



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO  
CRIMINAL APPEAL 2 & 5 OF 2007**

**JOHN WAWERU KIARIE.....1<sup>ST</sup> APPELLANT**

**IBRAHIM OYARO ARAKA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The two appellants herein John Waweru Kiarie and Ibrahim Oyaro Araka were charged with the offence of robbery with violence Contrary to Section 296(2) of the Penal Code. The particulars of the charge were that, on the 2<sup>nd</sup> day of May, 2005 along Kisumu Muhoroni road junction in Kericho District within the Rift Valley Province, while armed with pistols, robbed Jared Mukua Obwaka of his motor vehicle, registration KZD 057 a Toyota Corrolla, valued at kshs.400,000/= and used actual violence against the said Jared Mukua Obwaka in the course of the robbery.

After a full trial before the Hon. Mr. K. Mogambi, Senior Resident Magistrate, Kericho, wherein the prosecution called 8 witnesses, the two appellants were convicted of the charge and sentenced to suffer death as prescribed by the law. Being aggrieved by the findings and judgment of the trial court, they have now appealed against both the conviction and sentence. Their appeals were consolidated on 4<sup>th</sup> December, 2008 and heard together.

The two appellants raised similar grounds of appeal in their respective petitions filed herein. Firstly they both claim that they were victims of mistaken identity in that the complainant neither identified them nor did he give any evidence to the effect that they were among the people who attacked and robbed him. The appellants contend no description of the attackers was given to the police when the offence was first reported and that being the case, the identification parade in which they were allegedly identified as the culprits was improper. They also state, as further grounds of appeal that no weapon was recovered from them and that the stolen motor vehicle was not produced as an exhibit at the trial. Other grounds of appeal raised by the appellants are that the testimonies of the various prosecution witnesses were full of contradictions and that the prosecution evidence as a whole did not meet the required legal standards to prove a charge of robbery with violence.

Both appellants filed written submissions in which they included additional grounds of appeal, namely, that the charge against them was a frame up, that the learned trial magistrate disregarded their sound defence without giving any reason for so doing and also shifted the burden of proof to the appellants. Also challenged in this appeal is the judgment of the learned trial magistrate which the appellants say did not satisfy requirements of Section 169 of the Criminal Procedure Code.

The appellants elected to have the State reply to their written submissions and did not make any verbal representations at the hearing of the appeal. Submitting for the State, learned State Counsel Mr. Mugambi conceded both appeals on the grounds that there is doubt as to whether the appellants were properly identified as the persons who committed the robbery, owing to the fact that they were arrested after the robbers had disappeared into a thicket and after persons allegedly pursuing them had lost sight of the stolen motor vehicle which was later found abandoned. The appellants were paraded for identification without any description of the suspects having been given to the police for the purpose of such identification. Learned counsel submitted further that the witnesses said to have participated at the identification parade had already seen the appellants prior to their being placed on a parade. For these reasons the learned State Counsel was of the view that the conviction of the appellants and the sentence meted against them were unsafe. He asked us to allow the appeal.

We have, as is required of us, being the first appellate court, studied the record and judgment of the lower court and carefully evaluated and analysed the evidence adduced by the various witnesses at the trial. The complainant, Jared Ogaka Mukua, who testified as P.W.1, told the trial court that the subject motor vehicle was under his care when the same was carjacked on 2<sup>nd</sup> July, 2005. He testified that, on the material date he was approached by two people at the Caltex Petrol Station, Kericho town where he operated a Taxi business using the said motor vehicle. The two persons hired him to take them to Muhoroni where allegedly their car had stalled. Accompanied by P.W.2, Benjamin Magaka Aming'a who worked as his escort, they embarked on their journey to Muhoroni, with the two passengers sitting at the back while P.W.2 sat in the passenger seat next to P.W.1. On reaching Muhoroni junction, the two passengers ordered P.W.1 to drive off the main road. He did so for about three kilometres after which the passengers ordered him to stop. One of the passengers, who P.W.1 noticed was armed with a pistol, claimed ownership over the vehicle forcing P.W.1 to run out of the vehicle and hide in a sugarcane plantation. From his hiding place he saw the vehicle being pushed and then driven off. He came out of hiding and walked to the road. He stopped and boarded a matatu which ferried him upto a police road block where he reported the theft of his vehicle to the policemen manning the road block. After he described his vehicle to the police officers, they told him that the same had just passed the road block. The police officers asked P.W.1 to enter the Police Land Rover and immediately chased after the stolen motor. Unfortunately, the Land Rover developed mechanical problems thereby making it impossible for the team to catch up with P.W.1's vehicle. While in the company of the police officer, P.W.1 was informed that the motor vehicle had been recovered at Sondu. He later came to learn that the carjackers had been arrested.

Under cross examination, by the 1<sup>st</sup> appellant, P.W.1 testified that he did not know the people who robbed him and P.W.2 of the motor vehicle. During cross-examination by the 2<sup>nd</sup> appellant, P.W.1 stated he did not see the 2<sup>nd</sup> appellant properly among the nine people paraded for identification. P.W.2's account of the robbery incident was similar to that of P.W.1. He testified how the motor vehicle was commandeered by passengers they had carried and how he too escaped into a sugarcane plantation when P.W.1 was ordered to stop the vehicle. He came out of hiding after the motor vehicle had been driven away. P.W.2 confirmed P.W.1's account regarding the chase which was conducted by the police found manning a roadblock without any success (owing to a breakdown of the police vehicle). Under cross-examination by the 1<sup>st</sup> appellant, P.W.2 stated, inter alia, as follows:

***“I said I could not identify you at the police station. I don't remember you well.”***

When cross-examined by the 2<sup>nd</sup> appellant, P.W.2 testified that he neither knew when the appellants were arrested, nor did he know their names. During re-examination, P.W.2 testified that the height for the persons paraded was not ***“accurately the same.”***

The 3<sup>rd</sup> prosecution witness, Evans Juma Okoth (P.W.3) testified that he was a farmer and a resident of Silot location, Holo area. Regarding the robbery, P.W.3 told the court that he was informed that a robbery had been committed at Holo School on 2<sup>nd</sup> June, 2006 at 1.00a.m. He rang the police who came after twenty minutes and started combing the surrounding bushes assisted by members of public. In the course of the search, they came to a certain road and found two people, one holding bicycle and the other

inflating the bicycle's tyre. During the cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> appellants, the witness stated that when police officers searched the appellants only bread and sugar in a yellow paper bag were recovered.

P.C. Gilbert Oloo testified as P.W.4. He told the trial court that, while manning a road block along the Kisii/Kericho road on 7<sup>th</sup> May, 2007, he and his colleagues, one P.C. Ng'eno and Sgt. Gituma, they were informed, via police radio call ( received by Sgt. Gituma), that a motor vehicle registration number KZD 057 had been stolen and was headed towards Sondu from Kapsoit. The vehicle emerged from Kapsoit direction and on reaching the road block where no barrier had been mounted, Sgt. Gituma waved the driver of the motor vehicle to stop but he refused to do so. Instead he drove on towards the Kisumu road. P.W.4 noticed there were two people in the motor vehicle. P.W.4 and his colleagues pursued the vehicle upto Holo. The vehicle was driven into a bush and abandoned there as the occupants disappeared into the bush. With the help of the members of the public P.W.4 and his team conducted a search in the forest. He did not tell the court whether or not the search was fruitful. When cross-examined by the 1<sup>st</sup> appellant, the witness said he never saw the 1<sup>st</sup> appellant and that he could not identify him inside the vehicle. He told the 2<sup>nd</sup> appellant the same thing in answer to his cross-examination.

P.C. Chasi Macharia testified as P.W.5. He stated that he joined a team comprising of police officers and members of the public in a search for persons suspected to have stolen a motor vehicle KZD 057. According to this witness, the descriptions of the suspects were given to the police officers by the members of the public. The search team chased one of the suspects who disappeared into the bushes but did not manage to arrest him despite chasing after him for almost two hours. It was when the team came to a main road that they saw two people whom they arrested and escorted to Sondu police station alongside a bicycle and a yellow paper bags found in their possession. Under cross-examination by the two appellants, P.W.5 testified that on searching the appellants, he only found loaves of bread and sugar in their possession.

P.W.6, Reuben Onchoka gave evidence relating to the identification parade conducted in respect of the two appellants. He testified that neither P.W.1 nor P.W.2 identified any of the appellants. P.W.8, Sgt. Stephen Tangi of the C.I.D. office, Kericho, testified that he too was informed of the robbery of a motor vehicle registration number KZD 057 and proceeded to assist in the search for the same. On reaching Sondu, he found that the appellants had been arrested. He interrogated them and organized for an identification parade, and later charged them with the offence. Under cross-examination by the 1<sup>st</sup> appellant, P.W.8 testified that the 1<sup>st</sup> appellant was not identified at the parade and that he knew nothing of his arrest. P.W.8 testified also that he did not know if the appellants had been identified at "the junction."

In his defence, the 1<sup>st</sup> appellant (D.W.1) testified that he and his co-appellant were on their way home from the market, riding on a bicycle, when they noticed that one of its tyres was almost flat. They stopped to inflate the same and while doing so, police officers and members of the public emerged from the bush and arrested them. He tried to explain to the police what he and the 2<sup>nd</sup> appellant were doing, but the police refused to listen. They were both put in the police vehicle and taken to Sondu Police Station. Later, they were taken to Kericho Police Station where an identification parade was conducted on 4<sup>th</sup> May, 2005. Despite the fact that no one identified him, he was charged with this offence which he denied ever committing. The 2<sup>nd</sup> appellant's testimony as regards the incident was identical to that of his co-appellant. He too denied having any knowledge of the offence with which they were charged.

From our reading of the judgment, we have noted that the learned trial magistrate did take note of the fact that neither P.W.1 nor P.W.2 identified the appellants at the identification parade. Nowhere in the judgment did the learned trial magistrate record that any of the persons who testified at the trial identified the two appellants herein as the persons who had robbed P.W.1 and P.W.2 of the motor vehicle in question or that they had anything to do with the carjacking. The vehicle was found abandoned in the Sondu area. It is not clear from the evidence where exactly and on what road the two appellants were found repairing their bicycle and nobody testified that they were anywhere near the place where the

vehicle was recovered.

The circumstances under which the two appellants were arrested were such that there is ample doubt as to whether the two of them had anything to do with the robbery herein. It is surprising therefore that the learned trial magistrate, after stating the facts as disclosed by the evidence adduced before him, went ahead to hold that “...***the evidence adduced by the prosecution (was) overwhelming and that the prosecution had proved its case beyond reasonable doubt.***” In our considered opinion such findings are not supported by the evidence adduced at the trial which evidence, in our opinion goes to render credence the appellants’ defences which were not considered at all.

We find that the charge facing the appellants was not proved at all. For all the above reasons we find that the State has done the right thing in conceding this appeal and we shall allow the same even without making any specific findings on each and every other ground of appeal put forth. Consequently, the convictions of both the appellants are hereby quashed and the sentences imposed against them set aside. We order that the appellants be set at liberty forthwith unless they are otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 26<sup>th</sup> day of February, 2009.

M. KOOME

M. G. MUGO

JUDGE

JUDGE