**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 608 of 2004**

**LILIAN MUTHONI IRUNGU……. APPELLANT**

**VERSUS**

**REPUBLIC……..…….. RESPONDENT**

***(From the original decision in Criminal Case No. 2371 of 2003 in the Chief Magistrate's Court at Nairobi Mrs. J.N. Wanjala SRM)***

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

**LILIAN MUTHONI IRUNGU**, the appellant, was charged before the subordinate court jointly with four others with five counts. Count 1 was for robbery with violence. The particulars of offence were that on 1/9/2003 at Soin Arcade building along Westlands road in Nairobi, jointly with others not before court, while being armed with dangerous weapons namely AK 47 rifle and pistols robbed GEORGE ORR Kshs.2,521,259/= and at or immediately before or immediately after the time of such robbery used actual violence to the said GEORGE ORR. Count 2 was also for robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 1/9/2003 at Soin Arcade Westlands in Nairobi within Nairobi area, jointly with others not before court, while armed with dangerous weapons namely AK 47 rifle and two pistols robbed GEORGE ORR one baretta pistol serial S/No.H062664 loaded with rounds of ammunition caliber 9mm all valued at Kshs.120,000/= and at or immediately before or after the time of such robbery used physical violence to the said GEORGE ORR. Count 3 was for consorting with persons in possession of firearms contrary to section 89(2) of the Penal Code. The particulars were that on 1/9/2003 at Soin Arcade Westlands in Nairobi within Nairobi area with others not before court consorted with the deceased HENRY MBURU NUNU and PETER MUGIRO persons who without reasonable excuse had in their possession firearms namely AK 47 rifle S/No.56127204293, two Tokalev pistols S/Nos.KH82904, and B4853 respectively and 22 rounds of ammunition of assorted caliber, in circumstances that raised reasonable presumptions that the said firearms and ammunitions had reasonably been used in Commission of an offence of robbery with violence. Count 4 was for wounding with intent to maim contrary to section 231(a) of the Penal Code. The particulars of offence were that on the 1st day of September 2003 at Soin Arcade building in Westlands within Nairobi Area, jointly with others not before court wounded FRANCIS JUMA with intent to maim the said FRANCIS JUMA. Count 5, on the other hand, was also for wounding with intent to maim contrary to section 231(a) of the Penal Code. The particulars of offence were that on 1/9/2003 at Soin Arcade in Westlands within Nairobi Area, jointly with others not before court wounded JAMPHREY NGUGI NGEGI with intent to maim the said JAMPHREY NGUGI NGEGI.

After a full trial, all the other accused persons were acquitted on all five counts. The appellant was acquitted of counts 3,4 and 5. She was however, convicted on counts 1 and 2. She was sentenced to suffer death on each of the two counts. Being dissatisfied with the decision of the subordinate court, the appellant appealed to this court against both the convictions and the sentences.

At the hearing of the appeal, the appellant was represented by Mr. Otieno. Learned Counsel for the appellant, Mr. Otieno, submitted that the trial magistrate did not evaluate the evidence. Counsel contended that the conviction of the appellant was predicated on identification, principally by PW3 and PW4, at the scene and at a parade. Though the appellant raised serious issues with the way the identification parade was conducted, the court did not direct its mind to the conduct of the parade. Counsel contended that both PW3 and PW4 had prior discussions with the investigating officer on the persons whom they were to identify. Also, the officer who conducted the identification parade did not testify in court, nor were the parade forms produced in court. Therefore, magistrate should not have relied on the evidence of identification in the absence of the forms. On identification at the scene, counsel contended that the circumstances were not favourable to positive identification, as the attack was sudden and the people at the scene did not have time to identify or observe the attackers. In addition, the woman (alleged to be the appellant) merely sat and asked for tickets to Masai Mara. There was no evidence that she participated in the alleged robbery. The evidence that the appellant was seen struggling to enter the car was also wanting, as PW6 stated that PW3 (who was said to have witnessed the same) did not come out of the building. In any event, only two people were seen in the car and shot. On the arrest, counsel submitted that counsel submitted that PW8 stated that the appellant was arrested on 6.3.2003 which was before the date of commission of the offence. Also, the appellant was arrested on the information of an informer who never testified. It could therefore not be said that the appellant was arrested because of the robbery incident. In counsel's view, the prosecution did not prove its case beyond any reasonable doubt. Counsel sought to rely on the case of MUNENI NGUMBAO MANGI –VS- R – Mombasa Criminal Appeal No. 141 of 2005 on the ingredients of the offence of robbery with violence, and the case of NJAGI KADOGO –VS- R (2006) e KLR on identification.

The learned State Counsel, Ms. Gateru, opposed the appeal and supported conviction. On sentences, counsel supported the sentences, except that she contended that the sentence on count 2 should have been put in abeyance. Counsel contended that the prosecution proved its case beyond reasonable doubt, in that the ingredients of the offence were established by the evidence of PW1, PW3, PW4, PW5 and PW6. Counsel contended that identification was safe and free from possibility of error or mistake. The reasons were that the incident occurred it was in broad daylight and the robbers did not conceal their faces. PW3 and PW4 were also later able to pick the appellant at an identification parade. The failure of the prosecution to avail the parade officer to testify in court was not fatal to the conviction, as it had been explained that he had retired. The allegation by the appellant of an existing grudge with a police officer did not have credence. On contradictions, counsel contended that any contradictions were minor and did not demolish the prosecution case. Therefore, counsel contended, the appeal had no merits.

We have revaluated the evidence on record, as we are required to do in a first appeal. The appellant was convicted of two offence of robbery with violence. Her other 4 co-accused, with whom she was jointly charged, were all acquitted.

The ingredients of the offence of robbery with violence were highlighted by the Court of Appeal in the case of MONENI NGUMBAO MANGI –vs- R (supra) when the court reiterated what they had stated on the earlier case of JOHANA NDUNGU –VS- R – Criminal Appeal No. 116 of 1995 (unreported) that ?

"**In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the subsection in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use or a threat to use actual violence against any person or properly at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute the sub-section:**

**(1) If the offender is armed with any dangerous or offensive weapon or instrument, or**

**(2) If he is in the company with one or more other person or persons, or**

**(3) If, at or immediately before or immediately after the time of such robbery, he wounds, beats, strikes or uses any other violence to any person."**

All the other 4 accused in the subordinate court were acquitted. The evidence on record was that four people came into the offices of EARTH VIEW MANAGEMENT LTD at Soin Arcade Westlands Nairobi. Money and a pistol and ammunition were was taken away. Guns were used in threatening the office occupants in order to facilitate the robbery. One of the accused (PAUL KANGETHE), was actually a worker in the company. After the trial all the rest were acquitted, but the appellant was convicted of the counts of capital robbery. The appellant was the only woman accused person.

In our view, even assuming that the woman who went into that office at the time of the robbery was the appellant, the evidence on record did not connect her to the alleged robberies. According to PW4 JOSEPH MBOYA MUSYA, four people came into the office. The woman entered first. The four appeared to be together. PW4 asked the woman to sit down, and she did. Though he brought chairs for the others, two continued standing. Regarding the woman, the witness (PW$) stated evidence,

"***Then when I went to my desk I asked the lady what I would assist her. She told me she was wanted park tickets to go to Masai Mara. I asked her if she had a requisition. She was supposed to have a requisition for us to know which lodging she wanted in Masai Mara, how many tickets are required and for how much. She said she did not have. I usually keep requisition forms on my desk. I took one requisition form and I gave to her to fill in the details."***

Thoughm immediately thereafter, the two standing men appeared to have sprang into action, there is no evidence that this lady did anything in furtherance of the robberies. The only other evidence against her was that she was seen by PW3 HARRIET NAMUNDE MUYUMBU jumping into the escape vehicle where she first fell down, but later managed to jump into the vehicle. In our view, the evidence on record was not adequate to connect the woman with that robbery. The witnesses stated that the office was an office that the public who come in for the sort of business the woman came for. There is no evidence that she did anything that could be connected to the commission of the robberies. It is quite possible that she came there for a genuine business. It was for the prosecution to adduce evidence to connect her with the robberies, which they failed to do. None of the alternative three elements consisting the offences of robbery with violence were proved against her. Even if it was true that she also boarded the escape car, which is in doubt, she could as well have been taken hostage by the robbers in order to shut out any evidence that would come from her at the scene. Again, it would be for the prosecution to prove that this was the woman and that she became an accessory by concealing vital evidence. They did not do so.

On the identification, the circumstances at the scene were not favourable. It was during broad daylight. However, the attack was sudden. However, there was threat of use of firearms, the duration was short, and witnesses (except PW1) were forced to lie down. PW1 himself did not identify the appellant. The appellant does not appear to have been arrested because of any description given by the identifying witnesses, PW3 and PW4. She was arrested because of information from an informer who did not testify. In effect we do not know exactly why and in what circumstances she was arrested. The identification parade forms were not produced in court. The identification parade officer did not testify. The appellant complained about the way parade was conducted. The identifying witnesses stated that the members of the parade were not of similar appearance. In our view, though PW3, and PW4 claim to have identified the appellant at the scene, the fact that the appellant was arrested on the information of an informer who did not testify, and the fact that the identification parade forms were not produced nor did the parade officer give evidence in court, leaves a big gap in the identification evidence. The retirement of the parade officer cannot be a valid excuse for him not to come to testify in court. That gap has to be resolved in favour of the appellant, as there is real possibility of mistaken identity.

Having considered, all the evidence on record, we are of the view that the conviction of the appellant is unsafe and cannot be sustained.

The learned magistrate also erred in sentencing the appellant twice in the same trial on capital offences. Somebody cannot be hanged twice. Therefore, the second sentence should have been held in abeyance.

Consequently, and for the above reasons, we allow the appeals quash the convictions and set aside the sentences imposed by the subordinate court. We order that the appellant be set at liberty unless she is otherwise lawfully held.

Dated and delivered at Nairobi this 9th day of April 2008.

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**J.B. OJWANG** **G. A. DULU**

**JUDGE** **JUDGE**

**In the presence of –**

Appellant

Mr. Otieno for appellant

Ms. Gateru for State