REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CRIMINAL APPEAL 554 OF 2004

LIVINGSTONE KIHUGO MWANGI……..……..….APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

JUDGMENT

(Being Appeal from original conviction and sentence in Criminal Case No. 1470of2004 of the Senior Principal Magistrate's Court at Kiambu M.W. Wachira SPM)

The appellant LIVINGSTONE KIHUGO MWANGI was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 13th day of July 2004 along Riabai/Kiambu road in Kiambu District within the Central Province, jointly with others not before the court, robbed **DAVID KANYUA MWANGI** of his PSV license, one matatu drivers uniform jacket and cash Kshs.1,800/= all to the total value of Kshs.2,200/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said David Kinyua Mwangi.

After a full trial, he was convicted and sentenced to suffer death as prescribed by law. Being dissatisfied, he has preferred this appeal.

In his petition of appeal the appellant listed four grounds. Firstly, the appellant complained that the magistrate erred in convicting him on the identification of PW1 at night in difficult conditions, as the source of light was doubtful. His second ground was that the identification parade was conducted contrary to the force standing orders. Thirdly, he contended that the magistrate erred in being impressed by his mode of arrest, while the people who arrested him were not availed as witnesses. Fourthly, that the magistrate erred in rejecting his sworn defence of alibi without giving cogent reasons in terms of Section 169(1) of the Penal Code. The appellant filed written submissions to amplify his grounds of appeal.

Learned State Counsel, Ms Nyamosi, opposed the appeal and supported the conviction. It was her contention that there was ample light at the scene to enable the complainant PW1 to identify the appellant. The identification at the scene was positive as (PW1) described the role played by the appellant, in that the appellant took control of the steering wheel. She further submitted that the identification parade was properly conducted as the members of the parade were of similar features, and PW1 infact identified the appellant by touching. She also submitted that the defence of the appellant was considered in the judgment by the learned magistrate, as required by law.

The summary of the evidence before the learned magistrate was that on 13.7.2004 at around 7.30 p.m.

the complainant David Kinyua (PW1), a matatu driver, was driving motor vehicle KAK 790 P from Riabai to Kirigiti in Kiambu area. He was with a conductor and some passengers including PW3. At Kiambu terminus, two people boarded the vehicle and said that they wanted to be dropped at Kiambu. He drove for some other 50 meters and some other two people boarded the vehicle. When they reached Mada stage, one of the passengers said that he saw the person he was looking for passby but appeared unable to unbuckle the seat belt. PW1 looked back and told the conductor to unbuckle that passenger. Suddenly, PW1 saw men next to the driver's door who ordered him saying "*songa huko mbwa hii*". The man who was next to the driver's door opened the door and forced him to move to the co-driver's seat. The man who pretended to be held by the seat belt then moved to the front passenger seat and ordered PW1 to jump behind. The man at the steering wheel hit PW1 on the left cheek with a pistol. PW1 was robbed of Kshs.1,000/=, having been forced to lie down. The robbers tried to restart the vehicle. The vehicle however failed to start as it required to be pushed. The robbers tried to push the vehicle, but another vehicle approached and they ran away. The other vehicle came and stopped. The occupants of that other vehicle helped them to restart the vehicle. Then they went and reported the incident to the police. The appellant was arrested on 18.7.2004 from his house at Riabai by PW5 **IP MICHAEL KAITHIA** at about 10.00 p.m.

The appellant gave a sworn defence. It was his defence that he was employed by Eldoret Express. On 13.7.2004 he travelled from Bungoma to Nairobi arriving at 4.00 p.m. He went to his home. At about 11.00 p.m. he heard a knock on the door. When he opened police officers entered, arrested him and searched the house but found nothing.

This being a first appeal we are duty bound to re-evaluate the evidence and come to our own conclusions and inferences – see **OKENO –vs- REPUBLIC [1972] EA 327.**

The appellant's first ground of appeal is that the learned magistrate erred in relying on the identification of PW1 at the scene without considering that the said identification was free from error, and that being at night the conditions for positive identification were difficult. In his written submissions he stated that though PW1 and PW3 were in the same vehicle, only PW1 was said to have identified him. However, the said PW1 stated in evidence that he did not identify all the attackers. He also did not give a description of the attackers to the police when he reported the incident. The learned State Counsel Ms. Nyamosi, on the other hand, submitted that the circumstances of the identification were favourable and that the identification of the appellant was positive. She contended that PW1 described the role played by the appellant, who actually took control of the steering wheel of the vehicle.

It is not disputed that the incident occurred at night. It occurred when PW1 was the driver in a matatu vehicle. It is not disputed that the identification was by a single identifying witness.

PW1 himself testified that he was the driver of the matatu. He had stopped the vehicle and was looking at the rear of the vehicle, where a passenger was purportedly unable to unbuckle his seat belt, when the intruders came from outside the vehicle and ordered him to move away from the driver's seat. One of the intruders took over the driver's seat. PW1 was then ordered to jump to the back of the vehicle. He was also hit with a pistol on the cheek. He was also forced to lie down together with his conductor.

In our view, the circumstances for identification at the scene of crime were clearly unfavourable. It is trite that identification by a single identifying witness in the circumstances such as those in our present case has to be treated with great caution – especially where the circumstances are not conducive to positive identification – (see **WAFULA – vs – REPUBLIC [1986] KLR 627)**.

The evidence of PW1 was that the intruders came from outside the vehicle. He could not recognize all of them at the scene. He did not give any description of the appellant or any of the robbers when he reported to the police shortly thereafter. The appellant was arrested by PW5 **INSPECTOR MICHAEL KAITHA** as a suspected carjacker. He was not arrested because of the description given by the appellant. In our humble view, if PW1 had indeed identified the appellant at the scene, he would have given a description of him to the police when he made the report to the police. We are of the humble view that the identification at the scene of the robbery was not positive and without the possibility of

error. The fact that PW1 stated that one of the robbers took control of the steering wheel is not the same thing as saying that it was the appellant who took control of the steering wheel.

The second ground of appeal of the appellant is that the identification parade was not conducted in accordance with the police force standing orders. Considering the evidence on record, though there was an identification parade conducted on 19.7.2004 by PW2 **IP EDWARD KAMANDE** and the appellant was said to have been identified by touching, that identification parade did not have any evidential value.

We say so because, according to the evidence of **PW6 CPL. WILLIAM GICHUKI**, the complainant (PW1) actually met the appellant on 14th July 2004 some days before the identification parade was conducted. The said Cpl. Gichuki stated thus in his evidence

"On 14.7.2004 at 11.45 p.m., I was CID duty officer Kiambu District, when I was informed I was required at CID Kiambu. I found administration officers where I found they had arrested a suspect who was suspected to have committed a robbery reported on 13.7.2004. I booked the prisoner in custody and summoned the complainants… The driver identified the suspect as one of them…. In the course of investigations, I approached Inspector Kamande who conducted an identification parade".

Clearly, from the above testimony of Cpl. William Gichuki, the witness (PW1) had seen the suspect before the said Cpl. Gichuki approached the identification parade officer to conduct an identification parade. Even if the other procedural requirements for the identification parade were complied with, the identifying witness had already been shown the suspect who was already arrested. In our humble view, therefore, the identification parade which was conducted after the witness had been shown the suspect was not worthy of any evidential value.

The appellant also challenges the conviction on the fact that the people who arrested him were not called to testify. Clearly, those witnesses should have been called to state the reason why they arrested the appellant. From the evidence on record, the appellant appears to have been arrested, not because of this incident, but because of a perception that he was a carjacker or generally a robber. The failure of the prosecution to call those who arrested the appellant to explain the circumstances and the reasons of the appellant's arrest leads us to the inference that their evidence, if it was tendered, would be adverse to the prosecution case.

Lastly, the appellant challenged the conviction on the ground that his sworn defence of alibi was rejected by the magistrate without cogent reasons. Learned State Counsel Ms. Nyamosi has contended that the defence was properly considered and rejected by the magistrate. In considering the defence of the appellant, the learned magistrate had this to say –

"The accused defence of alibi is not true or believeable as the accused failed to produce any documents of employment from his employer. He failed to prove that he was on duty outside Nairobi on the date that the offence was committed".

From the above remarks in the judgment of the learned trial magistrate, it is obvious that the learned magistrate thought that the burden was on the appellant to prove his alibi. The magistrate shifted the burden of proof of the defence of alibi to the appellant.

It is trite that the burden of proving the falsity of the defence of alibi is always on the prosecution (see **KARANJA – vs – REPUBLIC [1983] KLR 501)**. In requiring the appellant to prove his defence of alibi , the learned magistrate therefore erred. That error prejudiced the appellant.

Having re-evaluated, the evidence in this matter, we are of the view that the conviction of the learned magistrate is unsafe and cannot be sustained. We therefore have to allow the appeal.

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

DATED and Delivered at Nairobi this 22nd day of March 2007.

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LESIIT

JUDGE

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DULU

JUDGE

Read, signed and delivered in the presence of –

Appellant

Ms Nyamosi for state

Tabitha/Eric – Court Clerks

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LESIIT

JUDGE

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DULU

JUDGE