REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 8 &16 of 2004

(From original conviction and sentence in Criminal Case No.1630 of 2001 of the

Chief Magistrate's Court at NAKURU, S. MUKETI, SRM)

SAMUEL NDEGWA……..…..……1ST APPELLANT

PAUL KIARITHA GITHUNDU…….……2ND APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

JUDGMENT OF THE COURT

The two appeals herein were consolidated and heard as one by consent of both appellants and the learned state counsel. The two appellants together with four others were jointly charged with three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 29th April 2001 at Rift Valley Agency in Nakuru Depot of Kenya Breweries Ltd within Nakuru District, jointly with others not before court and while armed with dangerous weapons namely pistols, robbed one Kennedy Mokaya Omwenga of Kshs.2,731,354.90 and a motor vehicle registration number KPF 097, Peugeot saloon, all valued at about Kshs.3 million and at and or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Kennedy Omwenga.

After a full trial, the appellants were convicted in the three counts and were sentenced to death as mandatorily provided by the law. They were aggrieved by their conviction and sentence and appealed to this court against the same. The appellants raised more or less similar grounds of appeal. The first appellant, Samuel Ndegwa Chege through his advocates, Kiplenge Ogola and Mugambi, stated in his petition of appeal that the learned trial magistrate erred in law and in fact in convicting him when the prosecution had not proved its case beyond reasonable doubt. He also stated that the learned trial magistrate erred in law and in fact in relying on circumstantial evidence to convict him. He further faulted the learned trial magistrate for failing to take into account the fact that an identification parade which was carried out was flawed. Lastly, he stated that the learned trial magistrate erred in law and in fact in convicting him on the face of a water tight defence that was not shaken in cross examination by the prosecution.

The second appellant, Paul Kiaritha Githundu stated that the learned trial magistrate erred in law and in fact in convicting him on the basis of faulty identification evidence. He also stated that the learned trial magistrate erred in law and in fact by relying on circumstantial evidence which was very weak to sustain

a conviction. He further argued that the learned trial magistrate wrongly analysed the prosecution evidence and came to a wrong conclusion.

The facts of this case briefly stated are that on 29th April 2001 at about 6.30 p.m. **PW1, Kennedy Mokaya,** who is the complainant herein, was at his place of work at Rift Valley Agency where he worked as a manager. He was preparing to go home in a motor vehicle registration number KPF 097, a Peugeot 504 saloon and white in colour. At the gate, the guard opened for him to drive out. He had given a lift to two salesmen namely John Odhiambo and Gordon Otieno. Before he could drive out he saw two men pointing pistols at them and he stopped the car. The two men walked into the depot. One of them approached PW1 and ordered him to come out of the vehicle. He held his jacket and ordered him to drive back to the depot. He was ordered to put off the alarm system at his place of work. They commanded him together with the cashier, Peter Njoroge, PW2, to open the safe which they did. The two robbers stole all the money that was in the safe and left. When PW1 went to the gate he found three men, one of whom was a fairly old man and who was holding a panga. Another one was holding a pistol. PW1 was ordered to disconnect the car alarm system and the old man went to the steering wheel. The robbers took off and PW1 called the police and the Securicor and reported the incident. PW1 recorded his statement the following day and after three months he was called by the police and told that some suspects had been arrested. On 2nd August 2001 he was asked by the police to identify the suspects in an identification parade but he was unable to identify any of the assailants. On 3rd August 2001, PW1 was told that another parade had been mounted and he managed to identify the second appellant, Paul Kiaritha Githundu. He said that he was the one who drove his motor vehicle after the robbery. Another identification parade was mounted and PW1 identified the first appellant as the person who, after stealing the money, had pointed a gun at him. On 6th August another identification parade was mounted and PW1 identified another person who he said was also among the robbers.

PW1 said that at the depot there were powerful security lights and he was therefore able to see the robbers since the incident took about half an hour. PW1 said that the amount that was stolen was Kshs.2,731,354.90 which was two days' collection, for 28th and 29th April 2001.

In cross examination, PW1 admitted that although he was terrified by the robbery incident, he was able to see the robbers very well as there were powerful security lights at the scene of the robbery. PW1 further stated he was able to identify the appellants during the identification parade. He said that he identified the appellants from their looks but he did not describe what those looks were, he only described their manner of dressing on the material day.

PW2, Peter Njoroge Mwangi, was travelling in the same car with PW1 before they were attacked and he corroborated the evidence of PW1 in all material aspects regarding the robbery incident. He further stated that during the identification parade, he was able to identify the two appellants and one other person who was acquitted by the trial court. He also stated that at the time of the robbery there was sufficient electricity light at the depot by which he was able to see the robbers clearly.

PW5, John Odhiambo, a salesman employed by Rift Valley Agencies, testified that after handing in the day's collection to the cashier he was given a lift by PW1 in his car and as they were driving out to the gate they were confronted by three people who had pistols. They were ordered out of the car and the robbers went to the office with PW1 and remained there for about ten to fifteen minutes. They told PW1 that he would find his car abandoned at a place known as Shirikisho Park View. The robbers also stole from PW5 Kshs.10,000/- and a watch, seiko 5 by make. The witness said that he was unable to identify the robbers.

PW6, Chief Inspector Absalom Monari, conducted the identification parade in respect of the first appellant on 5th August 2001. He testified that the first appellant was properly identified by PW1 and PW2.

PW8, Chief Inspector Paul Kipngetich Kirui, conducted the identification parade in respect of the second appellant and he said that PW1 and PW2 were able to identify the second appellant.

PW12, Gordon Otieno, was also travelling in the same car with PW1 and PW2 when they were accosted by the robbers. He corroborated the evidence of PW5 although he stated that the robbery took about half an hour. He said that he was not able to identify the robbers.

PW14, Inspector Patrick Musyoki, produced a confessionary statement which was allegedly made by the second appellant. The second appellant alleged that he had been tortured by the police and forced to make the said report and he objected to its production. A trial within a trial was conducted and the court ruled that there was no evidence that the second appellant had been tortured and forced to confess that he had participated in the robbery and went on to admit the report.

PW18, Police Constable Maurice Otieno, told the court that on 20th July 2001 he received information that a group of people was planning to commit a robbery in Nakuru. He was also informed that the same people had committed a robbery at Kenya Breweries depot in Nakuru. He acted on the said information by approaching other police officers and together they proceeded to Kanu street within Nakuru Town and arrested three people whom they suspected to be the ones. However, when those people were searched, they were not found with any weapon but one of them had a certificate of appointment as a police officer and it was realised that he used to be in the police force. PW18 took a mobile phone from one of the arrested people and he scrolled the numbers therein and found the name of the second appellant. They called him without identifying themselves and he directed them to a place known as Langalanga Mwisho where he was.

The police proceeded there, arrested him and conducted a search on him. The witness said that they recovered a firearm No.92968 which was loaded with three rounds of ammunition. The second appellant allegedly mentioned other people including the first appellant. Some of those people who were mentioned by the second appellant were arrested and they led the police to a place known as Kaptembwa where two firearms and some rounds of ammunition were allegedly recovered.

PW18 went to Rift Valley Agency and obtained some details as to how the robbery had been committed and the complainant said that he could identify the robbers if they were shown to him. PW18 proceeded to organise for identification parades to be conducted and the two appellants and the four other people who had been charged together with the appellants herein were identified. The witness agreed that apart from the identification of the two appellants by PW1 and PW2 there was no other evidence to connect them to the robbery at Rift Valley Agency.

In his defence, the first appellant told the court that he was a timber dealer and on 27th April 2001 he bought timber and transported it to Mombasa on 29th April 2001. He returned to Nakuru on 1st of May and on 27th May 2001 he was arrested and taken to Central Police Station where he was interrogated. On 1st August 2001 he was taken to an identification parade together with other people and he was identified by PW1 and PW2. However, he said that the identification parade was not properly conducted and he disputed the same.

The second appellant said that he was a shoe maker at a place known as Langalanga. He further stated that on 18th and 19th July 2001, plain clothes police officers went to his kiosk and asked for a Mr. Gitau and he said that he knew him but he was not there at the time. The police then carried a box of items that belonged to the said Mr. Gitau. On 20th July 2001 the second appellant was arrested and taken to the police station and was asked to disclose the whereabouts of the said Mr. Gitau. The police opened Mr. Gitau's box and a gun was found therein and the police told him that if he did not tell them where Mr. Gitau was, he would be made to carry his cross. The police told him that he would be charged for illegal possession of a firearm. Later he was charged with three counts of robbery with violence.

The trial court held that the two appellants had been properly identified by PW1 and PW2 and proceeded to convict and sentence them accordingly.

In arguing the appeal for the first appellant, Mr. Mugambi submitted that his client had been identified by a single witness, PW1, whose evidence was uncorroborated. PW1 said that the first appellant was the

person who took the money and pointed a gun at him. Mr. Mugambi further submitted that PW2 said that he was able to identify three people, one of them being the one who was near him and he identified a person who was accused number two before the trial court and who was acquitted by that court. PW2 never mentioned the first appellant. Mr. Mugambi further added that when PW1 went to the identification parade, he did not know the exact person who stole the money and he identified two people which meant that he was guessing. There was evidence in the occurrence book that when PW1 made the robbery report, he indicated that he could not identify any of the robbers. The occurrence book was produced in court at the request of the first appellant and the above position was confirmed. In light of that, Mr. Mugambi submitted that the identification parade was worthless.

The first appellant's counsel also argued that his client was not arrested with anything that could connect him to the robbery and referred to the evidence of PW18 regarding the circumstances under which the first appellant was arrested. Counsel cited several authorities and we will refer to them at a later stage of this judgment.

Mr. Karanja for the second appellant submitted that the identification of the second appellant by PW1 and PW2 was not sufficient to warrant his conviction. He said that PW1 testified that after the robbery he saw three men at the gate and one of them was an old man whom he identified as the second appellant. PW2 described the person as "***a short old man"*** who took the steering wheel of PW1's car. However, at that time PW2 had been forced to lie down with his face on the ground and so he could not have seen the robbers, Mr. Karanja submitted. Counsel added that the prevailing circumstances were not conducive to positive identification. He added that immediately after the robbery, PW1 and PW2 told the police that they were not able to identify the robbers and that was recorded in the occurrence book and he wondered how the two witnesses could purport to have identified the second appellant after a period of three months.

We have carefully perused the proceedings and the judgment of the trial court and considered the submissions that were made before us by the appellants' advocates. In ***ABDULLA BIN WENDO VS R (1953) 20 EACA 166*** the Court of Appeal stated as follows:-

"***Subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

The trial court warned itself of the danger of convicting the first appellant on the evidence of a single identifying witness but nevertheless, stated that the circumstances under which the identification was done were favourable to a positive identification and free from error and went on to convict the first appellant. It must have been lost to the learned trial magistrate that PW1 had immediately after the robbery told the police that he could not identify the robbers. If PW1 could not describe the robbers then the identification parade that was mounted was of no significance.

In ***FREDRICK AJODE VS REPUBLIC Criminal appeal number 87 of 2004*** at Kisumu (unreported), the Court of Appeal held that before an identification parade is conducted a witness should be asked to give the description of the person sought to be identified.

The conviction of the second appellant was equally vitiated by the weak evidence on identification of the appellant by PW2. It is trite law that although a court can convict an accused person on the evidence of a single witness, before it does so, it must test that evidence with the greatest care especially when the conditions favouring a correct identification were difficult, see ***CHARLES O. MAITANYI VS R [1986] KLR 198. PW2*** alleged that he saw the second appellant during the robbery at the gate. However, he had given evidence that at the time he was lying down, having been threatened with a gun and he was visibly shaken by the said threat. He could not therefore have had proper time to observe the persons who were

robbing them. PW2 had also told the police that he was not able to identify the robbers. The purported identification of the second appellant by PW2 long after the robbery incident could not, in the absence of any other evidence, be relied upon to convict the second appellant.

The circumstances under which the appellants herein were arrested by the police did not connect them to the robberies for which they had been charged. Apart from their alleged possession of a gun and ammunition which was not even sufficiently proved against them, there was nothing else to connect them with the robbery at Rift Valley Agency. We are of the view that the trial court failed to consider the above important issues regarding identification evidence against the appellants and that rendered the convictions unsafe. We therefore allow the appeal, quash the convictions and set aside the sentences that were pronounced by the trial court. The appellants should be set at liberty forthwith unless otherwise lawfully held.

DATED at Nakuru this 12th day of October, 2006.

MARTHA KOOME

JUDGE

D. MUSINGA

JUDGE

Judgment of the court, duly signed, delivered in open court in the presence of Mr. Murgat for the first appellant and holding brief for Mr. Maranja for the second appellant.

MARTHA KOOME

JUDGE

D. MUSINGA

JUDGE