



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

**Criminal Appeal 177 of 2006**

**(from original conviction in Cr. Case 505 of 2005 of Chief Magistrate's Court Makadara (Lucy Mutai (SRM)).**

**WILSON NJUGUNA MWANGI & ANOTHER..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

Wilson Njuguna Mwangi (**1<sup>st</sup> Appellant**) and Joseph Nganga Kimura (**2<sup>nd</sup> Appellant**) were jointly charged with two counts, robbery with violence contrary to Section 296 (2) of the Penal Code, that on the 1<sup>st</sup> day of March, 2005, along Githunguri Githiga Road at Mununga village in Githiga Location, Kiambu District within Central Province, jointly with others not before the court being armed with dangerous weapons, namely pistols, robbed John Githinji Muchai, one motor vehicle registration No. KAT 873B make Toyota Corolla Station Wagon, white in colour, one mobile telephone, make Sagem, one wrist watch make casio, one car remote control and cash Kshs.2000/= all valued at Kshs.577,000/= and at or immediately before or after the time of such robbery, threatened to use actual violence to the said John Githinji Muchai.

On the same date and place, they are alleged to have robbed Agnes Mugure Muchai of one mobile telephone make Siemens C45 and cash Kshs.60/= all to the total value of Kshs.7060/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence on her.

They jointly faced an alternative charge of handling stolen goods contrary to section 322 (1) of the Penal Code, that on 1<sup>st</sup> day of March, 2005, along Ngochi Road in Githunguri Location, otherwise than in the course of stealing, jointly retained one motor vehicle registration No. KAT 873 B, make Toyota Corolla, white in colour, knowing or having reason to believe it to be a stolen motor vehicle.

2<sup>nd</sup> appellant faced a further alternative charge of handling stolen goods contrary to section 322 (1) of the Penal Code that on 1<sup>st</sup> day of March, 2005 at Githunguri Police Station in Githunguri Location, Kiambu District, otherwise than in the course of stealing, retained one car remote control gadget, one mobile telephone make Sagem 926 and one wrist watch make Casio, knowing or having reason to believe them to be stolen or dishonestly obtained. The hearing proceeded before L. Mutai (SRM) Githunguri who then convicted the two appellants on the 1<sup>st</sup> two counts of robbery but reduced the charge to robbery contrary to Section 296 (1). Each was sentenced to 25 years imprisonment which sentences were to run

concurrently. Both appellants were dissatisfied with the conviction and sentence, hence this appeal.

The first appellant's grounds of appeal were that:-

- (i) The trial magistrate erred in failing to consider the cited grudge which was the cause of the complaints ill-will and thus implicating him.***
- (ii) The trial magistrate erred by wholly believing the evidence of identification by recognition though obtained in difficult circumstances.***
- (iii) The trial magistrate erred in failing to see the essentiality (sic) of a person who pointed/described him to the arresting persons since it is evident that he/she followed 1<sup>st</sup> appellant from the scene where the stolen motor vehicle was dumped, to that matatu in question.***
- (iv) The evidence in totality fell short of the required standard to justify a conviction as the case was not supported by a first report though the complainants claimed to have reported at a different police station.***
- (v) The trial magistrate erred in disregarding his defence which displaced the prosecution case.***

The second appellant states in his grounds of appeal that-

- (i) The trial magistrate erred in finding corroboration on the alleged circumstances of arrest as testified to by P.W.3 and P.W.4, yet she found it not convincing and thus acquitted him on the alternative charge of handling stolen property.***
- (ii) The learned trial magistrate erred in failing to see the possibility and the identifying witness having the wrong belief as many witnesses do believe the eighth person had been arrested as a result of seeing him being escorted to the police station. The last two grounds are similar to those alluded to by 1<sup>st</sup> Respondent.***

At the hearing the 1<sup>st</sup> appellants complained that the learned trial magistrate failed to appreciate that the evidence of identification relied on was faulty in all respects as it was obtained under difficult and inconclusive circumstances and poor conditions. This ground is repeated by the 2<sup>nd</sup> appellant. 2<sup>nd</sup> appellant points out to the trial magistrate's words in her judgment-

***"I find that even if P.W.1 and P.W.2 didn't know him prior to the material time, the circumstances herein are so favourable that they were able to identify the accused person positively at the scene of crime and also before the court. The offence occurred in the morning already day time. The first accused's face was noted."*** 2<sup>nd</sup> appellant says that the circumstances were difficult and inconclusive. From the proceedings the evidence of P.W.1 (***John Githinji Muchai***) is that on 1/3/05 at 7.30 am, he was driving his Motor Vehicle registration KAT 873B Toyota Corolla, white in colour while taking his wife to school. He was driving along Githiga- Githunguri Road and his wife was seated next to him. As they got near a river he saw 4 men emerge from the road, they stood in the road, two on each side of the road where there were bushes. They were all armed, two had small pistols and two had bigger pistols. Their faces were ***uncovered***. They pointed the pistols at him, so he stopped. Two of them came to his side and two went to the other side (***presumably the passenger's side***). They were ordered to jump to the rear seats – which they did. By then, P.W.1 says ***"I had recognized 2<sup>nd</sup> accused in the dock – identified. He is my neighbour and I had even lifted him before in my very vehicle..... The 2<sup>nd</sup> accused took over the driver's seat and started the vehicle..... 1<sup>st</sup> accused – identified – came and sat next to me..... we were ordered to lie on the rear seat and the attackers sat on us"***. As the Motor Vehicle began to move, they were ordered to produce all the money and cell phones and they obliged. The journey took about thirty minutes, then the motor vehicle stopped and PW1, his wife and two of the robbers came out, whilst 1<sup>st</sup> and 2<sup>nd</sup> accuseds (***now the appellants***) left in the vehicle. It was thereafter that the couple first made a

report at Lolomo Administration Police Post and were then directed to Lari Police Station and they made a report there – they were advised to proceed to Githunguri Police Station. On arrival they met many people and P.W.1 saw the 1<sup>st</sup> accused (**now 2<sup>nd</sup> appellant**) seated within the police station, under guard. He was bleeding from the forehead. 2<sup>nd</sup> accused (**now 1<sup>st</sup> appellant**) was escorted in by people not known to P.W.1. Then P.W.1 went into the OCS office and told him about the ordeal by which time P.W.1 had already seen his motor vehicle in the police station yard. 1<sup>st</sup> accused was searched and P.W.1 witnessed his cell phone make Sagem MC 926 (Ex 1), a remote control gadget (Ex. 2) and a wrist watch Ex 3) being recovered from 1<sup>st</sup> accused P.W.1 recognised the watch because it had a damaged strap even before. P.W.2 Agnes Mugure Githinji confirms that she was in the company of P.W.1 (**her husband**) in their Motor Vehicle registration KAT 873B Toyota white in colour. She confirms seeing 4 men emerge from the bushes and stand by the road side – this was along Githiga – Githungiri road – this was just before reaching Muthurwa River. They were all armed with pistols of different sizes which were pointed at the Githinjis. The men’s faces were uncovered. The vehicle stopped and the couple were immediately ordered to the back of the seat. She says “I did identify those who stood on the driver’s seat. I have not confused the 2<sup>nd</sup> accused (**identified**). I had seen him before. He sat on the driver’s seat and he later drove the vehicle.

**“..... I was sat on the back by one person. My husband was also sat on. The vehicle was driven by Willy, 2<sup>nd</sup> accused.”** She then narrated how they were ordered to surrender their money and cell phones and her husband’s watch, then driven up to some point where the motor vehicle was stopped and they were ordered out of it and left with two of the robbers while two others drove off in the motor vehicle. When they eventually got to Githunguri Police Station, the OCS informed them that their motor vehicle had been recovered by Githunguri Police. At the police station they met many young people and P.W. 2 says “I was able to spot 1<sup>st</sup> accused immediately, and identified his face as one of the robbers – (**1<sup>st</sup> accused identified**).” 1<sup>st</sup> accused was searched by a police officer in the presence of P.W.2 and a cell phone, watch and remote control gadget were recovered from him ..... “Shortly 2<sup>nd</sup> accused was brought and I immediately recognized his face. He had been lifted in January by my husband and in my presence. 2<sup>nd</sup> accused is my neighbour back at home. I didn’t know 1<sup>st</sup> accused prior.....”

She deems having differed with 2<sup>nd</sup> accused previously and says he is the one who drove off their motor vehicle.

PW3 (**Sergeant Fred Mugandi**) is stationed at Githunguri Police-station and says that on 1/3/05 at 7.00 am, he was at the Police Station when the OCS informed him that he had received a phone call from a member of the Public who had witnessed a robbery of motor vehicle registration KAT 873B and that it had taken Lari direction from Githiga. P.W.3 moved towards that direction along with other police officers and upon reaching Githiga junction, they met with the same motor vehicle coming from Lari direction, at a high speed. The officers turned back and chased the vehicle and upon reaching Githunguri town, it diverted towards the town and then on to Ngochi direction. The police officers followed it closely and saw it crossing the Ngochi river bridge. The officers got to the motor vehicle. It had already stopped. They ordered its driver to stop – he was with another passenger – they refused to stop and begun running on foot abandoning the motor vehicle. P.W.3 fired in the air but achieved nought – however, members of the public were attracted by the firing. P.W.3 chased 1<sup>st</sup> accused specifically and managed to catch him after members of the public had blocked him. He was beaten by members of the public very fast, but P.W.3 managed to rescue him; searched him and recovered the cell phone, remote control and wrist watch. Before leaving the scene, P.W.3 mobilised members of the public to chase 2<sup>nd</sup> accused and he was traced at the matatu stage, having boarded a vehicle towards Githiga. P.W.3 arrested 2<sup>nd</sup> accused at Githunguri matatu stage and escorted them to the Police Station. Members of the public gathered at the station compound. By then the complainants had arrived at the station, but P.W.3 did not know them and it is the complainants (P.W.1) who introduced himself and said 2<sup>nd</sup> accused was one of those who had robbed him of his vehicle. A search by police officers inside the robbed motor vehicle, resulted on finding a thermos flask in the co-driver’s seat and upon opening it, a toy pistol (Ex.5 ) was recovered inside it. P.W.4 (**CIP George Mugo**) the OCS Githunguri Police Station confirms receiving a call through his phone by a caller who informed him about the robbery – it was a lady who did not identify

herself. He then relayed the information to Sergeant Muganda with instruction that Sergeant and other police officers should go and block the way out of Lari forest because the motor vehicle had taken Lari direction. P.W.4 then circulated the information to all Kiambu police station by radio. He also kept in touch with Sergeant Muganda (*over the radio*) who constantly gave him an update of the ongoing. Before leaving the town, P.W. 4 heard gun shots from Ngochi direction and I saw the station motor vehicle head towards Ngochi and he followed it, and P.W.4 proceeded that way and met P.W.3 and another officer having apprehended 1<sup>st</sup> accused plus item which had been recovered from him i.e. a wrist watch, motor remote control gadget and a cellphone. The stolen motor vehicle was parked by the roadside and there were many members of the public there. P.W.4 drove that motor vehicle to the Police Station. He confirms recovery of a toy pistol hidden inside a flash in the stolen motor vehicle. He also received information that 2<sup>nd</sup> accused was heading towards the stage. He proceeded there along with P.W.3 and they arrested 2<sup>nd</sup> accused inside a matatu though nothing was recovered from him. When he returned to the police station, the complainants introduced themselves and told him 1<sup>st</sup> and 2<sup>nd</sup> accuseds were among those who robbed them. After hearing this evidence, the trial court ruled that the two accuseds had a case to answer and put them on their defence.

The 1<sup>st</sup> accused in his unsworn defence said he is a carpenter and had been given some contract to make furniture – so on 1/3/05 he left home to get a matatu to Githunguri town – this was at about 8.00 am. He reached Githunguri at 8.30 am., alighted and met some police officers whom he knew by physical appearance. On seeing him, one police officer said he knew 1<sup>st</sup> appellant and he was arrested, searched and loaded onto a police motor vehicle. He had Kshs.6000/- which was taken from him. At the police station he found a motor vehicle (Ex. 1) being searched and P.W.3 spoke to P.W.4 telling him that the Kshs.600/= may have been the exhibit. At the police counter, a lady came and sat next him, and asked him where he was from, then told him, that she knew his place too well – she is one of the complainants.

The 2<sup>nd</sup> accused in his sworn defence said on 1/3/05 at 8.30 am, he left his home in Githiga for Githunguri to see his cousin who had been arrested at Githunguri Police Station. At the Police Station, he spoke to the officer in charge to call his cousin Chege and that's when P.W.3 met him in the cells and chased him away – he left towards the matatu stage. After boarding a matatu, P.W.3 came and pulled him out and took him to the Police Station and he charged him – he denies committing the offence. He alleges that previously on another occasion, the same complainant had reported against him and P.W.4 released him on 2/12/05 and that this case was just fabricated against him.

In her judgement, the learned trial magistrate analysed the evidence and stated that the evidence of P.W.2 corroborated that of P.W.1 and that “I have carefully evaluated 1<sup>st</sup> accused's defence..... his version of defence was never introduced during the hearing of prosecution case ..... I find (it) a mere after-thought which failed to discredit P.W.1, P.W.2, P.W.3 and P.W.4).”

As for 2<sup>nd</sup> accused the learned trial magistrate said “..... his defence was a mere denial .... 2<sup>nd</sup> accused.....contradicted himself, ...” and her finding was that from the prosecution case, the evidence supported a charge under section 296 (1) of the Penal Code and proceeded to convict the accuseds on a reduced charge. It is against this backdrop that the appellants challenge the outcome saying the circumstances for identification were difficult and inconclusive. 1<sup>st</sup> appellant submits that the identification evidence relied on was by mistake, an afterthought, coupled with wrongs and unfounded illusions by either P.W.3, his arresters **OR** P.W.4, who both alleged to have been with him at the scene of his arrest, yet P.W.4 on cross examination said “ I told you were found in the vehicle at the police station” and so to his mind, P.W.4 decided that his reported presence in the motor vehicle is what made him the culprit without seeing him perpetrate the crime and he says this was a grave mistake by P.W.1, P.W.2, P.W.3 and P.W.4.

2<sup>nd</sup> appellant wonders how P.W.1 could see and identify him when it is his evidence in cross-examination that once he stopped the motor vehicle, the four surrounded the vehicle and ordered me to lie down. “**We obeyed, our faces looking down. 1<sup>st</sup> accused, sat on my back.**” He then poses the question how P.W.1 was able to identify him while he (P.W.1.) had closed his eyes and his face was looking down.

He also takes issue with evidence by P.W.1 that in his evidence he said:-

***“I saw 4 men emerge from the road, they stood on the road, 2 envisaged from each side of the road..... 1<sup>st</sup> accused came and sat next to me, another sat next to my wife..... I have demonstrated to court how I was made to lie in the vehicle, I was facing the front side of the vehicle.....”*** It is P.W.1’s contention that there are discrepancies in P.W.1 evidence and so he cannot be a credible witness – was P.W.1 lying facing down or lying on his side, facing the front side of the vehicle – would this contradiction be fatal – does it affect the opportunity and circumstances for positive identification. He says the learned trial magistrate ought to have warned herself on the danger of using conflicting evidence and cites the decision in **Ndungu Kimani –vs- Republic 1979 KLR page 282.**

***“The witness upon, whose evidence professed to rely on, should not create an impression on the mind of the court that he is not a straightforward person to raise a suspicion about his truthfulness or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which make it unsafe to accept his evidence.”***

Still on the question of identification, he points to the evidence of P.W.2 saying she never gave identification of him at the scene of crime to corroborate P.W.1’s evidence yet that later on she alleged to have been able to spot 1<sup>st</sup> accused at the police station as the man who had sat on her husband, inside their motor vehicle. He describes her testimony as an illusion with a possibility of fatal errors.

As to the prevailing condition, 2<sup>nd</sup> appellant asks the court to take note of the fact that this was an unexpected event and that P.W.2, and P.W.1 admitted to being shocked whilst P.W.1 said ***“I was frightened at the time. Even when I recorded my statement I was still in that state.”***

According to 1<sup>st</sup> appellant, the circumstances that prevailed at the scene were confusing as the two complainants were engulfed with fear and he here cites the decision of **Cleopas Otieno Wamwayi –Vs- Republic** Criminal Appeal No. 20 of 1989 (Ksm) which held that evidence of visual identification can bring about miscarriage of justice where a case against a defendant depends wholly or to a great extent on identification which he alleges to be mistaken.” Was there a mistake in the present case? Did P.W.1 and P.W.2 merely have a glimpse of their attackers or even recognize one of them as a neighbour.

1<sup>st</sup> appellant builds further on this issue of identification saying that since complainant did not tell police that one of their attackers was their neighbour, it can only be because there was no recognition. Does the omission to mention 1<sup>st</sup> appellant’s names in the first report to police officers make the entire matter fatal based on the Criminal Appeal case (***unreported***) **Nyeri Criminal Appeal 24 of 2004 Henry Kimathi –Vs- Republic.**

The State Counsel, Mr. Mukura submitted the State’s opposition to the appeal and argued that the robbery took place at 7.30 am, the attackers who accosted the complaints included the two appellants whose faces were uncovered and they recognize one as their neighbour whom they had known for 8 years as they came from the same village. He also points out that the conditions were conducive for recognition and identification of the two appellants, and that P.W.2’s, evidence corroborates that of P.W.1 with regard to the time the offence took place and that she was able to clearly see the two appellants and she in fact knew one appellant as they came from the same village and the two complainant’s evidence was without any possible mistake.

On the question of identification, the learned trial magistrate observed that it was not in dispute that P.W.1 & P.W.2 knew 2<sup>nd</sup> accused (***i.e 1<sup>st</sup> appellant***) very well. Indeed the trial magistrate took into consideration the circumstances affecting identification and noted that the offence occurred at 7.30 am which was already day time and that the robbers were not hooded – their faces were uncovered. In fact the learned trial magistrate stated-

***“I find that P.W.1 and P.W.2 did not just identify the 2<sup>nd</sup> accused but that they recognized him at all material times. P.W.1 and P.W.2 confirmed that they identified 1<sup>st</sup> accused at the scene of crime. The***

***court heard that he was the shortest among the four robbers ..... I find that even if P.W.1 and P.W.2 didn't know him prior to the material time, the circumstances herein were able to identify accused person positively both at the scene of crime and also before court. The offence occurred in the morning, the 1<sup>st</sup> accused's face was noted, he was seen by P.W.3 Sergeant Muganda leaving the complainants stolen vehicle, chased until arrested. I find that the prosecution evidence on identification was well demonstrated and I had no reason to doubt the same."***

So that the learned trial magistrate did address her mind to the issue of identification and the circumstances thereto. But the conviction was not just based on identification by P.W.1 and P.W.2. She also noted that accuseds were seen by the police officer (P.W.3) running away from the stolen motor vehicle the two had the complainant's motor vehicle just two hours after the robbery, coupled with the fact that 1<sup>st</sup> accused upon being immediately searched was found to have P.W.1's property which had been taken away during the robbery and these included the motor vehicle remote control gadget, a wrist watch and cell phone. So I have considered the appellants grounds against the evidence in the proceedings and what the learned trial magistrate stated in her judgement. Surely the questions of the witness not being able to identify the robbers cannot be because they were ordered to lie down and close their eyes. There is the evidence that P.W.1 and P.W.2 saw them at first instance. When they stood by the roadside with their faces uncovered – by then the complainant's eyes were open and no one was sitting on them. The complainant therefore had a chance to see them before being ordered to move to the back and lie down.

Of course this was an unexpected event and complainants admit to having been frightened but P.W.2 clearly stated-

“I was frightened but I saw your face too well” and there is nothing to suggest that the situation clouded her judgment or senses of comprehension or caused great confusion to her so that the cited decisions are not applicable. And as observed, the learned trial magistrate did not just base her conviction on identification per se – he also appreciated the factors of recognition, the time of day, the recovery, the direct encounter of the accuseds with the police officer as they ran away from the stolen motor vehicle and the recent possession of the stolen items within a short time span after the robbery. What about the contradictions that the appellants allude to with regard to P.W.1's evidence – I don't think those ***anomalies*** touch on the material particulars so as to regard him as not being a straightforward witness to fall within the ***Ndungu Kimanyi –Vs- Republic*** bracket – the anomaly was simply with regard to what position he lay in the motor vehicle – face down or side ways – but by which time he had already seen and identified his attackers. Then there is the other ground that the failure to call the investigating officer is fatal as he would have come to clear any doubts and corroborate P.W.3's evidence and that members of the public should also have been called. With this regard appellants relied on the decision in ***Bukenya – Vs- Uganda E.A. 1972 page 549*** which held that:-

“ ***A court of law has the right and duty to summon all important witnesses whose testimony may be seen essential and the prosecution must also avail the necessary witness***” To this the learned State Counsel Mr. Makura has responded that the failure to call the investigation officer and other witnesses has no adverse effect as the evidence by the witnesses on record was sufficient and under Section 143 of the Evidence Act, a fact can be proved even by a single witness and its not necessary to call many witnesses – P.W.3 and P.W.4 sufficiently played the role of the investigating officer as they went to the scene and arrested the appellants immediately. I cannot find fault with that type of reasoning.

As to who drove the motor vehicle to police station – the answer is found in P.W.4 (***CIP Mugo***) evidence – he drove the motor vehicle to the station. What about the question of P.W.1 and P.W.2 not mentioning 1<sup>st</sup> appellant's name when they first made that report to Lari Police Station and Lolomo police station. With regard to 2<sup>nd</sup> appellant the evidence clearly states they did not know him by name so there was no way Willy could have given his name to the police, but upon seeing him at Githunguri police station they immediately pointed him out as one of their attackers.

As regards 1<sup>st</sup> appellant, there is no evidence that the reports were booked at the other police stations

or statements merits recorded – the complainants simply made reports and were being referred to the next relevant police station – I don't think that is fatal and Bukenya's case offers no refuge.

Should the search and recovery have been recorded in a document and signed by the appellants? I know of no such legal requirement. I agree with Mr. Mukura that from the judgement, the learned trial magistrate did not convict any of the accuseds on the charges of handling stolen property and their alluding to the same is misplaced. The judgment also clearly shows that the learned trial magistrate considered the defence raised by both accuseds and weighed it against the evidence tendered by prosecution and found it to be an after thought which did not shake the prosecution case, indeed she analysed in detail each version of the defence and made well reasoned conclusions.

My finding then is that the conviction was safe and I uphold the same.

With regard to the sentence, each appellant was sentenced to serve 25 years imprisonment. Under the Penal Code on a charge of robbery under Section 296 (1) the provision is that:-

“Any person who commits the felony of robbery is liable to imprisonment for fourteen (14) years.”

This therefore means that the sentence imposed is manifestly harsh and excessive and the learned State Counsel conceded as much. Subsequently that sentence is set aside and substituted with an imprisonment term of 7 (**seven years**) which on each count to run concurrently and to begin from the date of conviction in the lower court.

Dated and delivered on 3<sup>rd</sup> March, 2008 at Nairobi.

**H.A. OMONDI**

**JUDGE.**