REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1235 of 2002

(From original conviction and sentence in Criminal Case No. 4018 of 2000 of the Chief Magistrate's Court at Thika - (H. A. Omondi - SPM)

JAMES NDUKU GITAU ……..…….....……..…APPELLANT

VERSUS

REPUBLIC …….....……..……. RESPONDENT

JUDGMENT

JAMES NDUKU GITAU, the Appellant herein was jointly charged with 3 others with four counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code** before the senior Principal Magistrate's court at Thika. After a full trial the Appellant was convicted on both counts, whereas his co-accused were acquitted on all the counts under **Section 215** of the **Criminal Procedure Code.** Following his conviction the Appellant was sentenced to death on all the four counts in the manner prescribed by law.

We wish to point out at this juncture that it was erroneous for the Learned Magistrate to have sentenced the Appellant to death on each of the four counts. As we have had occasion to state in the past, a person can only die once. Where an accused person faces more that one capital charge as in the instant case the trial court has two options on sentencing upon conviction. Either sentence, the accused to death on one count only and leave the sentence with regard to the other counts in abeyance or sentence the accused person to death on all the counts and then suspend the execution of the sentences in all other counts except on one count. The court of Appeal has dealt with this issue extensively in the case of ***MORU NDEGE BORU VS REPUBLIC, CR. APP. NO. 19 OF 2001 (UNREPORTED).*** As stated by the count of Appeal and is worthy repeating here:

*"…..**we hope that sentencing Courts will take heed of these simple requirements and act appropriately……"***

Following the Appellant's conviction and sentence, he was dissatisfied and hence lodged the instant Appeal. In his petition of Appeal, the Appellant laments that he was convicted on insufficient circumstantial evidence, the court relied on an involuntarily obtained charge and caution statement as well as statement under inquiry, evidence of identification and failure by the trial Magistrate to attach due weight to the Appellant's sworn statement of defence. In support of his grounds of appeal, the appellant tendered written submissions that we have carefully considered.

Mrs. Kagiri Learned State Counsel opposed the Appeal. Counsel submitted that the evidence on record supported the conviction. Counsel submitted that the Appellant was positively identified by PW6, PW7 and PW8 whilst in a traffic jam. Indeed according to PW6 and PW8 they recognised the Appellant in the Complainant's motor vehicle in the traffic jam. He was the one at the steering wheel at the time. They knew him as a taxi driver and had known him for more than 3 years. Counsel further pointed out that the evidence of PW6 and PW8 was corroborated by that of PW4 who was a security guard at the premises near where there was the traffic jam. He was also able to recognise the Appellant in the traffic jam whom he also knew before. Counsel also referred us to the Appellant's charge and caution statement as well as statement under inquiry which were admitted in evidence following a trial within a trial and submitted that in the said statements the Appellant gave details of his role in the robbery. In conclusion counsel submitted that the evidence on record linked the Appellant to their crime.

In reply, the Appellant submitted that he was framed in the case by PW6 who came up with PW4 and PW8 as witnesses. He also pointed out that if PW1 knew him before, he could have recognised the Appellant as he drove his matatu. He also submitted that the two vehicles i.e. the one allegedly driven by the appellant and that in which PW6 and PW8 were came face to face from opposite directions and due to the reflection of the light from the headlights of the two motor vehicles, it could not have been possible for any of the occupants of the two vehicles to see each other. As regards PW4's evidence, the Appellant submitted that he claimed to have been on the left side of the vehicle, yet he did not say how he was able to see the Appellant and whether the windows of the vehicle in which the Appellant was said to have been had been lowered or even whether they were tinted or not.

Briefly the facts of the case were that on 30. 6. 2000 at about 6 pm the Complaint left his house in the company of Julius Njoroge Kariuki (a laboratory technician at Gatundu Hospital and who was doing a part time job at the Complainant's clinic) in the Complainant's motor vehicle registration number KAL 227B, Toyota Hiace Matatu. They drove towards Mariguini Bar where he intended to drop Julius Njoroge Kariuki. On reaching the bar, Julius Njoroge Kariuki disembarked and as PW1, the Complainant waited for him to cross the record, he heard a voice greeting him in Kiswahili "***habari".*** He turned to look at the person and saw him pointing something resembling a pistol at him. PW1 however was unable to identify the person as it was dark. The person then pushed PW1 to the co-driver's seat and entered the motor vehicle. In the meantime PW1 saw Julius Njoroge Kariuki being held by two other men who were forcing him back in to the motor vehicle and they succeeded. The two men also entered in the front cabin of PW1's motor vehicle. The vehicle was then driven towards Gatundu town. They reached a place where there was a bump at a junction leading to Ituro and found traffic jam and could not move easily as there were about three vehicles that had blocked the road. Among the vehicles was a Nissan matatu that was facing the direction PW1's motor vehicle had come from. The registration number of this particular matatu was KAK 415M and also used to operate on the same route as PW1's motor vehicle. PW6 and PW8 were in this vehicle. They saw and recognized the appellant at the wheel of PW1's motor vehicle. Similarly PW1 recognized PW6 and PW8 in the other vehicle but could not do anything or even signal the said witnesses because one of the robbers in his vehicle had picked the object resembling the pistol as soon as he the noticed the traffic jam.

PW1's motor vehicle managed to manouvre itself out of the traffic jam and proceeded on towards Ituro. As they drove on, the driver suddenly stopped the motor vehicle and both PW1 and Njoroge were ordered to jump in to the passenger seat behind the driver. They did so and were then joined by one of the robbers who ordered them to give him all the money they had. He took from PW1 Kshs.200/=, a wrist watch make Seiko 5 and a small radio. From Julius Njoroge Kariuki he took his wallet. They were then ordered to lie under the seat. After driving for sometime, they stopped again and the robbers ordered both PW1 and Julius Njoroge Kariuki out of the vehicle and forced them to lie down on the ground. Soon thereafter PW1 had a loud bang and he lost consciousness momentarily. He had been shot. When he came to he saw his motor vehicle being driven away. He also heard a person groaning but could not see who he was as it was dark. He got up and walked to a nearby house knocked and identified himself. He was then taken to Gatundu Hospital after passing through Gatundu Police Station and making a report. He was issued with P3. He was in hospital for ten days. His motor vehicle was subsequently recovered on 1. 7. 2000 at Ituro village about $2_{1/2}$KM from Gatundu Town. PW1 was to later learn that his friend Julius Njoroge Kariuki had been shot and died from gun wounds inflicted on him by the robbers on 30. 6. 2000

during the incident.

In the meantime on the same date PW3 who lives in Gatundu and operates a matatu had just arrived at home at 9 p. m. and as he waited for the gate to be opened, a vehicle, Toyota Hiace came and stopped behind him. Between 4 and 6 people came out of the said vehicle and told him "…***unafikiria unaweza kujificha sana….”*** They held his hand and ordered him to board their motor vehicle. He was informed by those people that they had been paid Kshs.300,000/= to kill him and if he wanted to save his life he should give them an equivalent sum. PW1 told them he did not have the money whereupon upon the robbers closed the door of their vehicle and as they were preparing to leave with him PW3's nephew, Daniel Ndungu came to the gate and the same robbers got hold of him and pushed him into the vehicle and they drove off. As they drove PW3 was forced to part with Kshs.7,000/= plus his watch. They drove towards Ritho. However he was unable to identify any of the robbers as it was dark and he had been ordered to lie down. They were taken to place known as Kungu and stopped at a bridge where they were ordered to alight. PW3 was ordered to lie down. PW3 did not know what happened next because when he woke up he found himself at MP Shah Hospital with an injury at the back of the head.

On the same night at about 10p.m PW17 was on his way home when a matatu came by and stopped. Two people claiming to be policemen alighted from therein and ordered him to board the motor vehicle. They held him and pushed him into the motor vehicle and drove off. They ransacked his pockets and relieved him of kshs 19,000/=, two Barclays bank cards, employment and identity cards as well as his 11/2 kgs of meat. After driving for sometime they stopped and released him. He was unable to identify any of the culprits.

All the aforesaid incidents formed the basis of the four counts that faced the Appellant and his co-accused.

Put on his defence, the Appellant elected to give a sworn statement of defence. He stated that he was a taxi driver and that on 1. 7. 2000 he left home at about 4 p. m. to go to his place of work. At about 7 p. m. he met two police officers who requested him to occupy them to the Police station as the OCS had an assignment for him. At the Police Station he was detained for 2 hours and was then asked to lead the Police officers to his residence so that they could conduct a search. His house was searched but nothing was recovered. He was then beaten thoroughly and when he decided to defend himself, he was shot in the back and buttock by the police officers. The Appellant discounted the Police version that he was shot while fleeing from them.

The appellant was told that he had been arrested in connection with robbery committed on PW1. The following day CID officers' from Thika collected him and interrogated him regarding the robbery committed on PW1 and although he explained, the Police officers chose not to believe him. He was then charged with the instant charges that he knew nothing about. The Appellant maintains that PW6 and PW8 could not have identified him at night because if a motor vehicle is on full lights and one is inside another motor vehicle, due to the reflection of lights, one would ordinarily not see anything in the vehicle. He contends that all the evidence adduced against him was manufactured by PW6 who had a grudge against him.

The Appellant was arrested by PW12 and PW13 following a tip off by an informer to PW9. The informer told PW9 on 1. 7. 2000 between 5 – 6 p. m. that the people who had robbed Githinji had been seen by a driver and some touts when their motor vehicle blocked the other. After which PW9 arranged to have the Appellant arrested. He later learned that the Appellant had been shot during his arrest by PW12 and PW13. A charge and caution statement was obtained from the Appellant by PW15. It was admitted in evidence after a trial within a trial. In both the charge and caution statement as well as statement under inquiry, the Appellant allegedly confessed to the crime and implicated the other three who were subsequently arrested and charged alongside him.

We have analysed and evaluated afresh the evidence adduced before the subordinate Court and given due allowance for the fact that we neither heard nor saw the witnesses as they testified. See ***OKENO VS REPUBLIC (1977) EA 32.***

In convicting the Appellant the Learned trial Magistrate held:-

"……***The victims of the robbery did not identify any of their attackers. However there is circumstantial evidence with regard to accused 1, from PW4, PW6, PW7 and PW8 which inculpably point to accused 1 as the person involved in the spate of robberies from the time he was seen driving KAL 227B to his eventual entry into the bar carrying meat which he requested to be prepared…..***"

The circumstantial evidence referred to is the alleged recognition of the Appellant by PW4, PW6 and PW8 as he drove PW1's motor vehicle in the traffic jam. However was this evidence of recognition so watertight as to find a conviction? We shall revisit this issue later in the course of this Judgment. PW1 who is the Complaint in Count two had the following to say with regard to identification of the Appellant:-

"…..***When they entered (the vehicle) the other person with a pistol told me to move from the driver's seat. I was not able to identify the person as it was dark. I was pushed to the centre seat and the person with the object resembling a pistol sat on the driver's seat. The engine was running. We were five of us in the cabin…..***"

The same witness testified that the vehicle was driven towards Gatundu Town and that when he started driving that person placed the pistol like object in the pocket of his jacket. That after driving past the post office he removed it again and placed it on the dash board of the motor vehicle. The witness further testified that on reaching a place where there was a bump at a junction leading to Ituro they found a traffic jam and they could not move easily. He noted that there were three motor vehicles which had blocked the road. There was Nissan matatu which was facing the direction they had come from. He could even read the registration number of the matatu as the headlights of his vehicle were on. He saw in the said matatu three people whom he recognised seated in the driver's seat. They were two drivers and a turn boy. According to PW1 he could not call on this people whom he knew very well for assistance as he feared that he could be injured by one of the robbers.

The reason why we have endeavoured to extensively reproduce the evidence of PW1 albeit in a paraphrased form is to demonstrate that for all the time that PW1 remained in his hijacked motor vehicle, he as all the time seeing everything that the robbers were doing. He was not inhibited or impeded in his view at all. He was able to look around and observe what was going both inside and outside his motor vehicle. He even saw the occupants in the other vehicle. In those circumstances, can it be claimed that he could not have been able to see the Appellant as he drove his motor vehicle and to identify him. After all he testified that he was seated next to the driver of his hijacked motor vehicle who it is claimed was the Appellant. He also confessed that he had known the Appellant before and had even seen him at Gatundu Town. Yes it might have been at night but if PW1 was able to see the driver as he put the pistol like object in his jacket and then subsequently had it removed and placed on the dash board of the motor vehicle and thereafter taken over by the other robber in the jam, surely, PW1 could equally have been able to see and recognise the Appellant. The is no evidence that PW1 was at anytime up to this stage forced to cover his face or lie down so as not to see the robbers. It is during this period that he observed all that we have stated herein above. In our view and in the circumstances outlined above we are persuaded that PW1 may not have been a witness of truth. He could not have observed what we have stated out herein above with such detail and fail to recognise the Appellant. It is simply incredible.

We now turn to consider the evidence of identification by PW4. He is the watchman who claimed to have identified the Appellant in the traffic jam as well. He testified thus:-

"…..***I recall on 30. 6. 2000 at about 9.00 p. m. I was on duty at Kento's when I saw motor vehicle approaching, it was a Nissan registration KAL 227B coming from the direction of Gatundu Hospital. There was another motor vehicle coming from the petrol station direction registration KAK 415M. The one from the petrol station direction blocked the other one KAL 227B KAK shown on him, the driver was Nduku, identified as accused 1. I was not too far from the motor vehicle, line (sic) 2 metres…. Accused is known to me….***"

We wonder how PW4 could have been able to identify the Appellant in the circumstances outlined above. The appellant was said to have been at the steering wheel of KAL 227B seated next to PW1. According to PW4, PW1 was well known to him even by name. However he failed to see or recognize him at the time he is alleged to have identified the Appellant. If is true that PW4, was able to identify the Appellant, how come he was unable to identify PW1 who was seated next to the Appellant. Was it possible for PW4 to identify the driver of KAL 227B (the Appellant) and who was seated next to PW1 and fail to recognise PW1 yet both were well know to him? We do not think so. PW4 claims to have recognised the Appellant with the assistance of headlights from other vehicle. This could mean that there was no light in the vehicle that the Appellant was driving. It was at night. Both vehicles had their head lights on. They were from opposite directions. It is common knowledge that in those circumstances one cannot easily be able to see the inside of the vehicle and if there were people to recognize and or identify any of them because of the reflection. In our view the Appellant is right in submitting that due to the reflection occasioned by the headlights of the two vehicles facing each other positive identification was not possible. We also note that this particular witness did not say for how long he kept the occupants in the Appellant's motor vehicle under observation as to be able to identify then subsequently. This witness also stated that he was two meters away when he purported to identify the Appellant. We doubt whether someone who is two metres away and it is night, will be able to identify someone in a vehicle more so in the absence of any light within the said vehicle.

In our view the circumstances obtaining at the scene where PW4 purported to identify the Appellant were not conducive for any positive identification.

What we have said about PW4 with regard to purported recognition of the Appellant applies with equal force to the evidence of PW6 and PW8 on the same issue. Suffice to say that these witnesses were in the other motor vehicle that came face to face with the PW1's motor vehicle that was being driven by the Appellant. Both vehicles had their headlights on. It was at night. Due to the reflection, we are convinced that these witnesses could not have been able to see the occupants in the vehicle opposite them. Further if it is indeed true that they were able to recognize the Appellant in the vehicle, how come they were unable to recognize PW1 as well and who was seated next to the Appellant and whom they knew very well.

In ***ANJONONI & OTHERS VS REPUBLIC (1980) KLR 59***, the Court of Appeal stated:-

"….***The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the condition for identification the robbers in this case were not favourable…..***"**

We couldn't agree more in the circumstances of this case. However, that being our view of the matter, we hold that the Learned Magistrate erred in relying on the evidence of the purported identification and or recognition of the Appellant by PW4, PW6 and PW8 in returning a conviction against the Appellant.

The Learned trial Magistrate also relied on the evidence of PW7 in convicting the Appellant as well. It was the evidence of this witness that the Appellant gave her meat at about midnight on the material night to cook. According to the Magistrate this could have been the same meat that was robbed from PW17 on the same night. The Learned Magistrate reasoned that:

"***The Appellant entered the bar carrying the meat which he requested to be prepared. He is not specific where he bought the meat from and I can only connect it to PW17's meat. He was robbed by people driving a white matatu just as he got to his gate….***"

We think that the Appellant had no duty to say how he came by the meat. However the Appellant did say where he bought the meat from. The Prosecution had ample opportunity to investigate or make inquiries as to where the meat had come from and ascertain the truth. In so holding, we think that the trial magistrate was shifting the burden of proof to the appellant. The burden of proof in all Criminal cases with an exception of a few is always on the Prosecution. In any event to our mind this piece of evidence was so tenuous as to find a conviction. There was nothing special about the meat that would have

connected it with that robbed from PW17. There is no evidence even that the said meat weighed 1½ kilos as the one robbed from PW17.

We will now consider the charge and caution statement as well as the statement under inquiry which formed the circumstantial evidence that the Court relied on to convict the Appellant. According to PW15 he testified:-

"…..***Accused was brought to me by P. C. Wachira in my office. He appeared normal. He complained that he had a bullet wound around the hip. Joint but he did not appear to be in pain….***"

From the foregoing it is clear that he Appellant complained about bullet wound around his joint. The question that one may ask is why was the appellant complaining?

Further one would ask himself, would a person suffering from bullet wound thirteen days after being shot and having not been taken to hospital not be in pain?

The trial magistrate delivered herself on the issue thus:-

"….***Since he already had gun wounds inflicted by the Police and Police threatened to shoot him he feared for his life and decided to oblige. How long ago after his wounding did he record his statement. Nowhere in cross-examination does he suggest that he was threatened with a gun, leave alone just before recording a statement….***"

From the evidence of the officer who took the charge and caution statement it appears that the appellant raised the issue of threats. He stated under cross-examination:-

"……***.. I never threatened him with a gun…..***"

The duration of the time before the statement was taken was 13 days after the Appellant was shot and arrested. It would appear that the learned trial Magistrate failed to appreciate that the Appellant had raised the issue of threats and had been in custody for a long time before the statements were taken. All this time he was suffering from the bullet wounds in his hip. He was not taken to hospital. Considering all these we are not satisfied that the Appellant was in a position to voluntarily give those statements. We have also perused the said statements and in particular the charge and caution statement and noted that it does not say much. All he said in the statement was:

Count 1: "It is true we robbed that man and killed him – Joseph Kariuki Njoroge"

Count 2: "It is true we robbed him the vehicle and other things and wounded him"

Count 3: it is true we robbed him and beat him.

To our mind if the statement was voluntarily obtained it would have contained more details as to how the robbery was planned and executed. It would have contained the names of his cohorts.

The Appellant also faulted the trial Magistrate for rejecting his defence without giving cogent reasons. Commenting on the Appellant's defence in her judgment, the Learned trial Magistrate stated:-

"….***He contends that all the evidence had been manufactured by John Kareka (PW6) who had a grudge about him, though he does not disclose the nature of the purported grudge…..***"

It does appear that the Appellant's defence was separately evaluated which was wrong on the part of the trial Magistrate. Had it been evaluated alongside the other evidence we are convinced that the learned trial Magistrate could have returned a different verdict. While under cross-examination by the Appellant on this issue, PW6 stated:-

"…….***Yes I remember one day when reversing my matatu I hit your taxi, KQP by mistake. I went and told you it was just a taste of things to come….***"

Clearly then there was no love lost between the Appellant and this witness. Consequently the evidence of this witness should have been treated with a lot of caution. What was it between the Appellant and PW6 that would cause PW6 after knocking the Appellant's taxi instead of apologizing would simply say in jest:

"….***..this is just a taste of things to come….***"

Yet this was the star witness with regard to the alleged identification and or recognition of the Appellant in PW1's vehicle in the traffic jam. The Appellant in his sworn statement clearly pointed at this witness as being the one who framed him in the case and brought in tow PW4, PW7 and PW8. The Appellant's defence was not shaken at all in cross-examination by the Prosecution. Considering all the circumstances of the case, we are of the view that the Appellant's defence was plausible and raised some doubts in the Prosecution case.

The upshot of this Appeal then is that the same is allowed, the conviction quashed and the sentence imposed set aside. The Appellant is to be set free forthwith unless otherwise lawfully held. That shall be our Judgment.

Dated at Nairobi this 13th day of June, 2006

……..

LESIIT

JUDGE

……..

MAKHANDIA

JUDGE