



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang & Dulu, JJ)

CRIMINAL APPEAL NO. 27 OF 2005

BETWEEN

PETER GITUMA KAMICHOLE.....APPELLANT

-AND-

REPUBLICRESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Ms. Muchira, dated 11th January, 2005 in Criminal Case No. 2749 of 2004 at Kibera Law Courts)

JUDGMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya), the particulars being that he, on 22nd August, 2003 at Second Ngong Avenue within the Nairobi Area, jointly with another person not before the Court and while armed with a pistol, robbed **Bernard Wanjohi Karia** of one cellphone, Motorola T.190 and cash in the sum of Kshs.5,000/= ? all valued at Kshs.11,500/= ? and at, or immediately before, or immediately after the time of such robbery, used actual violence upon the said **Bernard Wanjohi Karia**.

PW1, **Bernard Wanjohi Karia** testified that on 22nd August, 2003 at about 9.00 a.m. he was walking from Fairview Hotel to Kenyatta Hospital when, on reaching Second Ngong Avenue he met the accused and another person. Even as the appellant herein stopped PW1 to ask him the way to some building, the appellant's companion drew a pistol, pointed it at PW1, and demanded all the valuables he had on him. When PW1 said he was carrying dialysis material for his brother who was undergoing dialysis in hospital, they said they did not want these. He gave the two strangers Kshs.5000/= which was for his brother's dialysis, and they also grabbed his Motorola T.190 cellphone, after which they walked away. PW1 then went to Central Police Station in Nairobi, and reported the incident. Then later, on 1st November, 2003 at about 6.00 p.m. PW1 was walking along 1st Eastleigh Avenue in Nairobi and saw the appellant herein. He followed the appellant who was in the company of someone else, and the two entered a lodging. PW1 reported the matter to the Chief's Camp, and he was given two officers who went into the lodge with him, and arrested the accused. In disputed circumstances, the Police released the appellant herein. Then on 9th April, 2004 PW1 again saw the appellant, in the company of somebody else, along Haile Selassie Avenue in Nairobi. On that occasion PW1, with the help of a mini-bus driver, arrested the appellant herein, and took him to Kilimani Police Station. After the appellant was charged, his relatives began calling PW1 asking him to stop the criminal proceedings, in return for payments; but he refused the deal. PW1 had

recognized the appellant herein from his facial appearance; on the face there was a scar on the forehead; and he had another scar on the left forehead; and he had another scar on the left fore-arm. The robbery incident which led to this case had lasted some two minutes.

On cross-examination, PW1 said it had been drizzling at the time of the robbery, and it was difficult then to follow the robbers. He said he had informed the Police he could recognize the robbers if he saw them. He said there was no grudge between him and the appellant herein. He said he had not recorded at the Police station the scarred features that marked the appellant's face and hands.

PW2, **Joseph Kamwangoya Gichuru**, who is the complainant's uncle, testified that PW1 had called him on 1st November, 2003 to say he had arrested the man who stole his mobile phone and he was at Eastleigh Chief's Camp that moment. PW2 went to the Chief's Camp, and assisted the Police to get the appellant herein to Kilimani Police Station by taxi.

On cross-examination, PW2 said the appellant herein was the person who had been under arrest at Eastleigh Chief's Camp, and whom he helped the officers at the Chief's Camp to take to Kilimani Police Station. He had not known the appellant before that occasion.

PW3, **Monica Wangui** testified that she lives on Ngong Avenue, and PW1 is her cousin. PW3 was at Kenyatta National Hospital on 22nd August, 2003 at 12.00 noon when PW1 arrived there, and told her he had been robbed of his cellphone and money. PW3 then took PW1 to Kilimani Police Station to make a report.

PW4, Police Force No. 53991, **P.C. Nelson Osoi** of Kilimani Police Station, gave evidence that he was on duty on 9th April, 2004 at 2.55 p.m., when the appellant herein was brought in by PW1, with the accusation that the appellant had robbed him of Kshs.5000/= and a cellphone, Motorola T190; the robbery had taken place on 22nd August, 2003 along Second Ngong Avenue in Nairobi. PW1 had duly reported the said robbery incident on 22nd August, 2003, OB. No. 44/03. PW4 interrogated PW1 and the appellant herein. PW4 found that PW1 could identify the appellant and had on an earlier occasion seen the appellant at Eastleigh and had arrested him and taken him to the Chief's Camp where, somehow, the appellant had been released. The appellant did not dispute those facts, and PW4 then laid a charge against him. He did not recover anything from the appellant herein.

When put to his defence, the appellant elected to make an unsworn statement. He said he lives at Eastleigh and is a seller of a stimulant-herb known as *miraa*. He said he had been going to work when he was arrested. He said he had been charged over an offence he knew nothing about.

The learned Magistrate approached his verdict by marking out *identity* as the turning point of the case. She then proceeded as follows:

“PW1 said he told [the] Police he would identify his robbers if he saw them. It was 9.00 a.m. It was drizzling but PW1 said he saw [the] robbers well. In about [half a month]...PW1 met [the] accused in Eastleigh and he recognized him. It was 6 p.m. PW1 called [the] Police, and they arrested the accused in a lodging he had walked into. Over unclear circumstances [the] accused is released from Police custody. On 9th April, 2004, about five months after, PW1 spots [the] accused [at the] Town centre. With the help of members of the public, the accused is arrested.

“I find these three attempts [to show] PW1's dogged determination to [bring the] accused to book, for having robbed him. I have no doubts that, as PW2 corroborates, PW1 had truly identified [the] robber of 22nd August, 2003 on 1st November, 2003 when he called PW2 at 8.00 a.m. to assist him as [the] accused was being released from lawful custody [in] dubious circumstances. I do not have doubts that on the morning of 22nd August, 2003 [the appellant herein] together with another, while armed with a pistol, robbed PW1 of the items [specified]. I find the prosecution has proved its case beyond reasonable doubt. I find the

accused person guilty as charged, and convict him.”

Consequently, the learned Magistrate sentenced the appellant herein to death, as mandated by law.

In his grounds of appeal, the appellant contends that he was convicted on the basis of mistaken identity; that the trial Court had erred in convicting on the testimony of a single identifying witness; that the trial Court had erred in rejecting his defence statement; that proof beyond reasonable doubt had been achieved. The appellant developed these points in written submissions which he brought along and placed before the Court.

Learned State Counsel **Mr. Makura** conceded to this appeal, on the ground that the conviction was not safe; that though conviction was predicated on identification by PW1, he was the sole identifying witness, and so the Court should have warned itself of the dangers attendant upon entering a conviction on that basis.

Counsel urged that the fact that the effective arrest of the appellant took place some eight months since the robbery incident, and the crime had been transacted over a brief period of some two minutes, lessened the certainty of accurate identification, and thus, rendered the conviction recorded an unsafe one. He submitted that since no witness apart from PW1, had brought forth any testimony implicative of the appellant as regards the commission of the crime itself, the evidence available to the Court was threadbare, and ought not to be held to found a proper conviction.

We have reviewed the facts of this case carefully as we are required to do as a first appellate Court. It is not our understanding that learned State Counsel is portraying as naught what the learned Senior Resident Magistrate aptly described, in relation to the complainant, as “dogged determination to [bring the] accused to book for having robbed him.” Indeed, such a steadfast, and public-spirited determination to activate the nuts-and-bolts for confronting criminal conduct, has all our praise, and deserves to be lauded. The complainant went beyond the call of duty, and did all he could.

But that brings us beyond the good citizen’s moral duty, and into another realm which is defined by specific *rules of law*, namely, the safeguards for a fair criminal trial. The governing law is s.77 of the Constitution of Kenya, which thus stipulates:

“(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence ?

a. shall be presumed to be innocent until he is proved or has pleaded guilty...”

The controlling principle pans out into specific rules of *evidence* and *procedure*, which ordain that conviction can only be entered on the basis of proof by the prosecution beyond reasonable doubt. Thus, where *identification* is the turning point in the prosecution case, then safe and secure identification is required that is, in general, supported by corroborative evidence.

Learned State Counsel **Mr. Makura** has highlighted elements in the instant case which would show that the circumstances in which identification of the appellant herein had taken place, would not meet the test of certainty and accuracy; and so there exists a chance that the wrong person could have been convicted. When there are *doubts*, in criminal trial, it is an established judicial practice that they are to be resolved in favour of the accused.

We think that absolute certainty was not achieved, in the instant case, as regards identification of the appellant as the robber of the morning of 22nd August, 2003. We accord this benefit of the doubt to the appellant herein, and allow his appeal. We acquit the appellant, and set aside the conviction and sentence. The appellant shall forthwith be released from custody, unless otherwise lawfully held.

Orders accordingly.

DATED and DELIVERED at Nairobi this 26th day of February, 2008.

J.B. OJWANG G.A. DULU

JUDGE JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Mr. Makura

Appellant in person