REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 196 of 2006
GLADYS WAMBUI NGURE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at Kerugoya in Criminal Case No. 1140 of 2005 dated 10th August 2006 by J. N. Onyiego – S.R.M)

J U D G M E N T

The appellant, Gladys Wambui Ngure was after trial convicted by the Senior Resident Magistrate, Kerugoya of three counts of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death as required by law. Her co-accused Simon Maina Ndungu was however acquitted. The conviction and sentence aforesaid has triggered this appeal. Through Messrs K. K. Nyakundi & Co. Advocates, the appellant has faulted his conviction on a total of five grounds of appeal to wit:-

1. That the learned magistrate erred in law and in fact by convicting the appellant without any evidence of identification as required by law.

2. That the learned magistrate erred in convicting the appellant on circumstantial evidence which was wholly unreliable, unreasonable and generally weak.

3. That the learned magistrate erred in relying on circumstantial evidence which was not corroborated and in the presence of other contradictory and strong evidence which was compatible with the innocence of the appellant.

4. That the learned magistrate's conviction was not based on reasoning and findings which were backed by direct and concrete evidence whose effect was to place the burden of proof on the appellant.

5. That the learned magistrate erred in law and in fact in convicting the appellant even when her co-accused who was acquitted stated that she was not among the suspects he ferried to the scene.

The evidence that informed the prosecution case was very simple and straight forward.

Briefly, on 15.9.2005 at about 1.30 p.m. PW1 Regina was in her shop within Kimunye market attending to customers when three young men appeared and requested to make a call using her public phone service commonly known as "*simu ya jamii.*" Unable to go through the three men left and after a short while returned with three other men and a brown lady identified in court as the appellant. Four men entered in her shop pretending to make a call again as the appellant stood at the door step. The four men then called some two customers who were taking a soda outside, PW2 and PW3 to enter the shop. When the two

resisted, one of the four men removed a gun and pointed at them. Another one removed a pistol and jumped on to the counter and asked PW1 if she wanted to die. The two customers (PW2) and (PW3) were then herded into PW1's bed room together with her. One robber attempted to shoot PW1. Two robbers remained in the shop as two others guarded their victims in the bed room. The three victims mobile phones and cash were taken. PW1 was tied with a rope and the three (PW1, PW2 and PW3) were forced to lie together in one bed and ordered not to raise any alarm. The thugs then left. They later freed themselves and informed people attending an open air crusade nearby as to what had transpired. Those people started following the thugs. In the meantime PW1 proceeded to Kirinyaga District hospital. On the way she met police officers who had been alerted of the robbery. She explained to the officers led by PW4 how she had been robbed.

Earlier on while at Kimunye stage on his way from Kianyaga law courts, PW4 had met with P.C. Sebastian Munyau who informed him that he had received a tip off of a suspicious motor vehicle parked within Kimunye shopping centre. The motor vehicle was KAR 872U Toyota G touring. He was informed that the motor vehicle had suspicious characters. He and Munyao went to the police post and armed themselves. They proceeded to where the motor vehicle was parked 200 metres away from their base. They found a driver inside whom they arrested and took to the station. They took possession of the ignition keys and left the car there. That driver was the appellant's co-accused in the trial. While approaching Kimunye market, PW4 was told of a robbery that had just occurred at PW1's shop. The officers decided to pursue the robbers. The officers were told that a group of people in company of one lady boarded a matatu. The officers also took another matatu in pursuit of the robbers. On the way, they were told that a group of people had alighted from a matatu and made their way into Mugumo primary school. The officers too proceeded on and as they approached Kiangwenyi bridge, they saw a group of five people in company of a brown lady. As the officers approached them and ordered them to stop, those people removed guns and started firing at them. An exchange of fire ensued and one of them was killed by the officers. The rest ran towards river Kiringa. The officers pursued them and managed to kill three more and recovered three pistols. The lady managed to escape the dragnet but was subsequently arrested by members of the public as she fled. She was stripped naked by members of the public who wanted to lynch her. The officers quickly intervened and rescued her. The officer recovered a leather bag from the gangsters who had been shot dead with some shirts and other items which were later identified by PW1 as the one she was robbed of.

The appellant together with the co-accused were then charged with the instant offences. Put on her defence, the appellant denied the offence. She said that on the material day she was from Nairobi going to castle Lodge to visit a friend and that on the way she was attacked by members of the public who said she was a thief. She denied her involvement in the crime.

In convicting the appellant, the learned Senior Resident magistrate held:-

"From the chain of events accused descriptions given of woman in company of men who had attacked Wambui's shop (sic). They were consistent with accused 2 whom they caught up on the way with robbers who were killed. Although the PW1, PW2 and PW3 identified accused 2 in the dock and yet no identification parade was conducted, the circumstantial evidence available is crystal clear that the woman who participated in the robbery is non other than the 2nd accused. If she was not at Kimunye as she purports, how come she was spotted at Kimunye, spotted boarding a matatu after they failed to find accused 1 in the car not knowing that he had been arrested and again after alighting from the matatu, fled through a primary school compound and they were found together. It cannot be an imagination. Accused two was the true woman (sic) who participated in the robbery and was caught escaping in company of the robbers who were shot dead and some of the items stolen from Wambui's shop recovered. The circumstances under which accused 2 was arrested is watertight. I am not left with any slightest doubt that the person who was the only woman in the robbery was accused two. Accordingly, I do find her guilty of the three counts of robbery and convict her as charged."

When the appeal came up for hearing, Mr. Nyakundi, learned counsel for the appellant orally submitted that the main issue in this appeal involves around identification. That there was no identification parade conducted in respect of the appellant, that the appellant was not arrested at the scene of crime. That

though the robbery was committed in September 2005 the complainants were asked to identify the appellant in court in January 2006. That the appellant was arrested by members of public, none of whom was called to testify. Accordingly the possibility of a wrong person being arrested cannot be ruled out. Counsel went on to submit that the evidence of her co-accused was to the effect that he had been hired by two men and two ladies to take them to Kimunye. He admitted that the appellant was not among those ladies. Indeed he stated that he was charged alongside a lady he did not know and whom he had never seen. If the appellant was one of the robbers it means they were three ladies. There was therefore high chance that the appellant was wrongly charged. With that learned counsel rested his submission. However he chose to rely on the case of Muiruri v/s Republic, Mombasa Criminal Appeal No. 40 of 1999 (unreported) to buttress his submissions on the question of identification.

The appeal was opposed. Mr. Orinda, learned principal state counsel in opposing the appeal orally submitted that the evidence was clear and linked the appellant to the crime. That it was more than a coincidence that the appellant could be seen at the shop by three witnesses and later be seen in the company of armed men at the scene of a shoot out where items stolen from the complainants were found. That gave the basis of circumstantial evidence making the conviction of the appellant safe. The arrest was shortly after the robbery and the robbery was in broad daylight. That failure to conduct an identification parade was not fatal. Finally counsel submitted that the authority cited by the appellant's counsel was distinguishable.

This being the first appellate court we are required to consider all live issues in the case as a whole and reach our own decision or conclusions on such issues. See Okeno v/s Republic (1972) E.A. 32.

It is manifestly clear in this case that guilt turned upon visual identification by the three witnesses of the appellant as one of the robbers at the scene. That being the case the trial court is required to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged and the position from the appellant. See Maitanyi v/s Republic (1986) KLR 194. There is evidence that the offence was executed with such precision that gave no opportunity for the robbers to be observed. There was great panic by the three witnesses who were in fact the victims. They were harassed and molested. They were pushed into the bedroom and there is no evidence as to whether there was lighting in the said bedroom. There is grave doubt therefore that the witnesses had plenty of opportunity to observe the robbers and to retain their clear description in their minds for such a long period – 4 months – yet there is no indication that these witnesses had known the appellant before the day of the incident nor that she had such special features as would make her easily recognisable. Of all the three witnesses, only PW1 talked of a lady who was short, brown and wearing a red skirt. The rest did not describe the appellant to anybody. In fact the aforesaid description of the appellant by PW1 was at variance with what she had initially recorded in her statement to the police. In any event how many ladies would easily fit that description. In the case of Muiruri Nduti (supra), the court of appeal confronted with a situation similar to one obtaining herein observed:- "In our view this aspect of the evidence is at least uncertain and quite unsatisfactory and in the absence of any other evidence for example the alleged confession as recorded by the police in the charge and caution statement, inquiry statement and the ballistic report the purported identification could be mistaken." This observation is all over with the circumstances obtaining in this case.

The doubts cast on the evidence of visual identification of the appellant is further compounded by the fact that the appellant was not arrested at the scene of the robbery or at the scene where the shoot out ensued. Instead she was arrested two kilometres away not even by the police but by members of the public. Surprisingly, none of these members of public were called as witnesses to enlighten the court the basis upon which they arrested the appellant. The appellant was not even arrested with any of the items stolen from the complainants nor with any firearm as would have led to a suspicion that she was of a bad character. She may have been arrested merely because she was a stranger in the area. The appellant in the defence stated that she had come visiting her friend working at Castle Lodge. On her way she came by a big crowd of people who confronted her and started beating her. She was then taken to the police station. From the foregoing it is quite clear that she was a stranger in the area. However that does not mean that she could have been a member of the gang. Indeed the evidence of her co-accused in the trial seem to support the appellant's case. The co-accused categorically stated that the appellant was not

among the ladies who had hired his taxi. The possibility therefore that the appellant could have been a victim of mistaken identity cannot be ruled out.

It has been held in the case of Ali Ramadhani v/s Republic, Cr. App. No. 79 of 1985 (unreported) that the identification of a person who took part in the scene of crime to the place of his arrest is of course strong evidence of identification and if all the links in the chain are sound, it may safely be relied upon. Since none of the members of the public who effected the arrest of the appellant testified we cannot tell whether their chase of the appellant, if at all was continuous and that they never lost sight of her in the process. We also do not know who could have pointed out to them the appellant as having been part of the gang. In each of these links serious doubts are cast. The link in the chain is therefore not sound.

To our mind therefore, the identification of the appellant by the three witnesses 4 months after the commission of the offence was dock identification which is generally worthless. There is no reason at all why the appellant was not subjected to an identification parade. After all upon arrest he was taken straight to the police station before the three identifying witnesses had seen her. The story would have been different had the appellant been exposed to PW1, PW2 and PW3 before being locked up in the police station. In our view and contrary to the submission of Mr. Orinda, we find that failure by the police to mount an identification parade in respect of the appellant 'ate' into the credibility of the evidence of visual identification of the appellant by PW1, PW2 and PW3.

The conviction of the appellant also turned on circumstantial evidence. However our reading of the evidence on record does not give the comfort that the evidence irresistibly pointed to the appellant as having been a member of the gang and that it was incompatible with her innocence. None of those witnesses, positively identified the appellant at the scene of crime, none of them gave a proper description of the appellant in their reports to the police, the appellant was not arrested at the scene of crime, or where the robbers were shot and items stolen from the complainants recovered. Nobody testified as to having seen the appellant with the robbers at the scene of the shoot out. Instead she was arrested two kilometres away by members of public who were not called to testify regarding the basis of their arrest. We doubt whether the appellant would have escaped the shoot out if indeed she was present. After all none of them had seen the appellant commit the robbery. The appellant was not in possession of any of the stolen items nor was she armed. It seems to us therefore that the appellant's arrest was merely on the basis of suspicion as she was stranger in the area. Suspicion alone however weighty can never form a basis of conviction. It just remains that, suspicion.

In the circumstances, we think that it would be unsafe to allow the conviction to stand. We therefore allow the appeal, quash the conviction and set aside the sentence. The appellant is entitled to her freedom unless otherwise lawfully held.

Dated and delivered at Nyeri this 21st day of October 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE