whereas this is so, the court's have held out elaborate safeguards so as to reduce any chances of any person being sentenced on the evidence of a single witness. For example in the case of **ABDALLA bin WENDO vs. R [1953]20 EACA 166**, the Court of Appeal held that when testing the evidence of a single witness, a careful inquiry ought to be made into the nature of the light available, the conditions of identification and whether the witness was able to make a true impression and description of the suspect.

From the evidence of both PWII and PW1 (*himself*), obviously took some time for PW1 to realize what he was in for. The robbers ordered his driver back to the vehicle. One of them took control of his vehicle, fortune and luck came to his aid only when the vehicle failed to start, and he is ordered out in front of the vehicle, while the thugs are fumbling with restarting the engine, and all the while PW1 is observing his attackers. He recognized the Appellant. He is short and dark, and he snatches his cap and wears it to disguise herself. The light of the vehicle are switched on he clearly sees the Appellant. He informs the Police in his first report barely one hour later that he recognized one of the robbers as the Appellant. He was his school mate, and a village mate.

The learned trial magistrate warned herself of the pitfalls of single witness evidence of recognition. There can be no question of mistaken identity. We agree with learned trial court's findings, and find no merit on grounds 1 and 2 of the appeal which therefore fail. For the same reasons we also find and hold that the prosecution's case was proved beyond reasonable doubt.

We are also satisfied that the learned trial magistrate's judgment complies with the requirements of Section 169(1) of the Criminal Procedure Code. It was written by the presiding officer of the court, in English, the language of the court. It contains the points for determination, the decision thereon, and the reasons therefor and it was dated and signed by the presiding officer, that is to say the trial magistrate in open court at the time of pronouncing it.

For those reasons, we dismiss the appeal herein and uphold and confirm the learned trial magistrate's judgment herein.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 10<sup>th</sup> day of December 2010**

**D. K. MARAGA**  
**JUDGE**

**M. J. ANYARA EMUKULE**  
**JUDGE**