REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & DULU, JJ.)

CRIMINAL APPEAL NO. 595 OF 2004

BETWEEN

JAMES KINYANJUI NJERI..…..... APPELLANT

-AND-

REPUBLIC……..…….RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Ms. Mwai dated 30th November, 2004 in Criminal Case No. 317 of 2004 at the Kibera Law Courts)

JUDGEMENT

James Kinyanjui Njeri, the appellant herein, was charged with the offence of robbery contrary to section 296(2) of the Penal Code (Cap.63). The particulars of the charge were that on 29th December, 2003 at UNI Base petrol station, in Kawangware within Nairobi, the appellant, jointly with others not before the Court, and while being armed with pistols, robbed ***John Wakaba Njau*** of his motor vehicle, a white Toyota Corolla Station Wagon registration No. KAM 235R valued at Kshs.300,000/=, and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said ***John Wakaba Njau.***

The complainant (PW1) was driving his motor vehicle, when it stalled owing to shortage of fuel, in the Kawangware area. PW1 and his son pushed the car along towards a petrol station, but before they got there, he sent his son to find some money for fuel. It was while he was waiting for his son to return, that a group of people came by, pointed a gun at him, and ordered him to move over into the back seat of the vehicle. When he told the intruders that he had no fuel, they took over the vehicle and pushed it up to the petrol station, where they helped them to fuel without paying the price, and they then drove off, with PW1 still in the back seat. After driving for some 20 – 30 minutes, the robbers abandoned PW1 in the vehicle and took off. In the meantime, the robbery had been reported to the Police, and their officers searched and came up to the place where PW1 was. PW1 gave the Police officers (including PW3 – ***P.C. Benson Kimani***) a description of the robbers.

The robbers were not immediately arrested; but on 1st January, 2004, three days after, ***Cpl. Julius Kimondo*** (PW2) together with some officers of the Administration Police, received information that the appellant herein was part of a rogue gang causing terror among the people of Kawangware. PW2 arrested the appellant, and dispatched him to Kilimani Police Station, without any earlier knowledge of the

incident which led to the trial which is now the subject of appeal. It was at an identification parade held at the Kabete Police Station by PW4 (No.230406, ***Chief Inspector Otieno***) that the complainant identified the appellant as one of those who had robbed him on 29th December, 2003.

PW1 testified that the robbers did not harm him, but they threatened him with a pistol. He affirmed that the robbers were in numbers, being more than one.

The question which the learned Magistrate set out to resolve was: whether or not the accused was one of the robbers. She noted that the appellant had not been robbed at the scene of crime, and indeed, nothing stolen from PW1 was recovered from the appellant's possession at the time of the arrest. She noted that the prosecution case relied on the identification of the accused as one of the robbers by one witness, PW1. The other witnesses had not been present at the time of the robbery. It was PW1's evidence that the appellant was not only part of the gang of robbers, but he appeared to be the ring-leader, as he was the one commanding the others; and that it was the appellant who pointed a pistol at the complainant.

It was PW1's testimony that he had noticed that the appellant bore a mark below the ear, and he had a gap in his front teeth. PW1 testified that he had given the description of the robbers to those who came to the scene, including the Police officer. He had been in the company of the robbers for some time: he saw them as they pushed his motor vehicle to the petrol station; and as the car was being fuelled; and as they revved the engine, started the car and got it moving; and as they drove with him in the back seat for some time. All this time, PW1 testified, the robbers did not disguise their faces, and the offence was committed in the morning hours when there was full lighting.

The opportunity for identification of the robbers thus present, led the learned Magistrate to the conclusion that "the [complainant] was in a position to positively identify the [appellant]. The circumstances and the time taken were [favourable] for a positive identification, and that is [how] when [PW1] was called to Kabete Police Station he was able to pick out the accused at an identification parade."

The learned Magistrate discounted the appellant's protests at the mode of conduct of the identification parade; PW4 had testified that "the accused only protested after he had been identified, [and] not before." In these circumstances the Court dismissed the protest; in the words of the learned Magistrate: "I thus find [the appellant's] claims to be [only an] afterthought, meant to discredit the identification parade. She concluded that "[the] accused was properly and positively identified by …PW1 as one of the robbers who robbed him." The learned Magistrate drew the conclusion "that the evidence shows/proves beyond reasonable doubt that the accused committed the offence."

The Magistrate found the appellant guilty, convicted him, and ordered him to serve the mandatory death sentence, as provided by law.

In his petition of appeal the appellant asserts as follows:

i. that, the learned Magistrate erred in both law and fact, by convicting on the basis of inadequate evidence of identification;

ii. that, the identification parade was not properly conducted;

iii. that, it was a grave error for the trial Magistrate to have convicted the appellant solely on the evidence of a single witness;

iv. that, the defence raised was not given adequate consideration.

The appellant made an unsworn statement, in which he claimed to have been arrested on 1st January, 2004 purely on account of the malice borne towards him by those who arrested him.

In his submissions, the appellant impugned the prosecution case on the basis that no proof had been tendered as to the theft of PW1's vehicle. It was also claimed that the vehicle said to have been stolen was

not exhibited in Court. The appellant maintained that he had had nothing to do with the commission of the offence charged.

In response, learned counsel ***Ms. Kagiri*** stated that the State supports both conviction and sentence. She urged that the prosecution had adduced sufficient evidence to prove that the appellant together with others had, on the material day, robbed PW1 of his motor vehicle, at which time they had threatened violence. Counsel submitted that the positive visual identification of the appellant, in well-lit morning conditions at about 9.00 a.m., was a reliable basis for connecting the appellant to the offence charged. The robbers' faces were undisguised, and they spent some tens of minutes with the complainant before they took off. Counsel urged that the identification parade at which the complainant positively identified the appellant herein, was properly conducted by PW4. ***Mrs. Kagiri*** submitted that even though the crucial evidence which led to the conviction of the appellant was that of a single witness, it was consistent, credible, and safe enough to be relied upon for the purpose of conviction. The learned Magistrate was conscious of the fact that she was relying on the evidence of PW1 essentially, as the basis of conviction, and she duly administered to herself the pertinent cautions.

Learned counsel made remarks on certain objections which had been raised by the appellant: the fact that a discrepancy had appeared on some of the Court records, as to the registration number of the motor vehicle which had been the basis of the charge against the appellant; that the said registration number should have read KAM 135R and not KAM 235R. This, counsel urged, was a minor error which did not go to the root of the charge – a meritorious contention, in our view.

Learned counsel urged that the evidence on record shows that the offence of robbery with violence had been committed by the appellant; the motor vehicle had been stolen for the entire period that the robbery was taking place. Counsel urged, and in our view, quite meritoriously, that the issue in this case is not whether the motor vehicle was in the end left with the complainant, but whether robbery with violence, in the terms of s.296(2) of the Penal Code (Cap.63), was committed against the complainant – and it indeed, was.

In his appeal the appellant had also contended that it was improper for the prosecution not to have called a petrol station attendant as a witness, from the fuel station where the stolen car was fuelled before the robbers drove it away. Learned counsel noted that there was evidence on record that the petrol station attendant in question could not be found, and, besides, as was urged, it was essentially the responsibility of the prosecution to determine the witnesses to be called.

Mrs. Kagiri urged that the findings of the trial Court be upheld, and conviction and sentence be confirmed.

The law on single identifying witness, as a basis for entering a conviction, is well settled. In ***Walter Awinyo Amolo v. Republic*** (1991) 2 KAR 254 the Court of Appeal had stated the governing principle as follows (p.256):

> ***"…the evidence of identification…should…be tested with the greatest care unless the witness or witnesses had given a description of the accused in advance, and his or their ability to identify was tested on a properly conducted identification parade."***

It has been urged, and we think, quite rightly, that such specific elements in the identification process, were present in the instant case: that PW1 who described the features of the appellant and also identified him at the identification parade, truthfully spoke before the Court as to the identity of the appellant, as having been one of the robbers.

In the ***Walter Awinyo Amolo*** case, a second appeal on a conviction for robbery with violence had been dismissed, and the Court of Appeal there noted, precisely as has been the case with the instant matter, that identification of the appellant had taken place conveniently and in broad daylight (p.257):

> ***"…the circumstances favouring identification were good, it being broad daylight, and the***

complainant and her sister had ample opportunity to see the appellant."

In all the circumstances, we have no doubts that the learned trial Magistrate exercised all due care in appraising the testimonies, and in particular that of the complainant, before coming to the fully-justified conclusion that the appellant was well identified as one of the robbers who attacked and robbed the complainant on 29th December, 2003. The evidence of identification relied on by the trial Court was, in our view, accurate and truthful, and left no doubts in the mind of the trial Magistrate, as she convicted the appellant.

Therefore, we dismiss the appeal, uphold the conviction, and confirm the sentence meted out against the appellant.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 12th day of June, 2007.

J.B. OJWANG

JUDGE

G. A. DULU

JUDGE