



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CRIMINAL APPEAL 20 OF 2008**

**JAMES MUNENE KANYI ..... APPELLANT**

**versus**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the conviction and sentence of E. J. OSORO – Senior Resident Magistrate*

*in the Chief Magistrate’s Criminal Case No. 3346 of 2005 at NYERI)*

**JUDGMENT**

The appellant was charged with the **offence of robbery with violence contrary to section 296(2) of the Penal Code**. He was convicted as charged and sentenced to death. He has preferred this appeal against conviction and sentence. As the first appellate court we have a duty to re-evaluate the lower court’s evidence as set out in the case of **GABRIEL NJOROGE VR REPUBLIC (1982 – 88) 1 KAR 1134**. It was stated in that case:-

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570).”***

The prosecution called a total of 10 witnesses. PW 1 an enrolled nurse was at a private clinic on 12<sup>th</sup> July 2005 at Kibirigwi. She had operated that clinic for 14 years. On that day before her lunch break whilst on duty she noticed five men who were hovering around the clinic. Those people were moving around the clinic in turns. Two would move around whilst others were seated on the grass. They did this from about 12 p.m. to 4 pm. She finished with the last patient at 3.30 p.m. After having her tea break two of those men went towards her and greeted her. One of them said to her that he had brought a patient to her. The other one entered inside the clinic as the patient. PW 1 began to get the particulars of this person. In getting his history this person said that he was called James Muchiri. He complained of pain in the hips and said that he was scratching a lot on the body. She noted that he did not look sick. She examined him by opening his shirt and she noted that there was no rash or any abnormality. Soon thereafter there was a commotion and noise coming from outside the clinic which she thought was a patient who had collapsed. She thought first of going out to attend to that patient. As she was opening the door of the clinic she was

hit on her eyes with a fist severally. The person whom she had attended and whom she identified as the appellant tied her neck and removed a gun. He continued holding her neck and passed the gun to another person. The appellant asked her for the car keys, money and cell phone. They took her mobile phone and her money. They then beat her and stepped on her thighs. She was injured and was bleeding from the nose and the mouth. She told the robbers that the car keys were with the neighbour. They left and went to the neighbour. When they left pw1 raised an alarm. She ran for about 15 metres from the clinic and she saw the robbers running. People came in in response to her alarm. One of the robbers was arrested on that day. She attended Karatina hospital where she was treated and discharged. She then stated:-

***“I did not see the suspect who was chased and arrested. I was asked by the police to go to Karatina Police station and I was able to identify the first accused (the appellant) in the identification parade.”***

She stated later that the identification parade took place three weeks after the incident. Further she stated that the appellant was the one who took the money and that he was the one who pointed the gun at her. That the appellant was the last patient entered in her book that is patient number 931. The appellant’s counsel in submitting in support of the appeal alleged that there was a contradiction in the evidence of PW 1 relating to the appellant’s patient number. We had examined the original lower court file and can confirm that the trial magistrate recorded number 931 and not number 200 as shown in the typed proceedings. There is therefore no basis of saying there was contradiction. PW1 in evidence further stated that the robbers had a bag with them and she was able to identify that bag which was before the court. The proceedings indicate that the appellant requested for the OB to enable him cross examine PW 1. At the next hearing date the appellant stated:-

***“I have now read the OB properly.”***

That being so the appellant’s ground no. 9 of appeal is rejected where the appellant stated that he did not have the OB.

Further PW 1 stated that she attended the police station twice. First time to record her statement and on the 2<sup>nd</sup> time to participate in the identification parade. At the parade she was able to identify the appellant because he had a cut on one finger, a cut on the shoulder, the head and the face. She confirmed that the people who lined up at the identification parade were similar in appearance. She however was able to identify the appellant because they were together inside the clinic for 3 – 5 minutes. PW 2 was one of the many people who responded to PW 1 screams. He said that he had rented a house next to PW 1 clinic. His house was 50 meters away from the clinic. On that day at 4 p.m. he heard a scream and when he got out of his house he found that it was PW 1. He said that he arrived within a minute from the time PW 1 screamed. She told the people who had responded to her alarm that five robbers had gone to back of the building. One of the robbers she described as wearing a T-shirt and jeans. He had one finger that is index finger missing. When PW 2 and other went to the back of the building they saw five people running crossing the river. PW 2 said that the whole town joined them and began chasing the five robbers. The five robbers on noticing that they were being chased dropped a bag then separated and began to run in different directions. PW 2 and others pursued one of those robbers whilst they were screaming. They noticed that this robber was lagging behind others. They chased him for 10 Kilometres. He went up a hill and as he was descending on the other side he was arrested by other people. PW 2 recognized this robber as the one they had been chasing because he was wearing jeans. He pointed out the appellant as that person. He also said that it was the appellant who had dropped the bag. He then stated:-

***“After we arrested the first accused (the Appellant) we took him back to the lady. We met police officers who took him away.”***

On being cross examined PW 2 said:-

***“We were taking you to the scene and on the way we met police officer who were after you and they took you. I could not have assisted to take you to the complainant as when the officers took you we left you.”***

PW 2 also denied that the appellant was arrested as he was going to visit his grandmother. He said that this could not have so because he was running through people's farms. He also said that as they chased the appellant he passed near a black jack who struck him with black jack spikes on his trousers. On being arrested he noted that the appellant's trousers had the black jack spikes stuck on them. PW 3 also heard the screams coming from the shopping centre. At that time he was in his farm which was about 200 metres away from the shopping centre. He arrived at the scene within 3 minutes. PW 1 told them that she had been robbed by 5 robbers who had ran away. They gave chase and he too noted that one of the robbers was lagging behind others. He was the one carrying a black bag which he later dropped. He later identified that person as the appellant. He stated that he was at the fore front of those chasing the robbers. He did not lose sight of the appellant during the chase. When the appellant climbed the hill they shouted to the people on the other side of the hill and they were able to intercept the appellant. He noted that the appellant was wearing jeans and his index finger was missing. When they went back with the appellant they found PW 1 had been taken to hospital. They therefore handed over the appellant to the police. PW 3 stated in cross examination that PW 1 had given the description of the appellant before they pursued him. He was emphatic that throughout the chase he did not loose sight of the appellant until he went down the hill. PW 6 was a police officer. He responded to information of a robbery which had taken place at Afya Clinic at Kibirigwi. Although he stated that this was on 4<sup>th</sup> July 2005 after re-examining his evidence in totality we are satisfied that the appellant did not suffer prejudice because of the discrepancy of that date. He responded to the information of the robbery and drove to the scene in the company of other police officers. It took them 15 minutes and not the usual 5 minutes to get there because of the traffic jam. They found PW 1 crying. She told them that five robbers had been at her clinic and robbed her of kshs.5000 and a Nokia mobile phone. She said that one of them had pretended to be a patient. This witness together with other police officers followed those that were giving chase and recovered a bag that had been dropped by the robbers containing clothes. They continued to follow the chase and on the way met members of the public who had arrested one of them. He re-arrested that person and put him in his vehicle. That person was the appellant. Although they attempted to pursue the other robbers they did not succeed. The appellant was taken to Karatina police station where he gave his name as James Muchiri. This officer later found out that his correct name was James Munene. On being cross examined the officer stated:-

***“I found the complainant at the scene and she described you saying that you had one amputated finger and that you are the one who played as the patient and later attacked her at gun point.”***

This officer denied that the appellant was returned to the scene after the arrest. PW 7 was a police officer who conducted the identification parade. It took place on 29<sup>th</sup> July 2005. He stated that the appellant voluntarily took part in the parade. There were 8 people present who had been picked from the cells. They were people with similar physique and appearance as the appellant. The only difference was that none of them had an amputated finger. As he arranged the parade PW 1 was kept at the flying squad office. When PW 1 attended the parade before touching the appellant she requested him to show his fingers. When he did she touched him to identify him as the robber. This officer stated that after the appellant was identified the appellant stated that PW 1 could have seen him whilst he was being finger printed at the CID Offices. PW 9 the clinical officer on 12<sup>th</sup> July 2005 examined PW 1 and on examination he found her face was puffy, the neck was tender, and the abdomen was also tender. The degree of injury was harm. PW 10 was the investigating officer of this robbery. He reiterated what PW 1 informed him about the robbery. He confirmed that the appellant was recorded in her book as patient number 931. The name recorded was James Muchiri. On being found with a case to answer the appellant in his defence stated that he was a business man. His business was to buy bananas from farmers and to sell them at the market. On the material date he had finished selling the bananas and had bonded a vehicle at 5 p.m. He alighted at Mwanda shopping centre on the way to visit his grandmother. He was then stopped by about 40 people who were armed with panga and clubs. They arrested him and as they were going to the scene they met a police vehicle. He was handed over to the police. He denied the offence. He said that PW 1 prior to the parade had been summoned to the flying squad office and had been asked whether she recognized him and she responded in the negative. The appellant also faulted the prosecution for failing to call the husband of PW 1. He stated that the husband was the one who made the initial report to the police. On being cross examined the appellant was unable to produce documents to prove his business existed or any licence. The court noted the demeanor of the appellant whilst he was

being cross examined. In the appellant's ground of appeal he argued that the trial court failed to note that the conditions did not favour his identification. The offence occurred during the day 4 – 4.30 p.m. The appellant was said to have pretended to be a patient. It therefore is obvious that PW 1 had close contact with him for what she said was 5 – 10 minutes. This was as she examined his alleged rash. Similarly PW 2 and 3 said that the chase took place during the day. One of them even noted on being arrested the appellant's jeans had black jack spikes. The ground of appeal relating to identification is rejected. The identification parade was in our view conducted in accordance with the laid down rules. Having re-evaluated the lower court evidence, we find that there is no major contradiction in the evidence of PW 1, 2 and 3. The one contradiction is on the date of the incident as stated by PW 6. As we said before in our view no prejudice was suffered by the appellant as a result of that misstatement. The contradiction was not fatal to the prosecution's case. PW 6 was one of the officers who arrested the appellant. The appellant in evidence did confirm that the members of public surrendered him to the police officers. The appellant argued that there were essential witnesses who were not called by the prosecution. We do not agree with that assessment. The only person the appellant mentioned was PW 1's husband. As we understand it from the appellant's defence that person allegedly was the first reporter of the robbery. The appellant in cross examining PW 1 did not cross examine on who made the first report. In any case the evidence of PW 6 was that the report was received by police through no. 999 of police. The appellant's ground on that issue therefore is rejected. The appellant contrary to his ground of appeal was issued with an OB and this he acknowledged during cross examination of PW 1. Having on a whole evaluated the lower court's evidence we conclude by stating that the prosecution well met the criminal standard of proof. PW 1 on screaming there was a quick response from the people. According to PW 2 she gave the description of the appellant. She also gave a description to the police who attended the scene and who arrested the appellant. Later PW 1 identified the appellant at an identification parade. That parade cannot be faulted because of PW 1's request to the appellant to stretch out his hand. That did not cause prejudice to the appellant. We therefore reject the argument of the appellant's counsel that the appellant was not properly identified. Contrary to what the appellant's counsel argued PW 6 confirmed that PW 1 identified the appellant before his arrest. The prosecution therefore satisfied the test set out in the case of **AJODE V REPUBLIC (2004) 2 KLR at page 81** where it was held:-

***“It is trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description.*”**

***Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition.”***

The same holding was adopted in the case of **SIMIYU & ANOTHER V REPUBLIC (2005) 1 KLR at page 193** as follows:-

***“In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.”***

The prosecution's case in our view was not weakened by failure to call those who initially arrested the appellant on the other side of the hill. This is because PW 2 and 3 said that the group that was chasing the appellant was communicating with those that were on the other side of the hill who then arrested the appellant. It should also be noted that PW 2, 3 and others chased the appellant for about 10 kilometres. They were able in that time to observe the appellant. He was the one lagging behind the others. In making a finding that the identification of the appellant was without error we are conscious of the caution we should bear in respect of identification evidence as set out in the case of **CLEOPHAS OTIENO WAMUNGA vs REPUBLIC (1989) KLR 424** where the court of appeal stated thus:-

***“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more***

***identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well known case of R vs Turnbull (1976) 3 ALL ER 549 at page 552 where he said:***

***Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

We reject concession made by the Principal State Counsel Mr. Orinda when he stated that the state was not opposing the appeal. We are satisfied with the identification of the appellant and we are of the view that it had no degree of error. There is no doubt which arises from the evidence adduced at the lower court regarding the guilty of the appellant. We are in agreement with the conclusion reached by the trial court in its judgment where the trial magistrate said:-

***“The court is satisfied that the first accused (the appellant) committed the offence charged herein.”***

We find that the appeal has no merit and the same is dismissed.

***Dated and delivered this 11<sup>th</sup> day of May 2009***

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**