REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 396 of 2004

JOSEPH KAMAU KIMANI……..…….....……..…..…..APPELLANT

VERSUS

REPUBLIC…… …….....…….…....RESPONDENT

J U D G M E N T

The Appellant was charged with **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. After hearing the prosecution and the defence case, the learned trial magistrate reduced the charge to simple robbery contrary to **Section 296(1)** of the **Penal Code** on the grounds:

"…….***however this court note that no (sic) personal violence was used on the complainant during the robbery. The charge should have read….immediately before or immediately thereafter threatened to use personal violence or simply that he was armed with dangerous weapon namely a gun. I am unable therefore to convict the accused under section 296(2) of the Penal Code."***

In the case of **ERICK WAMBULWA MUCHOCHO & ANOTHER vs. REPUBLIC CA NO. 24 OF 2003** the Court of Appeal commented on the issue of what constitutes an offence under Section 296(2) of the Penal code as follows: -

"…***An offence under the section can be committed in any one of the three circumstances set above, if the offender is armed with a dangerous or offensive weapon, he need not be in the company of other people; nor need he wound, beat, strike or use any other form of violence against the victim. The fact that the offender is armed with a dangerous or offensive weapon at the time of the theft constitutes a complete offence under the section. Again even if the offender is not armed with a dangerous or offensive weapon, but is, at the time of the theft, accompanied by one or more other persons, that being so accompanied constitutes a complete offence under the section.***

Lastly if at the time of the robbery, the offender wounds, beats, strikes etc the victim, that is another complete offence even if the offender is not armed with a dangerous or offensive weapon and he is just alone. It is now trite law that these are the three modes or ways in which a robbery with violence can be committed and the prosecution must choose one of the three ways in drafting the charge. Of course as it is well known, persons who commit robberies are usually armed with dangerous or offensive weapons and are perfectly prepared and others do use the weapons and more often than not, a group of persons would be involved in a robbery. Nevertheless, the prosecution is still bound to choose, and they usually do, one aspect of the offence which they think they are able to prove…"

Considering the Court of Appeal Ruling in **MUCHOCHO's Case Supra**, it is quite clear that all the prosecution in the instant case needed to prove is either one, the Appellant was armed with a dangerous or offensive weapon or alternatively that he acted in company with one or more people or in further alternative that he used or threatened to use force. In the charge, the prosecution relied on all three ingredients of the offence and led evidence in support of all the three. The learned trial magistrate, in reducing the charge on the basis that no violence was visited on either PW1 or PW2 was definitely in error.

Going back to the facts of the case, the prosecution case was that on 7th May 2003 the Complainant, PW1 hired PW2's taxi to take him to Kiambu to bank some Kshs.270,000/-. That on their way to Kiambu, they were blocked by an oncoming vehicle. One man alighted from the vehicle carrying a gun. He ordered the Complainant to hand over the money which he promptly did. At the same time the vehicle carrying the robbers made a U-turn to face the direction it had driven from and it is at that point that both PW1 and PW2 said that they saw the Appellant seated at the rear left seat with the window wide open and communicating with the man with a gun through sign language. The robbers then drove off. About nine months later, the Complainant and the taxi-driver, PW2 identified the Appellant in an identification parade.

In his sworn defence, the Appellant denied the charge and said that on 24th January 2004 he was stopped by three people and a police officer whom he knew because he had tried to 'tune' his girlfriend earlier. That when he asked the girlfriend what they were discussing the police officer slapped him and told him that he would put him in trouble. He said that upon arrest, he was held in police custody. That two people he met at the report office on the day of his arrest and later at the CID office identified him nine days later in an identification parade

In the Appellant's amended appeal he raises four grounds:

One that the conditions favouring positive identification were non existent and further that rules governing the conduct of an identification parade were contravened.

Two that the prosecution failed to prove its case

Three that the Appellant's defence was rejected, and;

Four the learned trial magistrate shifted the burden of proof and required the Appellant to prove his innocence.

The appeal was opposed.

MRS. OBUO, learned counsel for the State submitted that the prosecution adduced sufficient evidence to prove the case. Learned counsel submitted that the Complainant's hired vehicle was 1 foot from the gun men's vehicle and that since it was 2.00 p.m. the two witnesses, the Complainant and PW2 properly identified him. That subsequently the two witnesses were able to identify the Appellant in an identification parade. The learned counsel urged the court to dismiss the appeal.

I have carefully analyzed and re-evaluated the evidence adduced before the trial Court bearing in mind that I did not hear or see the witnesses and giving due allowance.

The Appellant challenges the identification by PW1 and PW2 in this case. According to both witnesses, the Appellant was seated at the back left of the robbers' vehicle. Both stated that the vehicle with the robbers was driving towards them when they were blocked. That means that at that point the occupant of the assailants' vehicle on the back left of the vehicle was not facing them. It was after the vehicle made the U-turn that they could have seen him. Taking that into mind, it would then mean that the two witnesses had a chance to see the back left seated man between the time the vehicle turned and the time the gun man ran back into it before they drove off. From the description of the two eye witnesses, they had a fleeting glance at the man later identified as the Appellant. Indeed PW2 said the whole episode

took only one minute while PW2 said it took 5 minutes.

Whereas that may not have posed a big problem what followed that fleeting glance does. None of the two eye witnesses described the person they saw in any way except to say that they could identify him by facial features. Those facial features were never specified at any stage of this case. In addition to all these anomalies the prosecution did not establish on what basis an identification parade was arranged for PW1 and PW2 to identify their assailants. PW4 who arrested the Appellant after a tip off also chose the members of the parade. According to PW4 the only description he had of the person the eye witnesses could identify was his age described as between 20 to 25 years. To compound the matter further, the identification parades were conducted nine months after the offence was committed.

In **AUGUSTINO RITHO & ANOTHER vs. REPUBLIC CA 99 OF 1986**, the Court of Appeal held: -

"***A mere description by dresses is not sufficient. Appearance at such short moment may cause confusion particularly where many people look alike and dress alike. There must be proper identification and not merely based on speculation…"***

I find that PW1 and PW2 could not have identified the Appellant as one of the assailants having given no descriptions of him prior to his arrest. The Appellant has challenged the identification saying the two eye-witnesses saw him after his arrest, on two occasions before the parades were conducted. That challenge is not without merit. The eye witnesses had a fleeting glance of their assailants and had not described the Appellant to the Police in any way except by means of age, according to PW4 the investigating officer. Nine months later, it is doubtful that they had any idea of how any of their assailants looked like to enable them identify him in a parade.

Having considered the evidence adduced on identification of the Appellant, I am satisfied that the same was not accurate and free from the possibility of an error. What was needed in this case was other evidence implicating the Appellant. I have sought such other evidence in the record of the proceedings and I find none. I agree with the Appellant that the prosecution failed to prove its case on the standard required.

The Appellant complained that the learned trial magistrate shifted the burden of proof against him by requiring him to prove his innocence. I do not find any evidence of this in the learned trial magistrate's judgment. He evaluated and analyzed the evidence adduced before him by both sides as was his duty to do, even though he arrived at the wrong conclusion.

The Appellant also challenged the rejection of his defence. In rejecting the defence, the learned trial magistrate found it did not "**contain any grain of truth**". In that defence however, the Appellant had only given account of his arrest and what may have motivated the arrest which he said was a grudge between him and PW4. Rejecting or accepting it would not have made much difference to the entire case in my view. The Appellant, therefore, suffered no prejudice.

Having considered this appeal, I find that it has merit. I will allow it, quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 22nd day of March 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - present

Mrs. Obuo for State

CC: Huka

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LESIIT, J.

JUDGE