



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

CRIMINAL APPEAL 611 OF 2004

BENSON MADARA APPELLANT

-AND-

REPUBLIC RESPONDENT

*(An appeal from the Judgment of Senior Resident Magistrate Ms. Mwai dated on 6th December, 2004
in Criminal Case No. 174 of 2004 at Kibera Law Courts)*

JUDGMENT OF THE COURT

Benson Madara, the appellant herein, faced a charge of robbery with violence contrary to s, 296(2) of the Penal Code (Cap. 63, Laws of Kenya). This charge was particularized as follows: the appellant, on 4th January, 2004 at Dam Village, Kangemi in Nairobi, acting jointly with others not before the Court, and while armed with a pistol, robbed **Daniel Ndirangu Mwangi** of a Siemens C-36 mobile phone and cash in the sum of Kshs.7,000/= all valued at Kshs.12,000/= and at, or immediately before, or immediately after the time of such robbery, used actual violence upon the said **Daniel Ndirangu Mwangi**. PW1, **Daniel Ndirangu Mwangi**, a shop-keeper at Dam Village, Kangemi testified that on 4th January, 2004 at about 8.30 pm he was in his shop with his wife and a neighbour, **Jane Wanjiru Gathii**. Some people then came along at that time, three remaining at the window, and two entering the shop through the door which had not yet been closed. One of the two drew a pistol, and ordered those in the shop to remain still. This man who had a pistol, was wearing a whitish shirt and a cap. When the two men ordered those in the shop to lie down, PW1 sought to know why, and, for this, he was hit on the head with the pistol. PW1, his wife, and **Jane Wanjiru Gathii** lay down. In the meantime, the two intruders searched the shop's cash-box, and grabbed Kshs.4,000/=. and also took a separate box in which PW1 had kept Kshs.3,000/=. They grabbed PW1's mobile phone, a Siemens C-36, and took off. PW1 stood up, raised alarm by screaming, and followed the thugs. He gave chase after one of them, up to a distance of 1 Km away. One of those thieves was arrested by members of a local security firm. PW1 got to the place where the arrest had been effected, and indicated that the man arrested had been one of the robbers and was one of the two who entered the shop. This arrested man, PW1 testified, was wearing no mask, and PW1 was able to observe his face. Inside the shop there had been a pressure lamp, and this enabled PW1 to see that the man arrested was not the one who had the pistol; but he was the man who took PW1's money. PW1 testified that the arrested man was the one urging him to respond fast to the demands of the robbers; and it was this arrested man who was now under trial. The arrested man was handed over to Police officers at Kabete Police Station.

The security firm personnel who had arrested the appellant herein told PW1 that when the arrest was effected, the appellant dumped a wooden box, which was referred to as a “home-bank”; and PW1 identified this box in Court as his, which had been taken away by the robbers.

PW2, **Francis Ogalo** is a security guard who stays at Kangemi and works with K.K. Security. His work-station is Kangemi, and he said he knew the appellant herein. PW2 was on duty on 4th January, 2004 when he heard people screaming; so he went to the gate to see what was happening. He saw five people running away, and three people giving chase. PW2 gave chase and intercepted two of those running away. He held one of them by the jacket, and noticed that this man had a toy pistol. One of the men escaped, but PW2 held onto one; he pressed on his security remote-control device, got back-up support, and arrested the appellant herein. It is at that point of arrest, that the “home-bank” was recovered. The complainant (PW1) came along when PW2 had already arrested the appellant herein; and he identified the appellant as one of those who had robbed him (PW1).

PW3, **Fridah Nkiathe**, said he knew the appellant and the complainant. She was in the shop with PW1 and a friend, watching television, when several people intruded upon them and ordered those in the shop to lie down. Two men, one brandishing a gun, entered the shop, leaving three outside. PW3 was at the time holding a child; she was hit by one of the intruders, who ordered her to lie down. The attackers took money, a mobile phone, and a “home-bank”. When those thugs started pulling away the television, PW3’s husband (PW1) screamed in protest, and the gang took off. As to how much PW3 saw, she said: *“I was not able to identify some of the people. [The] accused was one of those outside. I did not see him well, to [perceive] what he was carrying as I was lying down”*. It was PW3’s testimony that PW1 and the neighbour gave chase, as the thieves were running away. PW3 identified the wooden-box in Court as the “home-bank” that was stolen from the shop. This “home-bank” was now broken, but it was intact when stolen. PW3 saw one of the robbers hit her husband (PW1) with a pistol.

On cross-examination, PW3 said the appellant had been standing in the shop, and had been coming and going out, while two of the intruders remained in the shop for as long as the robbery attack lasted. PW3 said she had been forced to lie on the ground, and from that position, she had seen the appellant’s face. There had been a pressure lamp in the shop, which lit both the inside and the outside. PW3 said the appellant herein had been wearing a brown shirt, at the time of the robbery.

PW4, **Jane Wanjiru**, a salon worker staying at Kabete, was in PW3’s shop on the material date and time, watching television. A young man then entered the shop and ordered those in the shop to lie down and give him and his accompanying intruders, money. This young man was holding something which looked like a gun. The shop was lit. Two of the intruders entered the shop. PW4 did not lie down as demanded, but the robbers overlooked this as they were pursuing PW1 with demands and even hit PW1 on the head. These intruders, in PW4’s testimony, took money as well as a box, and ran away. Three of the robbers had been standing at the window of the shop, issuing threats, while two of their colleagues carried out theft inside the shop. PW4 could see the three, and she testified that the appellant herein was one of them; in PW4’s words, *“I saw him. Then we screamed and the man started running away, and [we] followed them. We were assisted by security people, to arrest the accused. I even pointed him out. Then the box was found; it is this one”*. Also pertinent on the issue of identification, is the following statement by PW4: *“I followed you and was present when you were arrested. I was able to identify you because of the clothes you were wearing. You were wearing the same clothes that you are wearing [a brown shirt]. We chased you and you were arrested We had followed you shouting ‘Thief! Thief!’ until you were arrested I even hit you when you tried to say you were not the one, and yet I had seen you as we were robbed”*.

PW5, Police Force No. 49971 P.C. **Samuel Ileri**, of Kabete Police station, testified that he was at his place of work on 4th January, 2004 at 8.40 pm when the appellant herein was brought by K.K. Guards, the complainant, and members of the public. The complainant reported that the appellant herein had been arrested after stealing from his shop. The appellant was brought along with certain exhibits, notably a wooden box-safe, the property of the complainant. PW5 confirmed that he had re-arrested the appellant herein.

PW6, **Dr. Zephaniah Kamau** testified that he is a Nairobi Area Police surgeon and that, in this capacity, he examined PW1 on 10th January, 2004, six days after the alleged assault on the head by robbers. On the upper part of PW1's head, PW6 found a scar which, in his opinion, had been caused by a blunt object. For this injury, PW1 had already been treated at Muteitone Clinic. The injury, in PW6's assessment, fell within the category of "harm".

When put to his defence, the appellant gave unsworn evidence in which he said that on the material date he was walking to his home in Kibera when there was a sudden commotion on his way, and he only saw people "running helter skelter"; so he also started running and, as he took to his heels, somebody just grabbed him and the two of them fell down together; he told his captor his name, and informed the captor he was only going home; but the man arrested him and took him to the Police station; and he was shocked when he was re-arrested and confined in the Police cells. He said the Police charged him with an offence he knew nothing about.

The following passage shows how the learned Senior Resident Magistrate arrived at the conclusion that the appellant herein had committed the offence of robbery with violence:

"The accused denied that he was involved. He claims that he was mistaken for a robber. The issue of the identification of the accused person arises; witnesses PW1, PW3 and PW4 were however categorical that they saw the accused among the robbers. They said that there was light from a pressure lamp in the kiosk Furthermore, they followed the robbers immediately. They ran after [the] [robbers, shouting], 'Thief! Thief!' The accused was arrested by PW3 out of a group of five men who were being chased by the mob, and the money-box was found not far from where he was arrested.

"Having considered all the above, I am satisfied that the accused person's identification was positive. He was identified by three people who saw him and there was light that would have [enabled] the witnesses [to] see him. His arrest as he ran away also goes to give support to the prosecution's case [The] accused's claim therefore, that he was mistaken for the thief, is thus dismissed as untruthful".

The learned Magistrate found the appellant guilty, convicted him, and sentenced him to death in accordance with the law.

The appellant comes before this Court, on appeal, urging that the prosecution evidence was fraught with contradictions; that poor visibility did not allow a positive identification of him; that the wooden-box exhibit could not be attached to him as at the time of recovery, because of poor visibility prevailing then; that the trial Court failed to accord his defence due consideration.

The appellant urged the foregoing points verbally and in writing, and contended that the prosecution witnesses had given false testimony.

Learned State Counsel, **Ms. Gakobo** contested the appeal, and urged that conviction be upheld and sentence affirmed. She urged that the appellant had committed robbery against the complainant and had been positively identified at the *locus in quo*. She submitted that the testimonies of PW1, PW2 and PW4 shows that the scene was well lighted, by means of a pressure lamp, and the witnesses clearly saw the appellant as one among the gang of five robbers. Not only was the appellant clearly perceived by PW1 as he was the one harassing PW1 and grabbing money from PW1, but the hot-pursuit chase following the robbery, made it possible to keep track of the five robbers and, the appellant being among them, was arrested only a short while later. Counsel attached much importance to the evidence of PW2, the security man who chased all the five thugs, arresting two, one of whom then escaped, and the remaining one being charged in Court and later, now, being the appellant herein. **Ms. Gakobo** submitted that the evidence of identification was free from any possibility of error, and that, the appellant herein was rightly convicted.

This Court has found no shortcoming with PW1's evidence of identification, and the evidence of other witnesses is substantially consistent with it. The evidence of the medical doctor (PW6) further fortified that of PW1, PW3 and PW4 who saw a member of the gang hitting PW1 on the head with a gun. Apart

from the reliable evidence of PW1, PW3 and PW4 who, in the light emitted by a pressure lamp, saw the appellant as one of the robbers, the chase-and-arrest scenario, in which the alarm led PW2 to effect arrest, and several witnesses then soon arrived to identify the appellant as one of the robbers, provides a powerful corroborative circumstance which, when viewed together, tells only a true tale: that the appellant was one of the robbers and was in flight from the *locus in quo*. This is proof, in our opinion, that the appellant was well identified as one of the five robbers of the material night.

It follows, we hold, that the appellant was rightly found guilty and convicted by the learned trial Magistrate.

We therefore dismiss the appellant's appeal, uphold his conviction, and affirm sentence.

Orders accordingly.

DATED and DELIVERED at Nairobi this 6th day of March, 2008.

J.B. OJWANG G.A. DULU

JUDGE JUDGE

Coram: Ojwang, J.

Court Clerk: Huka & Erick

For the Respondent: Ms. Gakobo

Appellant in person