REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 286 OF 2004

JOHN MULINGE NDUATI…….....…...…….APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGMENT OF THE COURT

The appellant, John Mulinge Nduati 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 12th of August 2003 at Mbaruk area Nakuru, the appellant jointly with others not before court while armed with dangerous weapons namely pistols robbed James Kiiru Mwangi of Kshs 77,400/=, one mobile phone make siemens A35, 60 sachets of tiger brand whisky and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said James Kiiru Mwangi. The appellant was further charged with another count of **robbery with violence contrary to Section 296(2)** of the **Penal Code.** The particulars of the charge were that on the same day and at the same place while similarly armed, the appellant jointly with others not before court robbed Stephen Ndungu Thuo of his mobile phone make Motorola T192 and one khaki jacket and at the time of such robbery threatened to use actual violence to the said Stephen Ndungu Thuo. The appellant pleaded not guilty to the two charges. After a full trial, he was convicted as charged on both counts and sentenced to death as mandatorily provided by the law. Being aggrieved by his conviction and sentence, the appellant appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had failed to take into account that he had not been properly identified by the complainants and further that the identification parade where he was purportedly identified was improperly conducted. He was further aggrieved that the trial magistrate had failed to take into account that none of the stolen items were recovered in his possession and further that the trial magistrate had taken into account extraneous matters in arriving at the said decision. He faulted the trial magistrate for failing to consider the fact that the evidence which was adduced against him by the prosecution witnesses was full of discrepancies which could not sustain a conviction. He was finally aggrieved that the trial magistrate had not considered his defence before arriving at the said decision convicting him.

At the hearing of the appeal, Mr Karanja Mbugua, learned counsel for the appellant made eloquent submissions urging this court to allow the appeal. He referred this court to several decided cases in support of the grounds of appeal put forward by the appellant. Mr Koech, learned state counsel opposed the appeal. He urged this court to uphold the conviction and the sentence imposed on the appellant by the trial magistrate. Before setting out the reasons for our decision, we shall briefly set out the facts of this case.

On the 12th of August 2003, PW2 James Kiiru Mwangi and PW4 Stephen Thuo Mwangi, employees of Edman Company Limited were traveling in motor vehicle registration number KAQ 886B Isuzu Pickup. The two (*hereinafter referred to as the complainants)* were salesmen and were traveling from Kapsabet to Nairobi. They told the court that when they reached Mbaruk area near Shiners Boys Secondary School, just past Nakuru town, at about 3.30 p.m. they were blocked by a Toyota Corolla DX Saloon motor vehicle which had trailed them for some distance. They told the court that one occupant of the said motor vehicle pointed a pistol at them and ordered them to stop the motor vehicle. PW4 who was driving the motor vehicle stopped the same and parked it off the road.

He told the court that after they had stopped the motor vehicle, two occupants of the Toyota Saloon entered their motor vehicle and ordered him to drive towards the Naivasha direction. The complainants testified that they were four of them at the front cabin of the motor vehicle. At some place between Elementaita and Kikopey, PW4 was ordered to drive the motor vehicle into the bush. The two robbers who had travelled in the complainants' motor vehicle communicated with the other robbers in the Toyota Saloon motor vehicle who followed them into the bush. While in the bush, the complainants were threatened and told to give all the money that they had in their possession. The complainants gave the robbers the sum of Kshs 77,400/=. The robbers also took some spirits which was in the complainants' motor vehicle. They also robbed the complainants of their mobile phones. The complainants testified that the entire robbery incident took about thirty minutes after which the robbers locked them inside the rear cabin of their motor vehicle and abandoned them.

The complainants were rescued by a police officer who was passing by after they had banged the cabin of the motor vehicle and attracted attention. They made a report to Kikopey Police Post. They were later advised to go to the C.I.D. office Nakuru. The complainants testified that during their robbery ordeal, they were able to identify their assailants. On the 26th of August 2003, PW4 was able to identify the motor vehicle which had blocked them when he saw it at the C.I.D. offices, Nakuru. On the 28th of August 2003, the complainants identified the appellant as being among those who robbed them in an identification parade which was conducted by PW5 Inspector Leonard Lutta and Inspector Ruto.

On the 19th of August 2003, PW3 Police Constable Livingstone Lihanda took the photographs of the Toyota motor vehicle which had been found abandoned at the Kolen-Total roundabout Nakuru. PW1, Police Constable Kipsang Kirwa acting on information from an informer went to the house of the appellant at Weavers Shabab and arrested the appellant on suspicion of having been involved in several robberies. In the information received, the appellant was referred to as "Brown". PW1 arrested the appellant on the 24th of August 2003. PW6 Inspector General Munyuri investigated the case and concluded that the appellant should be charged with the offences which he was convicted of.

When the appellant was put on his defence he denied that he had robbed the complainants. He testified that on the day that he was alleged to have robbed the complainants, he was at Subukia purchasing his items of trade. The appellant's evidence was corroborated by the evidence of DW2 Daniel Gachunguri who testified that he was with the appellant upto 7.00p.m. on that day at their place of business selling tomatoes. The appellant testified that he was arrested by the police on the 24th of August 2003 while he was at his home and later taken to the police station where an identification parade was conducted. He lamented that he was identified in a police identification parade which was not conducted in accordance with the law. He told the trial court to examine the Occurance Book to determine whether in the initial report of the robbery the complainants described their assailants. He denied that he was identified by the complainants during the robbery.

This being a first appeal this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore could not be expected to make any decision as to the demeanour of the witnesses (*See* **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution adduced evidence that proved the charge of robbery against the appellant to the required standard of proof beyond reasonable doubt. We have

considered the submissions made before us by Mr Karanja for the appellant and Mr Koech for the State. We have also re-evaluated the evidence which was adduced by the prosecution in the trial before the magistrate's court.

The evidence that was adduced by the prosecution to secure the conviction of the appellant was basically the evidence of identification. PW2 and PW4 testified that they identified the appellant as being in a gang of robbers who stopped them on the road, hijacked them and later robbed them of cash, mobile phones and of the spirits which they were carrying in their motor vehicle. The two witnesses testified that the robbery took place at about 3.30 p.m. It was therefore during daytime. The appellant has challenged the evidence of the complainants as regards the circumstances under which the said identification was made.

We have re-evaluated the evidence and have reached the following conclusion on the said evidence of identification; the robbery took place in daytime; the robbery took place for a period of about thirty minutes; the robbers wore no disguises during the course of the robbery and therefore they did not conceal their appearance; during the period that the complainant endured the robbery ordeal, they had a conversation with the robbers at close proximity. When the complainants were abandoned after the robbery incident, they told the police that they would identify the robbers if they were arrested. They described one of the robbers as being short and brown. Although their description as to height of the robber who resembled the appellant was not very accurate, when the complainants were called to attend an identification parade two weeks after the robbery incident, they were able to separately and without hesitation identify the appellant.

We recognize the fact that in the hectic circumstances of the robbery the complainants could have been mistaken in their identity of the robbers. However, in the circumstances of this case it is clear from the word go that the complainants co-operated with the robbers once they realized that the robbers were armed with a pistol. The complainants were with the robbers for a period of more than thirty minutes. During this period the complainants had calmed down and indeed they were able to have a decent conversation with the robbers.

Having re-evaluated the evidence that was adduced by the prosecution on identification, we have no doubt that the appellant was properly identified by the complainants as being among the robbers who carjacked them and thereafter robbed them of their properties. The complainants confirmed their positive identification of the appellant when they pointed him out in the identification parade which was mounted by the police two weeks after the robbery incident. We see no merit in the complaint made by the appellant that the said identification parade was improperly conducted. Having re-evaluated the evidence adduced by PW5 and PW6, it is clear that the said identification parade was conducted in accordance with the law. We are able to discount the complaint of the appellant as regards the manner in which the said identification parade was conducted because the complainants attended several identification parades but were unable to point any other person other than the appellant. The fact that the two complainants pointed out the appellant without hesitation clearly proves that they were certain as to the identity of the appellant.

We have considered the decided cases which were referred to us by the counsel for the appellant including the cases of **Osiwa –vs- Republic [1989] KLR 469**, **Oscar Waweru Mwangi –vs- Republic, C.A. Criminal Appeal No. 2 of 1999 (Nairobi) (***unreported***), Abdullah bin Wendo & Anor –vs- Reginum (1953) 20 EACA 166 and Kiarie –vs- Republic [1984] KLR 739** and are convinced that the identification of the appellant by the complainants was free from any error. The said identification was made in broad daylight. Furthermore, it cannot be said that the said identification was made in circumstances which were difficult. All the conditions favouring positive identification were present in this case. Although the complainants had not known the appellant prior to the robbery incident, the appellant was with the complainants for more than thirty minutes and during this period the complainants were able to identify his physical features. The complaint by the appellant that he was not found with any item stolen during the robbery is neither here nor there. The evidence of identification in this case suffices.

We have considered the alibi defence which was raised by the appellant. We are not satisfied that the

said alibi defence raises doubts in our minds to the extent that it would discount the evidence which was adduced by the prosecution against the appellant. As was held in the case of **Kiarie –vs- Republic [1984] KLR 739,** when an accused person raises an alibi defence, he does not therefore assume the burden of proving the said alibi but it would be sufficient if the said alibi defence raises doubt in the mind of the court that the said alibi defence is not unreasonable. In the circumstances of this case, the evidence of identification adduced by the prosecution against the appellant is watertight and places the appellant at the scene of the robbery. His allegation that he was at Subukia the material time of the robbery is not believable. The said alibi defence therefore is unreasonable in the circumstances of this case and we reject it.

In the premises therefore, we find no merit whatsoever in the appeal filed by the appellant. Having re-evaluated the evidence and considered the submissions made before us by the appellant and the State, we are satisfied that the prosecution proved its case against the appellant on the charge of robbery with violence to the required standard of proof beyond reasonable doubt. The appellant in company of more than two others while armed with a dangerous weapon namely a pistol threatened to use violence on the complainants and in the process robbed them of cash, mobile phones and spirits. All the essential ingredients to establish a charge of robbery with violence against the appellant were proved by the prosecution to the required standard.

We therefore dismiss the appeal and confirm the conviction and the sentence imposed on the appellant by the trial magistrate. It is so ordered.

DATED at NAKURU this 10th day of March 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE