REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 245 of 2007

PETERSON GATHERU WACHIRA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Karatina in Criminal Case No. 827 of 2006 dated 24th July 2007 by P. C. Tororey – Ag. P.M.)

J U D G M E N T

The appellant, **Peterson Gatheru Wachira** was convicted by the Ag. Principal Magistrate at Karatina law courts of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal.

The particulars of the charge alleged that on 20th day of August 2006 at Kiamwangi village in Nyeri District of the Central Province, jointly with others not before court while being armed with pangas and an axe, robbed **Lawrence Kimuri Kaigwa** of one Camera make Olympus, one television set make Goldstar 21" colour, one video recorder make Panasonic, one shaving machine make home cut, one smoother make Philips, one mobile phone make Erickson T65, mobile phone make 02, mobile phone make Siemens, mobile phone make Erickson R320 and cash Kshs.10,000/= all valued at Kshs.67,000/= and at or immediately before or immediately after such robbery threatened to use actual violence to the said **Lawrence Kimuri Kaigwa**.

The complainant, (PW1) on the night of 20th August 2006, was asleep with his family in his house at Kiamwangi village when at about 2.00 a.m. they were rudely awoken by a loud bang on the bedroom window. The complainant woke up in a jolt and saw several spotlights outside and a voice ordered him to open the door. He dressed up but those people outside were getting impatient and demanded whether he would voluntarily open the door or they force themselves in. Before he reached the sitting room the bedroom window was broken. He switched on the sitting room lights and opened the door. In walked two people who were armed with a panga and an axe respectively. They demanded money from him and his wife (PW2). In the meantime they went about stealing from the house the items particularised in the charge sheet as they ordered them into the bedroom and back to the sitting room. They threatened to kill PW1 if he did not produce more money. Once satisfied with what they had got they demanded keys to

PW1's car and they were given. They walked out and ordered them to lock the door. Soon thereafter, one of the robbers came back and threw the car keys back at them. Neighbours who had heard the commotion at PW1's residence responded by contacting the police who arrived shortly thereafter. The complainant and his wife **Lilian Warima Kimuri**, (PW2) had however managed to identify one of the robbers among the group courtesy of the electricity light in the bedroom, sitting room as well security lights in the compound. That person according to them was the appellant. On the 28th August 2006 PW2 spotted the appellant in Karatina town whilst at the co-operative bank and alerted the police. She followed him to a hotel in town. When the police arrived led by **P.C. Christopher Ndegwa** (PW3) she pointed him out to them. The appellant was then arrested and escorted to Karatina police station. PW2 had also alerted PW1 who joined her at the police station. At the police station, the appellant was searched and a mobile phone recovered from his pockets. The mobile phone was positively identified by PW1 and PW2 as belonging to them. PW1 produced a receipt as proof of purchase which had the serial Number of the mobile phone. The mobile phone was checked and found to bear the same serial number as that on the receipt. The said mobile phone was among the items stolen from their home on the night of robbery. The appellant was subsequently charged with the offence.

Put on his defence the appellant denied the charge and in his sworn statement of defence stated that on the material day he was in Nairobi where he had gone to sell vegetables. He had travelled to Nairobi with one **Gerald Kamau** a business associate on the 19th August 2006 and did not return until the 23rd August 2006. On the 28th August 2006 he was with the said **Gerald Kamau** in Karatina town at fresh milk café when two police offices walked in accompanied by PW1, PW2 and arrested him. He was escorted to the police station and was later charged. He maintained that this was a case of mistaken identity as he was away in Nairobi during the day of alleged robbery.

The trial magistrate made findings of fact that PW1 and PW2 positively identified the appellant as having been among those who robbed them on the material night. In identifying the appellant, they were assisted by sufficient light obtaining during the robbery. That shortly thereafter, the appellant was sighted in town by PW2 who contacted the police who came and arrested the appellant. Upon search he was found in possession of mobile phone belonging to PW1 & 2 and which had been stolen during the robbery. The mobile phone was positively identified by both PW1 and PW2 by way of documentary evidence. The appellant offered no explanation as to how he had come by the mobile phone hence the application of the doctrine of recent possession in convicting the appellant.

The grounds advanced by the appellant in his petition of appeal are that the learned magistrate did not appreciate that his identification was dock identification, that the learned magistrate misapprehended the doctrine of recent possession, prosecution evidence was full of contradictions and finally that the learned magistrate erred in law and fact by failing to consider his defence adequately.

In support of the appeal, the appellant submitted orally that the charge was defective in that it showed that he had been arrested on 20th August 2006 when in fact he was arrested on 28th August 2006. That the charge sheet had not been signed by the OCS of the police station as required. That PW1 and PW2 had no sufficient time to identify him as the robbers had ordered them to lie down. There was also evidence that PW1 and PW2 were scared during the time of robbery which must have impeded their observation of the robbers. He denied having been found in possession of the mobile phone. In any event, the charge sheet did not mention the mobile phone allegedly recovered from him. Further had he been found in possession as alleged he would have faced an alternative count of handling stolen property.

The appeal was opposed. **Mr. Makura**, learned Senior State Counsel submitted that contradictions in the charge sheet if at all were not fatal and are in any event curable under section 382 of the criminal procedure code. PW1 and PW2 had sufficient time to identify the appellant as the attack took between 15 to 20 minutes. When the appellant was arrested 8 days later, he was found in possession of a mobile phone that was positively identified by PW1 and PW2. The doctrine of recent possession was therefore properly invoked. The evidence against the appellant was thus overwhelming.

Re-evaluation of the entire evidence tendered in the trial court by this court as a first appellate is a must. It is a duty cast and or imposed on this court by law. We have to reconsider the evidence, evaluate

it and draw our own conclusions in deciding whether the judgment of the trial court should be upheld. That duty has been spelt out in many cases including **Okeno v/s Republic (1972) E.A. 32**.

The evidence of visual identification of an accused in difficult circumstances causes a lot of anxiety and must be tested with the greatest caution and can only be a basis for a conviction, if it is absolutely water tight. The way to approach it was set out in the celebrated English case of **Republic v/s Turnbull (1976) ALL E.R 459** as well as **Maitanyi v/s Republic (1986) KLR 198**. In the **Turnbull** case the **Lord Chief Justice** gave the following directions:

"***First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.***

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

Much as the learned magistrate did not conduct the inquiry aforesaid word by word, we have no doubt at all that she had the same at the back of her mind. In any event this was not identification by a single witness. They were 2 identifying witnesses. No doubt the identification of the appellant was in difficult circumstances. It was at night. PW1 and PW2 had just been jolted out of their sleep by the thugs banging on the bedroom window and threatening them with all manner of consequences in the event that they failed to open the door. However we agree with PW1 when he states under cross-examination by the appellant that "**..... You were the one who was talking to me and I saw you clearly. The fact that I was shocked could not prevent me from having a good look at you....."** There is evidence that there was electricity light in the house in which the robbery was committed. There was electricity light both in the bedroom and sitting room. There was also security lights outside. The totality of the foregoing is that PW1's house was sufficiently lit. That fact has not been discounted. The appellant together with his cohorts spent a considerable period of time with both PW1 and PW2. According to PW1 they took about 15 to 20 minutes. However PW2 estimated that they took about 30 to 40 minutes. Despite this discrepancy, the bottom line here is that the appellant and the two witnesses were together for a considerable period of time. There is evidence that the appellant had not covered his face and or disguised himself in any manner. In other words he was not disguised at all as would have made his identification difficult. According to the two witnesses he appeared to be the gang leader and was doing most of the talking. The gang moved with these witnesses from the sitting room to the bedroom and back to the sitting room. All this time lights in the sitting room and bedroom were all on. There is no evidence that the gang switched them off and or ordered that they be switched off, nor is there evidence that the gang ordered these witnesses not to look at them. We want to belief that throughout these movements PW1 and PW2 were at arms length and or in close proximity with the appellant and his team and since the lights were on, identification of the appellant would not have been that difficult. Indeed PW1 first noticed the appellant as he entered the house. Again this appellant was seen by PW2 as he returned and threw the car keys back at them. The evidence on record also shows that PW1 and PW2 both told the police in their first report that they could easily identify the appellant if they saw him again. In fact PW1

even gave a general description of the appellant to the police. There is no evidence of a grudge between the appellant and PW1 & 2 as would have catapulted them to frame him with the case. That being the case, we have no doubt at all that the appellant was positively identified at the scene of crime. We do not accept therefore that his identification was dock as claimed by the appellant.

The appellant believes that he was a victim of mistaken identity. However arising from what we have discussed above, we entertain no such doubts. The appellant was positively identified at the scene of crime by both PW1 & 2. Indeed it was out of this positive identification that when PW2 next saw the appellant in Karatina town 8 days after the robbery she was able to easily recognise him. She thereafter called the police. As fate will have it, when arrested and searched he was found in possession of a mobile phone belonging to the two and which had been stolen during the robbery. That mobile phone was positively identified by the two through the purchase receipt. The appellant offered no explanation for his possession of the phone. If anything, he claimed that the phone was planted on him. There is nothing on record to justify why both PW1, 2 and 3 would do such a thing. The appellant however feebly referred to an alleged grudge between him and **P.C. Odongo** over his refusal to have his sister marry **P.C. Odongo**. **P.C. Odongo** first and foremost did not testify. In any event we do not consider the reason advanced by the appellant for the alleged grudge credible. There is no rom here for transferred grudge. Further during the search on the appellant, it was not in the presence of **P.C. Odongo** alone. There was PW1, PW2 and PW3 with whom the appellant had no grudge. That being the case we do not see how these witnesses could easily have been recruited by **P.C. Odongo** to frame the appellant. Therefore just as the trial court, we reject the notion advanced by the appellant that he was framed in this case.

The appellant too has advanced the argument that the charge sheet did not mention the alleged phone recovered from him as aforesaid and that he should have been charged with an alternative count of handling stolen property if it was true that he was found in possession of the mobile phone. We have perused the particulars of the original charge sheet and noted that in the particulars thereof there is in fact mention of mobile phone make Erickson T65 among items stolen though indicated as a shaving machine in the typed record of proceedings. To us this is a typographical error and therefore nothing turns on that submission. The choice as to how many charges should be preferred against a suspect is entirely at the discretion of the investigating officer. There is no mandatory requirement that a person charged with a main count of say, robbery with violence if found with items stolen during the robbery must of necessity be charged with handling the same. Again therefore nothing turns on this submission.

The appellant was in recent possession of the mobile phone. He did not give an explanation to account for his possession. He merely claimed that the same was planted on him. In the circumstances, there is a presumption that he was among those who robbed PW1 & 2. See **Andrea Obonyo v/s Republic (9162) E.A. 542**. This evidence was strong and independently proved the guilt of the appellant. The learned magistrate was therefore right in invoking that doctrine in convicting the appellant.

With regard to the charge sheet it clearly shows that the appellant was arrested on 20th August 2006 and taken to court on 8th September 2006. However from the recorded evidence it is apparent that the appellant was indeed arrested on 28th August 2006. That is what PW1, PW2, PW3 and PW5 stated in their testimony. Indeed even the appellant in his own sworn statement of defence conceded that much. We think in the circumstances that reference in the charge sheet that the appellant was arrested on 20th August 2006 was inadvertent error. It is in any event curable under section 382 of the criminal procedure code. 20th August 2006 was the date when the robbery was committed. The appellant was not arrested on the same day of the robbery. Rather it was after 8 days. It could not therefore have been possible for the appellant to be arrested on 20th August 2006. The original charge sheet also shows that it was signed by both the OCS, Karatina police station and the learned magistrate contrary to the submissions of the appellant.

The defence of the appellant was duly considered by the learned magistrate and rejected and correctly so in our view. In the light of the overwhelming prosecution evidence that conclusion was inevitable. It was however unfortunate that the magistrate as she considered the defence made comments suggestive of shifting the burden of proof to the appellant when she required of the appellant to prove that he was in the

business of buying and selling vegetables, prove of having a hired a lorry to ferry such vegetables to Nairobi and receipts for the lodgings he spent the nights in whilst in Nairobi. It is trite law that an accused need not prove his innocence. The burden of proof never shifts from the prosecution to an accused person save in very few, rare and limited cases. This was not one of those cases. However considering the evidence led by the prosecution in this case, much as those observations by the learned magistrate should be deprecated, the evidence was nonetheless watertight and the appellant's conviction was inevitable. We do not think therefore that the appellant was prejudiced at all by those comments.

For those reasons, we are satisfied that the appellant was properly convicted. The appeal has no merit and it is dismissed.

Dated and delivered at Nyeri this 19th day of November 2009

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE