



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 254 & 255 of 2004**

**(From original conviction and sentence in criminal case No. 73 of 2004 of the Principal Magistrate's Court at Nyahururu–G. A. Mwasi [P.M])**

**PETER KARIUKI MICHINU.....1<sup>ST</sup> APPELLANT**

**DANIEL KOGI MUGO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants, Peter Kariuki Michunu and Daniel Kogi Mugo, with another who was however acquitted after trial in the subordinate court were charged with the offence of five counts of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. The particulars of the offences were that on the night of the 27<sup>th</sup> of December 2003, at Ol'kalau shopping centre in Nyandarua district, the appellants jointly with others and while armed with dangerous weapons namely two pistols and a panga robbed Hellen Nyawira Chege, Viginia Wothaya Munyiri, Stephen Gachihi Githinji, Joel Waruinge Mungai and Hezron Kimani Njihia (*hereinafter referred to as the complainants*) of various amounts of cash as stated in the charge sheet and at or immediately before or immediately after the time of such robbery, the appellants threatened to use actual violence to the complainants. When the appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After a full trial, they were found guilty of the lesser charge of **Robbery with Violence contrary to Section 296 (1) of the Penal Code**. They were each sentence to serve three years imprisonment. The appellants were aggrieved by their conviction and sentence, and each appellant filed a separate appeal challenging the said conviction and sentence.

At the hearing of the appeal, the two separate appeals filed by the appellants were consolidated and heard as one. Both appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted based on the sole evidence of identification which was made in difficult circumstances. They were aggrieved that the trial magistrate had not considered all the circumstances of the case before she arrived at the decision convicting them when in fact the prosecution had adduced no evidence which could sustain their conviction. They were further aggrieved that the trial magistrate had relied on contradictory testimony of the prosecution witnesses to convict them.

At the hearing of the appeal, the appellants presented oral submissions in support of the appeal. They submitted that the evidence of identification that was relied on by the trial magistrate to convict them was insufficient and had not established to the required standard of proof that the complainants had positively identified them. They questioned the manner in which the police identification parade was conducted and were of the view that the trial magistrate ought not to have relied on the said identification in the police identification parade to convict them. They urged this court to allow their appeals. Mr. Koech for the State opposed the appeals. He submitted that the prosecution had proved to the required standard that it was the appellants who had participated in the two robberies whereby the complainants were robbed of cash and other valuables. He submitted that the appellants were positively identified by the complainants and therefore their conviction on the basis of evidence of identification was proper. He urged this court to confirm the conviction of the appellants and in fact find that the appellants ought to have been convicted of the more serious charge of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. I shall revert to the arguments made on this appeal after briefly setting out the facts of this case.

On the 27<sup>th</sup> of December 2003, PW1 Stephen Githinji, PW4 Beth Gachiri, PW5 Hezron Kimani and PW7 Edward Ngatia were traveling in motor vehicle registration No.KAH 533M. The motor vehicle was a Canter Mini-lorry. They were traveling from Tumaini towards the direction of Ol'kalau. At around 11.00 p.m., they reached a place called Sokomoko near Ol'kalau Township and stopped the vehicle to deliver a letter to PW6 Pastor Joel Waruinge Mungai. They woke up PW6 who was asleep in his house. PW6 woke up and walked towards the direction of the motor vehicle. He was given the letter and decided to read it using the head lights of the motor vehicle. At that moment, according to the witnesses five men emerged from the side of the road and ordered all of them to lie down. Some witnesses testified some of the men were armed with a rifle while some were armed with pangas. The robbers then frisked their pockets and stole the cash which was in their possession. However, the robbers did not touch the women who were traveling in the said motor vehicle.

Some of the witnesses, in particular PW1 and PW5 testified that although it was dark, they were able to identify the appellants as being among the gang of robbers who robbed them on the material night. Some of the witnesses testified that the robbers wore masks while others testified that the robbers wore woolen balaclavas. They testified that, although they had not seen the appellants before, they were able to identify them by the head lights of the motor vehicle and by the moonlight. They conceded that the robbery took place for a short time because soon thereafter the police arrived and shot at the robbers who escaped into the nearby bush. None of the robbers were arrested at the scene of the robbery.

Meanwhile at about 9.00 p.m., on the same night, PW2 Viginia Wabaya and PW3 Teresia Gathoni were selling beer at a bar called Flavours Drop at O'ikalau. They testified that they were about six patrons in the bar. They testified that they saw three men enter the bar and order them to lie on the floor. They testified that the men had covered their faces using handkerchiefs. They recalled that the men were armed with a gun. They then robbed them of the cash that was in their possession before they left the bar. They testified that they were able to identify the appellants by the clothes they were wearing and by their physical appearance.

Some of the above witnesses told the police that they would be able to identify the robbers if they were arrested by the police. However none of the witnesses gave the police the description of the robbers in the initial report when the robbery was reported to the police. An identification parade was later carried by PW10 IP Stephen Kemei after the arrest of the appellants. Some of the witnesses were able to identify the appellants in the said identification parade. The prosecution did not however adduce evidence as to the circumstances of the arrest of the appellants. When the appellants were put to their defence, they testified that they had been arrested on the morning of the 28<sup>th</sup> December 2003 at the Ol'kalau bus stage. They denied that they had been involved in the robbery. At the time of their arrest, they were not found with anything that connected them to the robbery. No stolen item was recovered in their possession.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial magistrate to an exhaustive re-evaluation so as to reach an independent conclusion whether or not to uphold the conviction of the appellants. In reaching this determination, this court has to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make

any comments as regard the demenour of witnesses (**See Okeno vs Republic [1972] E.A 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence which established the guilt of the appellants to the required standard of proof beyond reasonable doubt. I have considered the submissions made by the appellants and by Mr. Koech on behalf of the State. I have re-evaluated the evidence which was adduced before the trial magistrate.

As stated earlier in this judgment, the appellants were convicted based on the sole evidence of identification which was made in difficult circumstances. The robberies in question took place at night. The first robbery took place at about 9.00 p.m. while the second robbery took place between 10.00 p.m. and 11.00 p.m. There was evidence that there was moonlight. The first robbery took place inside a bar. The witnesses testified that the robbers covered their faces with handkerchiefs. In the second robbery, the witnesses testified that the robbers had covered their faces using woolen balaclavas. Some witnesses testified that some of the robbers did not cover their faces. They were however all agreed that the robbery took place for a short period of time. During the robbery, the complainants were ordered to lie on the ground with their faces facing the ground.

When the initial report was made to the police, some of the witnesses told the police that they would be able to identify the robbers if they saw them again. The witnesses who said that they could identify the robbers did not however give the description of the robbers in the initial report which was made to the police. It is trite law that the police must record the description given by the victims of crime of the suspects when the initial report is made. This would enable the officer who is conducting an identification parade to be able to compare the appearance of the suspect and the description given by the victims of the robbery. In the absence of such initial report of the description of the suspects by the victims of the crime, it would be difficult to confirm whether or not the persons identified in the identification parade were actually the perpetrators of the offence.

In the circumstance of this case, none of the witnesses testified that he or she had known the appellants prior to the robbery incident. The appellants were not arrested with any item connecting them to the robbery. None of the robbed items were recovered. The robbery incidents took place at night. It is apparent that the robbers terrorized the victims of the robbery in the course of the robbery. There is a possibility that some of the witnesses who alleged to have identified the appellants, in the stressful circumstances of the robbery could have been mistaken that they had identified the appellants as being among the gang of robbers. Taking into account the totality of the evidence of identification adduced by the prosecution witnesses, and upon re-evaluating the evidence adduced by the said witnesses, there is reasonable doubt raised as to whether the said witnesses identified the appellants as being among a gang of robbers who robbed them.

I do hold that the circumstances under which the said robberies took place were not conducive for positive identification. The witnesses who purported to have identified the appellants gave contradictory descriptions of their identification of the robbers. Whereas some of them testified that the robbers wore masks, some testified that the robbers had not worn anything to conceal their facial features. As was held by the Court of Appeal in the case of **Peter Kimaru Maina vs Republic CA Criminal Appeal No.111 of 2003 (Nyeri) (unreported)** at page 3 of its judgment;

***“Before the court can base a conviction on the evidence of identification at night, such evidence should be absolutely water tight – R vs Eria Sebwato [1969] E.A 174; Kiarie vs Republic [1984] KLR 739. Further, visual identification must be treated with greatest care and ordinarily a dock identification alone should not be accepted unless the witness had in advance given description of the assailant and identified the suspect on a properly conducted parade. Amolo vs Republic [1988–1993] 2 KAR 254.”***

The Court of Appeal further held in **Wilson Kamuri Ndirangu vs Republic CA Criminal Appeal No.88 of 1999 (Nakuru) (Unreported)** at page 7 of its judgment;

***“Furthermore, as argued before us by Mr. Karanja, the moments must have been stressful for the witness, who was faced with a gang armed with a pistol and being threatened with death. We agree***

**with Mr. Karanja and as was held by this court in *Patrick Nasibwa vs Republic, Criminal Appeal No.80 of 1997 (Unreported)***

*‘This case reveals the problem caused by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in the BLACKSTONE’S CRIMINAL PRACTICE 1997, Section F18*

- (a) Some people may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances;*
- (b) Visual memory may fail with the passage of time; and*
- (c) As in the process of unconscious transference, a witness may confuse a face he recognized from the scene of the crime (it may be of an innocent person) with that of the offender.”*

In the present appeal, it is clear that the circumstances under which the said identification of the appellants was made by some of the complainants does not lend confidence to this court to be certain that the said complainants had positively identified the appellants as being among the gang of robbers who robbed them. This court cannot convict the appellants based on the said evidence of identification made in circumstances that suggests that the possibility of erroneous identification could not have been ruled out.

The upshot of the above reasons is that the appeals filed by the appellant must be allowed. The convictions of the appellants are quashed and the sentences imposed set aside. The appellants are acquitted of the charge of **Robbery with Violence contrary to Section 196(1) of the Penal Code**. The appellants are ordered released from prison and set at liberty unless otherwise lawfully held.

**DATED at NAKURU this 8<sup>th</sup> day of November, 2006**

**L. KIMARU**

**JUDGE**