



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

**Criminal Appeal 100 of 2003**

**SAMMY MWAURA MWANGI .....**  
**APPELLANT**

**VERSUS**

**REPUBLIC .....** **RESPONDENT**

**(Being an appeal against the conviction and sentence in Eldoret C.M's Criminal Case No. 2539 of 2002 delivered on 19<sup>th</sup> August 2003 by Solomon Wamwayi (C.M))**

**JUDGMENT**

Sammy Mwaura Mwangi was initially arraigned before the Chief Magistrate at Eldoret on 18<sup>th</sup> day of March 2002 where he was jointly charged with another person who we shall refer to simply as 'W. N' of three counts of the offence of Robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the offences were:

**Count One:**

*“On the 3<sup>rd</sup> day of March 2002 at Langas Estate in Uasin Gishu District within Rift Valley Province, Mwangi and W. N jointly with others not before Court being armed with offensive weapon namely Pangas, Iron bars and clubs robbed PETER NGURE of cash K.Shs. 8,300/- and at or immediately before or immediately after such robbery used actual violence to the said PETER NGURE”.*

**Count Two:**

*“On the 3<sup>rd</sup> day of March 2002 at Langas Estate in Uasin Gishu District within Rift Valley Province, Mwangi and W.N jointly with others not before Court being armed with offensive weapons namely Pangas, Iron bars and clubs robbed PETER EKAMAIS of cash K.Shs. 50/- and at or immediately before or immediately after such robbery used actual violence to the said PETER EKAMAIS”.*

**Count Three:**

*“On the 3<sup>rd</sup> day of March 2002 at Langas Estate in Uasin Gishu District within Rift Valley Province, Mwangi and W.N jointly with others not before Court while armed with offensive weapons namely Pangas, Iron bars and clubs attempted to rob PARIS OCHIENG ODHIAMBO of his motor vehicle*

*Registration KSO 535 Toyota Corolla white in colour valued at K.Shs. 120,000/- and at or immediately after the time of such attempted robbery threatened to use actual violence to the said PARIS OCHIENG ODHIAMBO”.*

After a full trial, Mwangi was convicted of the offences in Counts 1 and 2. He was however acquitted on the offence in the Count 3. W. N was acquitted of the offences in the three counts.

Mwangi was sentenced to suffer death in both instances, which we feel should not have been the case as a man can only die once. The proper procedure would have been for the learned trial Magistrate to suspend the second sentence, and leave it in abeyance to await the decision of the appellate Court, should the Mwangi have preferred any appeal against the conviction and sentence in any of the counts.

Be that as it may, Mwangi who feels aggrieved by both the conviction and the sentences has preferred this appeal which he bases on the grounds that:

- “1. The learned trial Magistrate erred in law and fact by basing his conviction and subsequent sentencing on the evidence of identification in absence of corroboration in material particulars.*
- 2. The learned trial Magistrate erred in law and fact by failing to appreciate that despite the fact that it was alleged that he had been arrested at the scene within a very short time of the incident, he was not found to be in possession of the stolen items.*
- 3. The learned trial Magistrate misdirected himself in law and fact in convicting and sentencing him when it was not clearly established how the arresting officer had joined the chase and arrested him.*
- 4. The learned trial Magistrate erred in law and fact by relying on the allegation that he had been found in possession of military uniforms which PW1 and PW2 alleged to have seen him wearing at the scene of the crime, yet he was not charged with the offence of being in possession of public stores as required by law.*
- 5. The trial Court erred in law and fact by dismissing his defence without giving due credence to his evidence, pertaining to his previous relationship with the arresting officer.”*

The State, which opposes this appeal is of the view that not only was Mwangi arrested within a few meters of the scene by police officers who were then on patrol, and that the chain of events was never disrupted, but that there was no need for an identification parade as he was within sight of all witnesses throughout the time. The State is also of the view that his evidence was considered by the learned trial Magistrate who decided to disregard, it as it was not credible. All in all, it is its contention that the charges were proved beyond reasonable doubt.

Briefly PW1, who was a taxi driver parked his vehicle at a bar Parking in Kona Mbaya, Langas Estate at 2.30 a.m. on 2/3/2002 and he requested a local watchman to escort him to his home. They noticed a police vehicle which was parked near the area behind them and were then accosted by four people who appeared to be police officers and who were dressed in police uniform (jungle and desert camouflage). The watchman (PW2) was hit on the head with a hammer, as PW1 was robbed of Shs. 8,300/-, his driving licence and Identity Card. Just then, a police landrover which PW1 and 2 had seen in the vicinity before they started their walk to his home, drove to the scene and PW1 heard gun-shots. He then saw their assailants make a dash for freedom but one was arrested and brought back to the scene. PW1 claims to have seen his face with the aid of the landrover headlamps. When PW1 went to record his statement at the Police Station later that morning, he learnt that a second assailant had also been arrested.

PW2 testified how he had noticed a group of five armed people following them. They were dressed in military uniform. He narrated how the five ordered them to stop and when they stopped, he was hit on the head at which point he lost consciousness. He later discovered that he had lost Shs. 50/- during the attack. PW2 did not attend any identification parades.

Later that morning, as PW5 who was also a taxi-driver, took a customer to Langas, five armed people who were dressed in military jungle outfits and police uniform attempted to rob him of his vehicle, but he managed to escape. He reported the incident to Langas Station policemen who were in a vehicle at the Kona Mbaya point. He went back to the scene in the company of the policemen, but the thugs were nowhere to be seen.

When he went to make a formal report at the police station later that morning he was shown military uniforms and two people who had allegedly been arrested in connection with attempted robbery, and who were dressed in military uniform. He however did not see the faces of the two suspects, neither did he attend any identification parades.

The appellant whose evidence was that he was arrested from his house about 4 a.m. claimed to have been implicated by PW4, whom he owed Shs. 400/- on account of a radio, which he had sold on his behalf, and which default had led to a physical confrontation after which PW4 had warned of dire consequences. He maintained his innocence.

The learned trial Magistrate considered the evidence for the prosecution as well as the defence statement at length and he found that the “*circumstantial evidence of PWs 1, 2 and 4 clearly points to accused 1 (this appellant) as one of the robbers who robbed PW1 and PW2*”. He declared the appellant’s defence a falsity, after which he found that the prosecution had proved its case against him beyond reasonable doubt, and convicted him accordingly.

As expected of us, this being the first Appellate Court, we have had to re-evaluate the evidence on record, bearing in mind that we shall not be able to examine the demeanor of the witnesses, with a view to establishing whether this appeal is meritorious.

PW1 and 2 testified that their assailant was arrested within a distance of 70 metres from the scene of their attack, the evidence of a Police dog handler (PW3) would tend to confirm this for, he informed the court that he was collected by the Langas police from his post at Eldoret to assist in tracking the robbers who took him to the scene within the vicinity. He took a police dog for the purpose. He however could not track the robber within the vicinity but that the one “robber” who was already in the vehicle took them to his colleague’s home, where they managed to arrest W.N. They also recovered military uniform, which they alleged was next to him.

Though PW1, 2 and 5 testified that they reported the matter to police who were on patrol within the vicinity, the evidence of PW4, of the crime office at Langas would tend to show that he received the report of attempted robbery from PW5, while he was at his desk soon after the attempt. PW4, however testified that he was part of the group of officers who later arrested the person who had robbed PW1 and 2, which, we find to be contradictory.

Nevertheless, the Investigating Officer (PW6) testified how he went to Langas Police Station to collect the appellant on 3/3/2002, at the instructions of his superior, after which he conducted the investigations, yet when challenged to produce the relevant Occurrence Book by the appellant, he conceded that the Occurrence Book lacked the relevant entry and that he had actually not gone to Langas for that particular purpose, he had only sent for the appellant, who was brought to him. He also conceded that the uniform which the appellant allegedly wore at the material time was handed over to him by his colleagues from Langas, which would mean that the appellant was actually not dressed in the uniform at the material time.

PW10, a Scenes of Crime officer testified how he took photographs of 2 suspects who were dressed in military fatigues, on 3/3/2002. The photographs were not produced in evidence and as such we are not able to tell from the proceeding who the two (2) suspects are. It may have been people other than the appellant and his co-accused.

It would appear that the assailant took to different directions when police shot in the air yet, the issue of whether the circumstances were conducive for purposes of identification by PW1. It was PW2’s evidence that it was dark at the material time. Were the vehicle lights on, were they shining against the appellant,

how did PW4 actually follow the appellant to the point where he found him? We are of the view that these vital issues were not addressed fully by the learned trial Magistrate.

We are well alive to the legal position that *“in order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution”* (**Kariuki Karanja v. Republic [1986] KLR 190**).

We have given serious thoughts to issues pertaining to identification of the appellant and in our view, it was very important that a parade should have been conducted to establish whether he was one of the assailants. We say so because, none of the victims could recognize or identify their assailants. Though PW1 testified that he was able to recognize the appellant after his arrest soon after the incident, as the one who was carrying a rungu during the attack, there was need to corroborate this evidence. In any event, PW1 clearly stated that none of their assailant were the accused during the trial. PW5 testified that he did not look at the face of the person who was arrested soon after the arrest. It cannot be ruled out that the appellant was not at the scene at the material time and that he was not even arrested at the scene. We believe that this is why it is necessary that parades be conducted with a view to eliminating any errors/mistakes or we dare say, mix-ups. It is therefore possible that the person who was arrested at the material time was not the one who was charged with the offence.

One would question why, if at all it was true that the appellant was wearing the police uniform, PW3 the dog handler who was collected from Eldoret for purposes of tracing the robbers and who claims to have found the appellant in the vehicle, did not say that the appellant was dressed in military uniform. The fact that he was not charged with the offence of being in possession of public stores contrary to section 324 (2) of the Penal Code, also raises doubts in our minds.

The evidence by the police officers especially PW6, who happens to have investigated the matter was full of contradictions, which also raises serious doubts on the credibility of the evidence for the prosecution. We have looked at the Occurrence Books for both Eldoret and Langas Police Stations, which were called for by the appellant during the trial. The evidence for the prosecution was that the appellant was arrested by the Langas Station patrol group, but unfortunately, the date of his arrest and the reasons for his arrest were not noted as is expected. The only entry that attempted to link him to the offences was an addition in the Remarks Column of the words “Accused Sammy Mwaura”. We are of the humble opinion that if he had indeed been arrested on the spot, there was no reason why his name should not have been clearly included in the report, under the column “Nature of Occurrence” as clearly indicated in all other reports for the day and thereafter.

The Occurrence Book from Eldoret Police Station is silent on what offences he was booked for, neither is there any mention of recovery of police or military uniform from him.

We believe that had the learned trial Magistrate taken this facts into account he would have found that the entries smacked of deliberate attempts to implicate the appellant and he would have arrived at the logical conclusion that it may as well as have been a frame up, which would have given credence to the appellants statement that he was framed by PW4. It is also very important to note that PW4 was the officer who actually arrested the appellant after a chase in which he claimed to have been accompanied by colleagues, yet none of his said colleagues was ever called to give evidence, at least to corroborate that line of evidence.

We have considered all the evidence on record and in our view, there were serious lapses. We believe that should the learned trial Magistrate given due consideration to the effect of the said lapses and contradictions, he should have arrived at the logical conclusion that the prosecution had not been able to prove its case against the appellant to the required legal standards.

Based on the above, we form the opinion that the convictions were not properly founded, and we do in

the circumstances allow this appeal, quash the convictions and set aside the sentences. The appellant should be released forthwith unless otherwise held in lawful custody.

Dated and delivered at Eldoret this 22<sup>nd</sup> day of June 2006.

**JEANNE GACHECHE**

**Judge**

**MOHAMMED IBRAHIM**

**Judge**

Delivered in the presence of:

Miss Oundo holding brief for Mr. Omutelema for the State

Mrs. Fundi holding brief for Fundi for the appellant