REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 314 OF 2006

THOMAS KAREKO MWANGI alias ALEX……..APPELLANT

VERSUS

REPUBLIC……...…….……..RESPONDENT

JUDGMENT

The appellant Thomas Kareko Mwangi alias Alex was charged with the offence of **robbery with violence** contrary to **section 296(2) of the Penal Code.** The particulars of offence state that the appellant on the 16th day of September 2002 at Nuclear Investment Offices in Nyahururu town within the Laikipia District of the Rift Valley Province, jointly with others not before court and while armed with a pistol robbed **Lawrence Gakiri Gitahi** of Kshs 118,800/=, a pouch containing Kshs 3,000/=, a duplicate ID card, a job card, bank plate, mobile phone C24 all valued at Kshs 127,800/= and at or immediately after such robbery threatened to use personal violence to the said **Lawrence Gakiri Gitahi**.

The appellant was tried before the Principal Magistrate, Nyahururu, Hon. Kathoka Ngomo and was convicted of the charge. He was sentenced to suffer death. Being aggrieved by the conviction and sentence he filed this appeal citing the following grounds:

1. That he was not properly identified to warrant his conviction and that the identification parade at which he was identified was flawed.

2. That the description, by clothing, attributed to the perpetrator of the crime did not match that of the appellant.

3. That the investigations into the offence were not exhaustive enough and there was no evidence to show that the appellant was mentioned by the complainant when the offence was first reported to the Police.

4. That, taken in their totality, the circumstances surrounding visual identification were not conducive for positive identification.

5. That his defence was wrongly rejected, without any reasons being given for so doing, thereby occasioning a miscarriage of justice.

The appellant represented himself at the appeal and relied on his written submissions that he had filed expounding on the grounds of appeal set hereinabove. The appellant challenged the evidence adduced by **Lawrence Kagiri Gitahi (PW1), Teresiah Wambui Wambugu (PW2)** and **Stephen Onchwati Makori**

(PW3), which he said was contradictory in material respects. In particular, the appellant pointed out that, whereas PW1 stated in her evidence that the appellant spoke Kikuyu at the scene, PW2 on the other hand testified that he spoke in Kiswahili. The appellant also submitted that both witnesses testified that they were frightened when they saw their attacker holding a pistol and that they were in a state of shock and fear as the robbery took place. He also stated that three witnesses testified to having been ordered to lie down, which meant that they did not have reasonable opportunity to see and identify their assailants.

The appellant faults the parade conducted for his identification contending that the same was conducted at the instance of the officer in charge of the investigations herein, one **IP Joseph Kiplagat Korir PW6,** *contrary to the requirements of the relevant rules governing identification parades.* Additionally the appellant challenges the said identification parade on the grounds that the Police officers concerned described the appellant to the witnesses prior to their participation in the identification parade. He also complains that PW1 purported to identify him at the said identification parade four months after the robbery incident, notwithstanding the fact that PW1 had not given any description of his attacker as would connect the appellant with the commission of the offence herein. The appellant pointed out that PW2, who alleged to have seen the appellant clearly during the robbery was not able to identify him at the identification parade explaining the her difficulty as follows:

"***There were three others besides you*** *(at the scene)****. At the parade I did not identify you because there were many of you…. I had a short moment at the parade."***

The appellant contends therefore that in view of the above his conviction was based purely on dock identification and we should find it unsafe. Regarding the evidence of the arresting officer, PC Chris Manda the appellant submitted that the same should not be relied upon since the said officer testified that the only reason for arresting the appellant was simply because he was found inside a house that was locked from the outside. Hence the appellant contends that the ground for suspicion, was not established which meant that the learned trial magistrate erred by convicting the appellant in circumstances where no proper basis was laid to connect him with the crime for which he was charged.

The State, represented by learned state Counsel Mr. Njogu, conceded to this appeal on the grounds, mainly, that PW1 was the only identifying witness and that the identification at which he claims to have identified the appellant was conducted several months after the robbery. The learned state counsel also accepted the appellant's contention that there was no indication that the said witness or any other person had given a prior report describing the attacker to enable the Police arrange the identification parade.

We have, as is required of us, being the first appellate court analyzed and re-evaluated the evidence adduced before the trial magistrate and have arrived at our own independent conclusion. PW1 testified that he was a cashier working with a transport company called Nuclear Investment. On the material date, the 16th September 2002 he reported to work at 7.45 a.m. and proceeded to another office of the company where he found PW2 counting money that PW1 was to take to the bank. Besides PW2, PW1 found another person at the said office whom PW2 introduced as her brother in-law. PW1 then assisted PW2 in the counting of the money which amounted to Kshs 107,300/=. It was while PW1 was completing banking slips that there was a knock at the door and PW2 requested him to check who was knocking. As he did so, PW1 found two men whom he described as the appellant and another standing at the door. He greeted them and the asked how he could help them. The appellant, whom PW2 testified was wearing a black T-shirt and a black jeans trouser stated in Kikuyu that he wanted to see '*madam'*. PW1 called PW2 telling her that she had visitors. He retreated to the inner room and shut the door. Before he could sit down the door was hit hard causing it to open. On looking behind PW1 saw the appellant and asked him what the matter was. The latter pointed a pistol at PW1 and ordered him to lie down. He frisked him and took his wallet containing Kshs 3,000/=, national identify card, a certificate of good conduct, a bank plate and a Siemens mobile phone.

While the appellant was stealing from PW1, PW2 and her brother-in-law were brought into the room and ordered to lie down. The assailants ordered PW2 to open the drawers in the room, removed the keys to the office and left, locking PW1, PW2 with her brother- in law from the outside. The witness testified that PW2 was robbed of two mobile phones. According to PW1 the incident took about 3-4 minutes.

After the robbers left PW1 called a passerby through the window who came and opened for the trio. They reported the matter to the Police at Nyahururu Police Station and recorded statements. PW1 further testified that on 28th January 2003 CID officers came to Nuclear Investment offices and told them that someone had been arrested in connection with the robbery. He was asked to participate in an identification parade where he claims to have identified the appellant out of nine persons paraded. He claimed to have identified him by his facial features. During cross-examination by the appellant PW1 testified that there were two assailants at the scene of the robbery and that when the victims were ordered to lie down they did so facing down. He said that he was surprised but he neither lost consciousness nor did he faint. That the appellant's face was implicated (implanted?) in his mind thus enabling him to identify the appellant even after 3-4 months. PW1 testified that he looked at the appellant for 10 minutes before pointing him out and that he could not recall exactly how many months had elapsed from the time of the incidence to the time when PW1 attended the identification parade. He however stated under re-examination that the reason he took ten minutes to identify the appellant was that time had lapsed since the time of the incidence.

PW2 on her part testified that, on the material date, she had received the sum of Kshs 107,300/= from her company's booking office and another Kshs 8,500/= from her Director by the name Benson Maina Mutahi. That she returned to her office in the company of her brother-in-law **Stephen Ochwati Makori PW3** where on arrival PW2 showed him a place to sit while she went into the inner room to count the cash. She was joined by PW1 in the counting and while doing so she heard someone knocking the door to the reception area. She asked PW1 to check who it was. She then heard *people ask in Swahili whether 'Madam' was present* . PW1 answered in the positive and called PW2. She found two people waiting. She described one as the '*tall one'*, wearing a black jeans trouser and black T-shirt. She offered them seats which they refused to take. Instead the tall man pushed PW2 into the inner room having violently pushed the door to gain access. There she found PW1 lying down with a stranger holding a gun. PW2 and PW3 were forced to join PW1 on the floor and they did so facing down. Without stating which of the two men she was referring to PW2 had the following to say:

"***He demanded of us our mobile phones. We told him they were in the draw. He asked for cash and I told him they (sic) were on the table. He said that he wanted Kshs 400,000/=. We told him that that was all we had. I was ordered to rise up. I then went to the reception and I was ordered to open the drawers so that they can check whether there was more cash there. We went up to the Insurance room. They ordered me to open so that they can check the money. When the found none they asked for keys to the offices, from me they took two mobile phones … the total value was 10,450/=. They then took me to the room where Kagiri and Stephen were. They then ordered us to lie down. I was able to identify the tall one. He is the accused in the dock. They then locked us from outside and left with the keys. We stayed lying down for about 5 minutes."***

PW2 supported PW1's testimony that he called through the window for a bystander to open for them and that thereafter they went to Nyahururu CID offices, reported the incident and recorded statements. When cross-examined by the appellant PW2 stated that there were three other assailants besides the appellant but that he was the only she identified. She testified that she saw him for only three minutes. Asked about the identification parade PW2 testified that she did not identify the appellant because there were many people paraded and she had just a short moment at the said parade. She also stated that she was shocked because the appellant held a gun and asked her not to look at him.

On his part PW3 testified that on the material date he had gone to visit his sister-in-law PW2 at her office where he found PW1 but whilst at the said office some four people came one of them carrying a pistol. They robbed him of his driving licence and identity card and a wallet and that he was aware that office cash was also taken but he did not know how much. That the robbers ordered PW3 together with PW2 and PW1, to lie down, locked the door from outside and left. PW1 called someone from outside who opened for the trio and they proceeded to Nyahururu CID office. He reported the incident. According to PW3 it was the appellant *(whom he identified at the dock)* who had a pistol and ordered them to lie down while pointing the same at the three. Under cross-examination by the appellant PW3 testified that during the robbery the appellant wore a black T-shirt and a black jeans trouser. He testified further that he had told the Police that he would be able to identify the appellant if he saw him and that

although he was surprised to see the robbers he could still recall the appellant's face three months after the incident. PW4 a manager with Nuclear Investments only testified that he had given Kshs 107,300/= to PW2 and later received information that the money had been stolen.

PW5 on the other hand testified that he was the investigating officer in the case. That he is the one who recorded statements. The appellant did not cross-examine him even after requesting the court to adjourn the matter to enable him prepare for such cross-examination. **PW6 IP Joseph Kiplagat Korir** is the one who conducted the identification parade. He testified that he had 8 members of the parade bearing the same height, same structure and physique. PW2 was unable to identify anyone but PW1 identified the appellant by touching him by the shoulder and saying that *'he was the one'*. During cross-examination by the appellant PW6 testified that the appellant stood between the 1st and 3rd parade member when PW1 was called to identify the suspect and between member number 6 and 7 when he was identified by PW1. **PW7 PC Chris Manda** testified that on 21st January 2003 he was informed over a mobile phone call that a robbery was committed at Pesi Area. That the complainant at the scene gave the description of suspects enabling PW7 to inform Police Officers manning a roadblock along the Nyeri-Nyahururu Highway to be on the look out. After 15 minutes PW7 was informed that a person matching the description he had given to his colleagues had been arrested. The suspect who PW7 said was called Eutclius was interrogated and led PW7 to Kibathi area where he alleged that some colleagues of his, wanted by the Police for serious crimes were hiding in a locked house. PW7 ordered the occupants to come out but they declined to do so. PW7 then broke a window and two occupants, who included the appellant, came out. In this regard PW7 testified as follows:

"***The accused did not give us an explanation why they were locked inside. We did a search in the house but recovered nothing… we took them to Ndaragwa Police Station and later to the divisional CID office Nyahururu. Later an identification parade was conducted and the accused was identified by the complainant and some witnesses as the person who had broken into the nuclear offices and stolen. The other people were charged in another matter. Nothing was recovered from the accused."***

Under cross-examination by the appellant PW7 stated as follows:

"***We arrested you because you did not give us a satisfactory explanation why you were in a house locked from outside."***

In his unsworn defence the appellant testified that on 21st January 2003 at about 2.00 a.m. he was asleep with his cousin when he heard a knock at the door. People who said they were police officers forced the door open and beat the appellant seriously questioning him about people he did not know. He was arrested and taken to Ndaragwa Police Station and then paraded at an identification parade in Nakuru on 28th January 2003. According to the appellant he was picked from position 7 *(out of 9 members)* where a lady officer had ordered him to stand after the first identifying witness had picked a person standing at that position 7. He testified that he was not satisfied with the identification parade and that he was not at all connected with the robbery herein.

It is clear from the witness account that only PW1 identified the appellant at the identification parade. PW3 who was with him at the robbery scene was not called to participate in the identification parade despite his evidence that he had told the Police he would be able to identify the assailants if he saw them. PW2 on the other hand was unable to identify the appellant or anyone else. PW1 testified that it took him 10 minutes to identify the appellant at the identification parade. His evidence in this regard was:

"***I looked at you for 10 minutes before I pointed you out. I cannot recall how many months had passed from the time of incident to the time I attended the parade."***

His evidence, not being corroborated remains nothing more than the identification of a single identifying witness under difficult circumstances. It was held in the case of **Oluoch vs. Republic [1985] KLR 549** that such evidence is almost worthless hence the need to consider it with great caution and the requirement of the trial court to warn itself of the dangers of relying on such evidence when convicting an accused. Following the leading authority **Abdullah Bin Wendo** vs. **Republic [1953] EACA 156** the

Court of Appeal had this to say in the Oluoch decision:

"***It is trite law that a fact may be proved by a single witness but when such evidence is in respect of identification it must be tested with great care."***

The trial magistrate in the case under appeal did not warn himself of the danger of relying on the evidence of PW1 but instead considered the same as corroborated by the testimonies of PW2 and PW3 who did not identify the appellant at the parade trial. The learned trial magistrate had this to say concerning the testimonies of the above three witnesses:

"***As far as corroboration goes it does it come up any better than it has in this case. All three witnesses gave highly corroborated evidence."***

Going by the holding in the Oluoch decision the evidence of PW2 and PW3 did not enhance the testimony of PW1 at all. Concerning the fact that PW2 was unable to identify the appellant at the parade the learned trial magistrate had this to say:

"***It is also conceded that his ID parade took place more than four months after the commission of the offence. Memories do fade with the passage of time though not equally among individuals. So it should not surprise anyone that PW1 was able to pick someone at the parade while PW2 did not."***

The learned trial magistrate failed to consider the fact that PW1 took a whole ten minutes before he picked out the appellant at the identification parade. The witnesses testified that the robbery took between 3 and 5 minutes. This coupled with the period of time that lapsed between the time of the offence and the identification parade a doubt arises as to whether PW1 was not mistaken in his identification of the appellant. The problem posed by visual identification of witnesses has been considered severally by our courts. In **Section F.18 of Blackstone's Criminal Practice 1997** it is stated as follows:

"***a) Some persons may be difficulty in distinguishing between different persons of moderately similar appearance and many witnesses to crimes are able to see the perpetrators only fleetingly often in very stressful circumstances.***

b) Visual memory may fade with passage of time and

c) As in the process of unconscious transparence a witness may confuse a face he recognized from the scene of the crime with that of the offender."

We are of the view that by taking a whole 10 minutes looking at the appellant before identifying him at the parade PW1 clearly demonstrated this difficulty in identifying the attacker notwithstanding his testimony that his face was 'implanted' in his memory.

PW7 testified that he told the witnesses that the persons who robbed them 'may or may not be at the identification parade'. We do not consider that to have been proper given the holding in the Court of Appeal's decision in **Rex vs. Lulatikwa s/o Kabile alias Rutabaha s/o Kasese [1941] 8 EACA** at 46, thus '***it is dangerous to suggest to an identifying witness that a person he identified is believed to be present on the parade."*** PW1 stated that he identified the appellant by his facial features. Nowhere in the various witness accounts were the attackers' facial features described to anyone. The witnesses only mentioned the manner of dress. Clearly from the evidence of PW7 the appellant was arrested simply because he was found in a locked house following a lead by a stranger who had been arrested in connection with a different offence. He stated that the appellant failed to explain why he was in a house that was locked from the outside. Dismissing the appellant's defence the learned trial magistrate made a finding that by not explaining where he was on the day the offence was committed the appellant's guilt was established. After posing the question as to where the appellant was on the day of the incident the learned magistrate had this to say in his judgment:

"***The prosecution's evidence is that he was busy at the scene committing this offence together with others who are not in court. I have no doubt at all in my mind that the accused committed this offence."***

Considering what we have stated concerning the prosecution evidence we are of the view that the finding by the learned trial magistrate was erroneous and that by shifting the burden of proof to the appellant the learned trial magistrate clearly misdirected himself. Our conclusions therefore are that the charge against the appellant was not proved beyond reasonable doubt and the conviction and sentence were therefore not warranted. This being the case the appeal is hereby allowed. We quash the conviction and set aside the sentence and hereby order that the appellant be set at liberty forthwith. He is to be released from jail unless he is otherwise legally held.

Dated, signed and delivered at Nakuru this 11th day of June 2009

M. KOOME

JUDGE

M. G. MUGO

JUDGE

In the Presence of:

N/A - For State

Appellant - In person