REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 51 of 2005

JEREMIAH NDABA MWANGI……. APPELLANT

V E R S U S

REPUBLIC……RESPONDENT

(From the original decision in Criminal Case No. 717 of 2004 of the Senior Principal Magistrate's Court at Kiambu - D. Mulekyo (SRM)

J U D G M E N T

JEREMIAH NDABA MWANGI, the appellant, was charged before the subordinate court jointly with two others with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code.

Each of the three accused persons before the subordinate court, were charged separately, with an alternative count of handling stolen goods contrary to Section 322 (2) of the Penal Code. After a full trial, the other two accused persons were acquitted of all the charges. The appellant was acquitted of count 1 and also acquitted of the alternative charge. He was however convicted of count 2 and sentenced to suffer death as prescribed by law. He was dissatisfied with the decision of the subordinate court and has appealed to this court through his Counsel M/s F.N. Njanja & Company advocates. The appellant initially filed his own petition of appeal, but his counsel later filed a supplementary petition of appeal.

At the hearing of appeal, Mr. Njanja, learned counsel for the appellant submitted that the entire case was based on visual identification. Counsel contended that the evidence of visual identification was faulty and there was no corroboration. In addition, the court did not warn itself before convicting on the said evidence. Counsel submitted that the evidence of the two eye witnesses was that the attack was sudden, which must have caused intense fear on them. In addition, the gangsters also masked the two eye witnesses. Therefore, there was need for conducting an identification parade to clear any doubt.

The identification parade conducted by P.W.6, counsel argued, could not be relied upon as there was no prior description of any of the robbers. Counsel also pointed out that P.W.1 stated that the members of the parade were only 6, which was contrary to the police standing orders which required at least 8 members. In addition the witnesses stated that the members of the parade were of different height and features. Counsel also contended that there was no corroborative evidence that would support the conviction. No items were recovered, and no fingerprints or forensic evidence connecting the appellant was tendered. The appellant was merely arrested because he had gone to the police station to look for his

brother. Counsel further argued that the prosecution case was riddled with contradictions. Though the trial court acknowledged the contradictions, it resolved them in favour of the prosecution, instead of the legal requirement that the same should be resolved in favour of the appellant. Counsel emphasized that the case was a frame up, as there was no evidence as to who made a report of the incident to the police. Lastly, Counsel submitted that there was no tangible evidence of a confession. Counsel sought to rely on several cases. Counsel relied on the case of *JOHN KAMAU -VS- REPUBLIC – NAIROBI CRIMINAL APPEAL NO. 231 OF 2004 (C.A.)* – on confessions, the case of *NGUMBOA NZARO –Vs- REPUBLIC (1991) 2 KAR 212* and the case of *REPUBLIC -VS- TURNBULL [1976] 3 A E R 549* on the possibility of mistaken identify, as well as the case of *DAVID MWITA WANJA -Vs- REPUBLIC – CRIMINAL APPEAL NO. 117 of 2005 (Nairobi) (C.A.)* on conduct of identification parades.

The learned State Counsel, Mrs Gakobo, opposed the appeal and supported both the conviction and sentence. Counsel submitted that P.W.1 and P.W.2 identified the appellant at an identification parade. Counsel submitted that the incident lasted for more than 4 hours and therefore there was adequate time for the witnesses to observe and identify the appellant. Though at one time the witnesses were blind folded, there was a time when the witnesses sat face to face with the robbers. In fact, P.W.2 felt suffocated by the polythene cover and removed it from his head shortly before the vehicle stopped and the appellant ordered the said P.W.2 and P.W.1 to sit up. The appellant was clearly described by the witnesses as the one who drove the motor vehicle, and at one point handed over the motor vehicle keys to P.W.2 to drive the vehicle. In counsel's view, the conditions and circumstances were favourable for positive identification. Counsel emphasized that the identification parade was properly conducted.

Counsel further submitted that though none of the stolen items was recovered from the appellant, those items must have been with the other co-robbers. Counsel further argued that the absence of an indication of the OB number in the court records, was not fatal to the prosecution case. Though there were no physical injuries suffered by the complainants, the necessary ingredients establishing an offence of robbery with violence had been established. Counsel sought to distinguish the case of JOHN KAMAU, which was relied upon by counsel for the appellant. The court, according to counsel, did not take into account or base its decision on an alleged confession.

This is a first appeal and we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences.

The brief facts are as follows. P.W.1 JOSEPH ZWILI NZUKI, a pharmacy salesman was on duty on 1/3/2004 in a motor vehicle KAP 850X Toyota Hilux. He was with a driver. They went around selling drugs in Nairobi and environs. They were at Githunguri at about 1 pm, when as they drove through a bushy area, four men emerged with one holding a pistol pointing in the air. According to this witness, it was the appellant who was holding the pistol. The appellant opened the motor vehicle door, after the driver stopped. A young man came and ordered the appellant to come out of the vehicle and demanded the witness's cell phone and took the same together with a calculator. The driver of the motor vehicle had also come out. Then the robbers shepherded them back into the motor vehicle, after the driver P.W.2 opened the back of the vehicle. Though the robbers put polythene bags on P.W.1 and P.W.2 heads while they lay down, at one point the robbers came and ordered them to sit in front of the vehicle with them. According to this witness, it was the appellant who was driving the vehicle. The robbers took the drugs, and Kshs.22,000/- from P.W.1 and mobile phone as well as calculator. Later P.W.1 identified the appellant at an identification parade. The evidence of P.W.2, who was the driver of the motor vehicle, was that he saw the appellant as one of the robbers. According to this witness also the appellant took control of driving the motor vehicle. At one point the appellant came and opened the back door and told P.W.1 and P.W.2 to sit in front of the vehicle with them. This witness also identified the appellant at an identification parade. This witness claimed to have lost Kshs.3000/- during the robbery.

The appellant was arrested on 22/3/2004, when he went to Kiambu CID offices to enquire about his brother who had been arrested for an alleged robbery. He was arrested by P.W.6, SERGEANT JOSEPH GICHANGI. An identification parade was later conducted by P.W.5, Inspector *SHADRACK WACHIRA* on 24/3/2004. The appellant was identified by P.W.1 and P.W.2. The appellant thereafter was charged with the offence.

When put on his defence, the appellant gave an unsworn statement. It was his defence that he was arrested on 22/3/2004 when he went to Kiambu Police Station to look for his brother who had been arrested. He stated that he was arrested by the duty officer when he failed to produce Kshs.5000/- demanded by the said duty officer from him for the release of his brother. He was put in the cells and beaten. He was shown some people whom he was told were his relatives, but actually, they were not his relatives. On 24/3/2004 those same people who were alleged to be his relatives were called to an identification parade where they identified him. He stated that he was not guilty.

Faced with this evidence, the learned magistrate found the appellant guilty of robbery with violence, convicted him and sentenced him to suffer death in the manner provided by law. The other two co-accused were acquitted.

We have evaluated the evidence on record. The appellant's conviction is predicated on the evidence of visual identification by P.W.1 and P.W.2. It is trite that where the evidence to implicate an accused person is entirely based on visual identification, such evidence should be watertight to justify a conviction and must be free from the possibility of error – see ***KIARIE –VS- REPUBLIC [1984] KLR 739***. A witness can also be honest but mistaken.

P.W.1 and P.W.2 claim in their evidence that they saw the appellant clearly. The incident occurred in broad daylight. They saw the appellant holding a pistol in the air. The appellant was the one who took over the driving of the vehicle. The appellant later, opened for the two witnesses from the boot, and they even sat together.

On the face of it, the above appears to be very positive identification, especially as the two witnesses also identified the appellant at an identification parade. However, a closer scrutiny of the evidence on identification shows that there could have been an error in the identification. Firstly, there is no evidence that P.W.1 and P.W.2 informed anybody that they could be able to identify the robbers or any of them. No description was given to the police of the appellant or any of the robbers. P.W.6, *SERGEANT JOSEPH GICHANGI* clearly stated that he arrested the appellant when he went to the Kiambu Police Station on 22.3.2004 to see his brother who had been arrested. Though he said that he had information that the appellant was involved in a robbery on 1/3/2004, he did not disclose that information. That information cannot be a basis for convicting the appellant. It was hearsay, and its source was not disclosed. Some searches were done in various places where it was alleged by this witness that the appellant had sold drugs. Nothing was recovered and no witness confirmed that sale.

The above evidence, considered alongside the defence of the appellant creates great doubt regarding the involvement of the appellant in the robbery. The identification parade did not help either, as P.W.2 clearly stated that members of the parade were not similar. More importantly, none of P.W.1 or P.W.2 stated that he could identify any of the robbers. This together with the circumstances of arrest, gives credence to the appellant's story that the two, P.W.1 and P.W.2, saw him before the parade.

In our view, the appellant appears to have been arrested from grapevine information of him being a robber, rather than tangible evidence that indeed he was one of the robbers in the incident in question. We are of the view that, from the evidence on record, the identification of the appellant is not without possibility of error or mistake. The evidence of identification on record, is not sufficient to sustain a safe conviction. On that ground we will allow the appeal, quash the conviction and set aside the sentence.

Consequently, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 21st day of May, 2008.

……. **…….**

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

JUDGE JUDGE

In the presence of-

Appellant

Mr. Njanja for appellant

Mrs Gakobo for State

Huka/Mwangi court clerk