BENSON MUTUKU MUNYIVA …….…… APPELLANT

VERSUS

REPUBLIC ……...…… RESPONDENT

(Appeal from original Conviction and Sentence in Senior Principal Magistrate's Court at Embu in Criminal Case No. 649 of 2005 dated 27th March 2007 by Ms L. W. Gitari – SPM).

J U D G M E N T

The appellant, **Benson Mutuku Munyiva**, was charged in the subordinate court with two counts of robbery with violence contrary to section 196(2) of the Penal Code. He pleaded not guilty but after full hearing, the learned Senior Principal Magistrate (**L. W. Gitari**) found him guilty as charged on both counts, convicted him and sentenced him to death. That sentence was erroneous. On this point, the court of appeal has said severally, and more particularly in the case of **Abdul Debano Boye & Another v/s Republic Criminal No. 19 of 2001** (UR) as follows:-

"**We have repeatedly said that where an accused person is convicted on more that one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalised before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentences of death is carried out? We can find no sense at all in such proposition and the long practice which we are aware of is that once a sentence of death is imposed the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."**

The appellant was not satisfied with that conviction and sentence and so he appealed to this court against both conviction and sentence. His grounds of appeal revolve around the question of identification, lack of corroboration and failure to adequately consider his alibi defence.

Brief facts as can be deciphered from the record are that the complainant **Virginia Wambugi Njuki** (PW1) was in her house on the night of 6th and 7th October 2004. At about 2.00 a.m. whilst praying she heard a loud bang. She was with her daughter **Linet Mukami Njuki** (PW4) the complainant in the second count and a maid called **Wanjiru**. She looked outside through the window and saw people saying in a chorus, that they were coming. She started screaming. Those people went by her sitting room window and started cutting the grills using an axe. Within no time the grills were down. Five of those people then jumped into the house through the window. They went to where PW1 was and demanded

money. She gave them Kshs.7,500/=. They told her that the money was insufficient. She was then hit on the shoulder with a blunt object. They demanded her mobile phone which she gave out. It's make was Samsung C.100. They also took her wrist watch make Seiko. The thugs then demanded to see the Mzee and started looking for him in the various rooms within the house. In the process they came across the maid from whom they robbed Kshs.1300/= and PW4 from whom they took a mobile phone make Nokia 1100 and Kshs.40/=. Two men demanded the keys from the complainant for her motor vehicle registration number KAC 191S a Toyota Hilux pickup that was packed outside. They led her to where the vehicle was and forced her to start it. Some of them then drove away in the motor vehicle leaving behind two in the house guarding PW1 & 4. After a short while the two also left on foot. The pick-up aforesaid however overturned after a short distance and two of the robbers died instantly. The incident was reported to the police. PW4 claimed to have identified the appellant during the robbery and gave his description to the police. Later on 16th February 2005 the appellant was arrested in connection with a spade of robberies in the neighbourhood. PW4 was subsequently called and she was able to identify the appellant from the identification parade that was conducted by **C.I.P Benjamin Gitonga** (PW6). The appellant was then charged with these offences.

The appellant in his defence gave a sworn statement of defence and told the court that on 5th October 2004 he was in Mombasa on duty as a transporter. He was ordered to go to Chemilil from Mombasa by his employers where he reached on 7th October 2004. He thereafter left Chemilil on 9th October 2004 for Mombasa and reached thereat on 11th October 2004. He continued working up to February 2005 when he was arrested. Essentially the appellant advanced an alibi defence.

The above facts were analysed and evaluated by the trial court which reached the conclusion that the appellant had been positively identified and therefore guilty of the offences charged.

In support of the appeal, the appellant tendered written submissions which we have carefully read and considered.

Mr. Omwenga, learned Senior state counsel opposed the appeal. He submitted that the identification of the appellant was free from error. PW4 who identified the appellant had ample time with him, there was ample light in the house and she gave a description of the appellant to the police soon after the robbery. This description was the basis of the identification parade that was properly conducted. Finally, he submitted that the alibi defence of the appellant was considered and rightly rejected by the learned magistrate as it was displaced by the evidence of identification.

This court as the first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so, we have to appreciate that we did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that – **Soki v/s Republic (2004) 2 KLR 21**; **Kimeu v/s Republic (2002) 1 KLR 756**.

The conviction of the appellant turned on the evidence of identification by PW4. PW1, her own mother who was in the same house as PW4 was however unable to identify any of the robbers, the appellant included for as she stated it was dark. The other person in the house was a maid by the name **Wanjiru**. However she was never called as a witness. As it is therefore we have evidence of identification by a single witness in difficult circumstances. Because of that, there is need for caution as has been stated in many cases by the court of appeal, for example **Abdalla Bin Wendo and Another v/s Republic (1953) 20 EACA 166**, **Roria v/s Republic (1967) E.A. 583** and **Maitanyi v/s Republic (1986) KLR 198**.

We have anxiously considered the issue of identification of the appellant and it is our view that, that evidence was insufficient to find a conviction. Evidence of the existence of light from the lantern lamp came from PW4 but wasn't collaborated at all by any other witness. Indeed PW1 stated "**I was not able to identify anybody when they were in my house I was shocked and the robbers had torches and me I was in the dark."** On the other hand, PW4 stated that "**I was asleep when my mother came and woke me up after she had commotion outside"** why did PW1 fail to mention the existence of light in PW4's room had it had been there? Why did the prosecution fail to summon the maid who was together with PW4 in support of this aspect of light in the room. In any event neither the trial court nor the

prosecutor delved in to the questions as to the source of light, its intensity, its position relative to the appellant and the time taken by PW4 to observe the appellant so as to be able to positively identify him subsequently. These enquiries as stated in the case of **Maitanyi (supra)** are mandatory failing which the conviction would be considered unsatisfactory. Though PW4 and the maid were ordered to come out from under the bed and gave out money, PW4 testified that "**I went to the bedroom and was confused and the house girl was at (sic) already under the bed and she called me and I joined her."** She went on to state that she was traumatised. She categorically admitted that for all the seven minutes that the robbery took place she was in utter

confusion and feared for her life. No wonder she hid under the bed. She may thus have mistakenly identified the appellant with others due to such trauma.

PW4 did give a description of the appellant to the police as medium size, dark and speaking frequently in Kiswahili. She admitted though that, the description fitted many people in Kenya. She never even gave any special marks or clothing that would have enabled her to remember the appellant four months after crime. This is when the identification parade was conducted. There is no evidence in any case that the appellant fitted that description.

We also think that the trial magistrate erred in law and fact in admitting identification parade evidence to collaborate the alleged visual identification of the appellant. It does even appear that the said identification parade was carried out in breach of the police standing orders. One of

the requirements in the standing orders is that "**If the witness desire to see the accused/suspect person walk, hear him speak, see him with his hat on or off, this should be done but in this event the whole parade should be asked to do likewise."** It is apparent that during the identification parade, PW4 asked the appellant to speak and he did. However no other member or members of the parade were asked to do likewise. Accordingly the parade was not conducted with scrupulous fairness as required. It was thus prejudicial to the appellant. That being the case the value of the identification as evidence was again weakened. In any event, the identification parade was conducted on 23rd February 2005, yet the robbery was committed on the night of 6th and 7th October 2004. This was slightly over 4 months after the event. In those circumstances it cannot be said that the appellant's appearance at the scene of crime was still vividly registered in the mind and or memory of PW4 to enable her positively identify the appellant on the identification parade.

It is common knowledge that memory tends to fade with the passage of time.

It should also be born in mind that the appellant had not been arrested on the basis of the description given by PW4. Rather he had been arrested by the OCS, Embu Police Station on suspicion of having participated in a spade of robberies within Embu town. Once in custody, PW4 was contacted to come and possibly attempt to identify the appellant. In those circumstances the possibility of mistaken identity cannot be wholly ruled out.

When all the foregoing is considered, it is our firm view that the trial court erred in not treating the evidence of identification with scrupulous circumspection. The court did not even warn itself of the dangers of convicting the appellant on the evidence of single identifying witness in difficult circumstances.

As for alibi defence, it is now settled that an accused person who raises the defence of alibi does not have the burden of proving that defence – See **Sekitoleko v/s Uganda (1967) E.A. 531** and **Kiarie v/s Republic (1984) KLR 738**. In this appeal, the trial magistrate's finding that the appellant was picked up during the parade and his alibi defence was not therefore untenable since he did not say who his employer was or which transport lorries he was working with, was most unfortunate, because it tended to shift the burden of proving the alibi to the appellant.

In the result, we allow the appeal, quash the conviction on both counts and set aside the sentence of death imposed on the appellant "**.... on both counts as by law provided."** The appellant will be released

forthwith, unless otherwise lawfully held.

Dated and delivered at Embu this 27th day of October 2009

M. S. A. MAKHANDIA

JUDGE

WANJIRU KARANJA

JUDGE