REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 203 of 2004

(From the original conviction and sentence of the Senior Resident Magistrate's court at Molo in Criminal case No.3454 of 2003 – R. K. Kirui – S.R.M)

ZAKAYO ONGORI OTWEKA …..……...……..APPELLANT

VERSUS

REPUBLIC……..……...……..…….RESPONDENT

JUDGMENT OF THE COURT

The appellant Zakayo Onkori Ontweta, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal code. The particulars of the offence were that on the nights of the 26th and the 27th of November 2003 in Nakuru District together with others not before court, while armed with dangerous weapons, namely pistols robbed John Chepkwony of an unregistered new vehicle engine number *Pariculars withheld* valued at Kshs 600,000/=, cash of Kshs 5,000/=, a jacket and shoes all valued at Kshs 607,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said John Chepkwony. The appellant was further charged with three other counts of robbery with violence contrary to **Section 296(2) of the Penal code**. The particulars of the charges were that on the same night and in the same place, the appellant with others not before court robbed Charles Mutai, Geoffrey Kipkorir Langat and JCC, who were passengers in the said motor vehicle, of cash and personal belongings as listed in the charge sheet and at or immediately before or immediately after the time of such robbery used actual violence to the said complainants.

The appellant was further charged with rape contrary to **Section 140 of the Penal Code**. The particulars of the offence were that on the night of the 26th – 27th November 2003 at K M the appellant, jointly with others not before court had unlawful carnal knowledge of JCC without her consent. The appellant was alternatively with indecently assaulting the said JCC by touching her private parts contrary to **Section 144(1) of the Penal Code**. The appellant pleaded not guilty to all the charges. After a full trial, the appellant was convicted and charged on all five counts which he was charged. He was sentenced to death on each of the four counts of robbery with violence. In respect of the fifth count of rape, the appellant was sentence to serve ten (10) years imprisonment. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

At the hearing of the appeal, Mr. Mongeri learned Counsel for the appellant made submissions challenging the decision of the trial magistrate in convicting the appellant. He argued the grounds of appeal by submitting that the prosecution had not established the guilt of the accused to the required standard of proof. He submitted that the evidence of identification which was relied on by the

prosecution to secure the conviction was unreliable. He submitted that the circumstances of the robbery was such that the victims of the robbery could not have positively identified the appellant as being among the gang of the three robbers who hijacked the matatu and later robbed the passengers and the matatu crew. He further submitted that the circumstances of the robbery were such that there was no sufficient light by which the complainants could have identified the appellant. Besides, he argued that the testimonies of the complainants as to the circumstances under which they were robbed were inconsistent and contradictory.

Learned Counsel for the appellant took issue with the manner in which the police conducted the identification parade in which the complainants are alleged to have identified the appellants. He submitted that the said identification parade was not conducted in accordance with the law. He further submitted that the circumstances under which the motor vehicle which had been robbed from the complainants was recovered raises doubt that it was the appellant who was found in possession of the said motor vehicle. He submitted that a critical witness who was actually found in possession of the said motor vehicle was not called as a witness by the prosecution. He submitted that the prosecution had not adduced any cogent evidence to connect the appellant with the robbery. He urged this court to allow the appeal.

On his part, Mr. Koech for the State supported the conviction and the sentences imposed on the appellant by the trial magistrate. He submitted that the prosecution had adduced overwhelming evidence which connected the appellant to the robbery. He argued that the complainants had positively identified the appellant as being among the gang of robbers who committed the offence. Although the complainants saw the appellant for the first time during the robbery ordeal, the robbery took such a long time that the complainants could not be mistaken that they had positively identified the appellant. Their identification of the appellant at the scene of the robbery, was confirmed when the complainants were able to point out the appellant in an identification parade which had been mounted by the police after the appellant was arrested. He further submitted that the appellant was found in possession of documents which were in the motor vehicle when it was robbed from the driver of the said motor vehicle. The said document which was found in possession of the appellant, sufficiently connected the appellant to the motor vehicle which was robbed from the complainant. He submitted that the totality of the evidence adduced by the prosecution proved beyond reasonable doubt that it was the appellant who robbed the complainants and raped one of them. He urged the court to disallow the appeal.

This being a first appeal, this court is required in law to consider the appeal by way of rehearing. This court is required to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses so as to reach its independent determination whether or not to uphold the conviction of the appellant. Of course, this court has to put in mind the fact that it neither saw nor heard the witnesses as they testified. (*See* **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge of robbery with violence against the appellant to the required standard of proof beyond reasonable doubt. We have carefully considered the submissions which were made by Mr. Mongeri on behalf of the appellant and by Mr. Koech on behalf of the State. We have also re-evaluated the evidence adduced before the trial magistrate by both the prosecution and the appellant in his defence.

Both the appellant and the State appreciate the fact that this appeal turns on three pieces of evidence which was adduced by the prosecution to secure the conviction of the appellant. The first piece of evidence is that of identification. The complainants in this case were traveling in an unregistered motor vehicle which was being operated as a matatu. The motor vehicle was being driven by PW 2, John Chepkwony. The conductor of the motor vehicle was PW 7, Geoffrey Kipkurui Rotich. PW 4, JCC and PW 6, Charles Mutai were passengers in the said motor vehicle. They all testified that while they were traveling in the said matatu from O heading towards the direction of K, they were stopped by five men who were posing as passengers. It was at night. After the five men boarded the matatu, they threatened them with guns and swords and in the process diverted the matatu into a nearby forest where they robbed them of their personal belongings. PW 4 was raped by two of the robbers. All the witnesses testified that the robbery ordeal took place from about 7.00 p.m. to 3.00 a.m. They testified that they were able to identify the appellant as being among the gang of robbers who robbed them.

Some of the witnesses testified that they identified the appellant by the interior light of the motor vehicle and others by the moonlight. They all testified that during the entire robbery ordeal, they were in close proximity with the robbers who included the appellant. The robbery took place on the night of the 26th of November 2003. The identification parade which was conducted by the police where PW 6 identified the appellant was held on the 10th of December 2003. The witnesses were able to confirm the identification of the appellant two weeks after the robbery after arrest of appellant. Although the complainants saw the appellant for the first time during the robbery ordeal, we are satisfied, upon the re-evaluation of the evidence adduced, that the complainants positively identified the appellant as being among the gang of robbers who robbed them. The complainants were in close proximity with the appellant. The robbery ordeal took place for more than six hours. The complainants had a conversation with the appellant. There was sufficient light which enabled the complainants to be positive about the identification of the appellant.

The fact that they were positive of the identification of the appellant, was reinforced by the fact that the complainants were able to unhesistantly identify the appellant in the identification parades which were mounted by the police after the appellant had been arrested. Although the appellant complained that the said police identification parades were irregularly conducted, we have scrutinized the evidence on the manner in which the said police identification parades were conducted and we are satisfied that they were conducted in accordance with the law. The minor discrepancies in the number of the persons who were members of the identification parade did not affect or prejudice the legality of the said identification parades. In the circumstances of this case, we are satisfied that the complainants positively identified the appellant. The grounds of appeal which were argued by the appellant to the effect that he was not positively identified have no merit.

We are fortified in our conclusion that the appellant was positively identified by another aspect of evidence which was adduced by the prosecution in support of its case. PW 1, Dennis Milesu, testified that when the motor vehicle which was stolen was recovered in Gucha District, a relative of the appellant called Joel Nyagwara who was in possession of the motor vehicle told them that the motor vehicle belonged to the appellant. The motor vehicle was recovered on the 29th November 2003. PW 1 went to Gucha bus stage on the 1st of December 2003 and was shown the appellant whom he arrested. He searched the appellant and, in a polythene paper contained the appellant's identity and voter's card, he was able to retrieve a photocopy of an inspection report of the motor vehicle which had been stolen during the robbery. The inspection report contained the engine number and the chassis number of the motor vehicle which was stolen.

Although the appellant submitted that the said inspection report was planted on him by the police when he was arrested, we have re-evaluated the evidence and are satisfied that the said inspection report was found in possession of the appellant in circumstances that clearly shows he obtained possession of the said motor vehicle after robbing the same from the complainants. The appellant did not give any reasonable or acceptable explanation of how he came into possession of the said inspection report of the motor vehicle which was robbed from the complainants. In the circumstances of this case, we are satisfied that the doctrine of recent possession applies to connect the appellant with the robbery of the said motor vehicle from the complainants. His protestation to the effect that the said motor vehicle was not recovered in his possession is not supported by evidence. The prosecution established that Joel Nyangwara was a relative of the appellant who the appellant had left possession of the said motor vehicle which was robbed from the complainants. The testimony which the appellant adduced in his defence did not dent the otherwise overwhelming evidence which was adduced by the prosecution witnesses in support of the criminal charges.

The upshot of the above is that the appeal filed by the appellant lack merit and is hereby dismissed. The conviction of the appellant on the four counts of robbery with violence contrary to **Section 296(2) of the Penal Code** was safe and was supported by cogent, consistent and overwhelming evidence of the prosecution witnesses. We however note that the trial magistrate sentenced the appellant to four death sentences apart from the sentencing him to serve ten (10) years imprisonment on the charge of rape. The Court of Appeal has issued directions to the effect that where a person is convicted of several capital offences including a term of imprisonment, the trial court should only sentence such a convict to one

death sentence. The other sentences should be kept in abeyance. In the circumstances of this case therefore we shall set aside the three other death sentences imposed on the appellant by the trial magistrate. We shall further keep in abeyance the sentence of ten (10) years imprisonment that was imposed.

The summary of the above as relates to the sentence imposed is that the appellant shall only serve one death sentence in respect of the first count. The other sentences imposed are hereby ordered to be kept in abeyance. The conviction and the said death sentence imposed on the appellant by the trial magistrate is hereby confirmed.

It is so ordered.

DATED at NAKURU this 14th day of November 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE