



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Criminal Appeal 38 of 2006

MARY WANJIKU KARIRIMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 1499 of 2003 of the Senior Resident Magistrate's Court at Kerugoya P.Nditika (Mr) – SRM)

J U D G M E N T

MARY WANJIKU KARIRIMBI with three Co-accused were charged with four counts of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. The appellant was convicted after a full trial, on counts 1 and 2. She together with the Co-accused were however acquitted on the other counts. Upon conviction she was sentenced to death as prescribed in law. Being dissatisfied with the conviction, the Appellant lodged this appeal through Messrs Gacheru J. & Co. Advocates.

When the appeal came up for hearing, **Mr. Omwega**, learned State Counsel representing the State conceded to the appeal. Counsel submitted that the evidence adduced by the prosecution was threadbare and could not sustain a conviction.

The brief facts of the case are that the complainant in count 1, one **Peter Kimanjo Wahome** was driving his motor vehicle registration number KAP 992 D, a matatu. This was on 16th May, 2003. On getting to Kutus Petrol Station at about 7.30 p.m., he stopped and gave a lift to his friend by the name of J. B. and another gentleman by the name of Mwai. He was then approached by a man and a woman who requested to be ferried to Kianyaga. The woman entered and occupied the back seat whereas the man sat in front. As they drove towards Kianyaga, the man suddenly told the complainant to stop. The complainant stopped and suddenly saw somebody behind him armed with a pistol. He was ordered to go behind. The robbers then took over the motor vehicle and drove towards Kamiguas having ordered the complainant (PW4) and his conductor to (PW5) lie down.

Eventually the two were dumped on the way and left completely naked. A report of the robbery was made to the Police. The following day the motor vehicle was found abandoned at Mwea. Following further investigations the appellant with the Co-accused were arrested and charged.

Mr. Gacheru in his submissions questioned the evidence of identification saying that none existed that linked the Appellant to the offence charged. That though an identification parade was in which the appellant was identified by a witness by the name John, the said witness was never called as a witness. To Counsel therefore there was no proper identification of the Appellants. Counsel also faulted the judgment of the learned Magistrate. According to Counsel, in writing the judgment the learned Magistrate

failed to comply with the mandatory provisions of Section 169 of the Criminal Procedure Code.

Mr. Omwega conceded to the appeal as stated earlier. Counsel submitted that the appellant's conviction was predicated upon evidence of identification by PW2. However PW2 could not have identified the robbers as he was the police Officer who received the report of the robbery at the Police station. As PW5 did not attend Identification Parade, his purported identification of the appellant in court was dock identification, which was the weakest kind of evidence.

We agree that the conviction entered against the appellant by the learned trial magistrate turned on the evidence of identification. Of the key prosecution witnesses i.e. **PW4 and PW5**, it is only the later who purported to identify the appellant. However his purported identification of the appellant is suspect. The offence was committed at night. It is not clear by what means this witness was able to identify the appellant. It is clear from the record and in particular the evidence of PW4 that "..... **there was no enough light to enable one see the passengers.....**" As to whether there was light inside the motor vehicle, there is no agreement. Even if there was light inside the motor vehicle, the brevity with which the offence was committed could not have left PW5 with any chance of observing the appellant sufficiently to be able to identify her. We also note that an identification parade was conducted in respect of the appellant and she was picked by a witness who went by the name **John**. Surprisingly and for reasons which are not apparent from the record, the said identifying witness was never called to testify. Further the appellant was a stranger to PW5. In the circumstances and if indeed PW5 had properly identified her, one would have expected that he would in his first report to the police describe her in details. This was not the case here. Indeed PW2 in his testimony stated that there was no description of the accused persons and even using the description one could not identify the thugs. This witness further confirmed that the reportee had not properly identified the thugs when the motor vehicle was hijacked. We also thought that the complainant's friend by the name J.B and his friend, Mwai were crucial witnesses who ought to have been called to corroborate the evidence of PW4 and PW5. Once again no reasons are apparent from the record why the said witnesses were never summoned to testify or could it be that they were part of the gang that committed the robbery.

We are not at all impressed by the evidence of identification. The evidence of identification by PW5 was wholly unreliable.

In the case of **CLEOPHAS OTIENO WAMUNGA vs. REPUBLIC 1989 e KLR it** was held:-

“what we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis of the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”

We note that though the learned magistrate proceeded to convict the appellant on the evidence of PW5, a single identifying witness the learned magistrate failed to caution herself of the dangers of relying on the evidence of a single identifying witness. This was a gross non-direction in law. The magistrate also failed to make inquiries regarding the conditions of light prevailing at the scene in terms set out in the celebrated case in ***Maitanyi vs Republic [1986] KAR 75.***

The evidence of identification by PW5 was worthless since it was not preceded by a properly conducted identification parade. In the cases of ***Gabriel Njoroge vs. Republic (1982-88) 1 KAR 1134 and Walter Awinyo Amolo vs Republic (1991)2 KAR 254,*** the count of appeal held that evidence of visual identification must be treated with greatest care and ordinarily a dock identification alone should not be accepted unless the witness, has in advance, given a description of the assailant and identified the suspect on a properly conducted parade. This was not the case in the circumstances of this matter and accordingly, the purported identification of the appellant was not safe and free from possibility of mistake. All in all and having considered the many gaps in the prosecution case, the hazy evidence of

identification by the complainant and the conductor, we find that there was need for all these lapses to be explained by the prosecution. With regard to the appellant's defence, we find that the same was candid and not an afterthought as the learned magistrate found in his Judgment. The Appellant's defense was simple and clear and did not leave unexplained lapses and gaps as did the prosecution case. The prosecution case could not have sustained a conviction in all the circumstances of the case. We agree with both Counsels therefore that the prosecution evidence was threadbare and therefore unsafe. We find the conviction entered in this case was unsafe and should not be allowed to stand. We allow the appeal, quash the conviction and set aside the sentences. The Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Embu this 11th day of May 2007.

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KHAMINWA

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Gacheru for the Appellant

Mr. Omwega for State

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KHAMINWA

JUDGE

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MAKHANDIA

JUDGE