REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 577 of 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 6495 of 2001 of the Senior Principal Magistrate's Court at Kibera (Ms. Siganga SRM)

PAUL THUO MBURU……….....….…………………..APPELLANT

VERSUS

REPUBLIC…………………… ……….....……....RESPONDENT

J U D G M E N T

The Appellant **PAUL THUO MBURU** was convicted in one count of **ROBBERY WITH VIOLENCE** contrary to **Section 269 (2)** of the **Penal Code** and one count of **GRIEVOUS BODILY HARM** contrary to **Section 234** of the **Penal Code**. He was sentenced to suffer death in the first count and two years imprisonment in the second count. The two years sentence was suspended pending execution of count 1. The Appellant was dissatisfied with the conviction and sentence and therefore, lodged this Appeal.

In his amended grounds of Appeal, the Appellant has raised five grounds which we summarize as follows: -

1. That the learned trial magistrate misdirected herself by failing to consider the disparity between the alleged date of arrest which was 17th July 2001 and the date of plea which was 17th October 2001.

2. That the learned trial magistrate erred in law and fact by acting on evidence that was purported to be visual identification.

3. That the learned trial magistrate erred in law and fact by acting on dock identification which was worthless.

4. That the learned trial magistrate erred in law and fact by relying on inconsistent evidence.

5. That the learned trial magistrate failed to give due consideration to the appellant's defence.

The Appeal was opposed. **MRS. GAKOBO**, learned counsel for the Respondent submitted that she supported both the conviction and sentence. The facts of the case are that the Complainant **GODFREY BALTAZA** who was PW1 was driving home on 18th June 2001 at about 5.00 p.m. when his vehicle stalled. He decided to call his son **BILLY BALTAZA**, who was PW2 in the case, to go to his rescue. As he waited for his son, he stood outside the vehicle near Ngong Town. That is when two men armed with guns accosted him forcing him into the vehicle. Then he was robbed of Identity card, ATM cards and cash. His son came and he too was ordered to enter the vehicle. It appears that **BILLY** took time to understand that the two strangers he found with his father were thugs. One was outside while one sat on the driver's seat. He therefore, did not obey them. That is when the one who was seated at the front seat, identified as the Appellant, came out of the vehicle and shot **BILLY** twice in the chest. When **GODFREY** saw that his son had been shot he started screaming for help whereupon the robbers ran across the road, carjacked another vehicle and left the scene. Eventually, **BILLY** was treated and survived the incident. The incident took eight minutes according to **GODFREY** and 20 minutes according to **BILLY.** Both Complainants identified the Appellant as the one who shot **BILLY.**

BILLY saw the Appellant in a photograph in one of the newspapers some times later and he told the police. Two months later **GODFREY** and **BILLY** were called to the police station for identification parades. However, the suspects refused to participate in the parades. Eventually the Appellant and his co-accused were charged. From the evidence of PW5 **PC MUREITHI,** the Appellant and his co-accused were arrested at Thika Fly-over on 17th June 2001. They were inside a vehicle which had been circulated as having been stolen.

The Appellant denied the offence in his defence. He took issue with the fact that after his arrest on 17th July 2001, he was only charged with the offence on 17th October 2001. He said that the charge was an afterthought. He also took issue with the evidence of **DR. KAMAU**, PW4 who said that he filled the P3 form in respect of **BILLY**, six months after the incident.

On the first issue raised by the Appellant, it was his contention that since he was arrested on 17th July 2001 and his photograph printed in the local dailies the next day, the only reason why the police delayed to charge him was because they were looking for suitable evidence to frame him. **MRS. GAKOBO** on her part submitted that there was no basis for PW2 **BILLY** to frame the Appellant with this offence. **MRS. GAKOBO** misapprehended the Appellant submission on delay in charging him in court and not delay in arresting him as she understood.

We have evaluated the evidence adduced before the trial court. According to PW5 **PC MUREITHI** the Appellant and his accomplices were arrested on 17th July 2001. The basis of arresting him, according to **PC MUREITHI** was because he was driving a vehicle which had, the evening before, been circulated as having been stolen from its owner in Ngong Township. On arresting him, he was found in possession of a firearm. Later on, the Appellant was charged with various other offences including the one before court. We have also considered that **IP OTIENO** (PW3) was asked to conduct an identification parade in respect of the Appellant on 16th October 2001, three months after his arrest and four months after the incident in issue in this case. That was an inordinately long period to carry out identification parades for persons who had been arrested several months before. We agree with the Appellant that such delay needed to be explained. Apparently, the delay was not explained. The investigating officer was not a witness. He was the person best placed to explain that anomally.

On our part, even though we agree that the delay was inordinate, nevertheless from the evidence given on cross-examination by **GODGREY** and **BILLY,** we are satisfied that there was no evidence to suggest that either of them could have framed the Appellant with this offence. The Complainants did not know the Appellant on a personal level and so there was no basis or reason for them to frame him. The delay can squarely be blamed on the police. We lay blame against the police. Even if they had many cases to investigate against the Appellant, the delay was inexcusable. As far as the case itself was concerned, nothing turns on that ground.

The last three grounds were argued jointly. It was the Appellant's contention that **GODFREY** did

not describe the robbers to the police and so there was no basis of conducting an identification parade. That **BILLY** described the robber who was not arrested but not the Appellant. That despite both saying he was the one seated on the driver's seat and the one who shot **BILLY,** their evidence was not creditworthy.

MRS. GAKOBO did not agree with the Appellant. She submitted that since the incident took place in broad daylight being 5.30 p.m. or so; and since it took between 8 to 20 minutes, and since **BILLY** led to the arrest of the Appellant in this case, then the evidence of identification was reliable.

In the case of **ERIA SEBWATO vs. REPUBLIC 1960 EA 174** it was held;

"***Where the evidence alleged to implicate the accused person is entirely of identification that evidence, must be absolutely watertight to justify a conviction."***

We agree with the above holding. The test to be applied first and foremost is to determine whether the circumstances of identification were conducive to positive identification.

The incident was in the evening, before sunset being 5.30 p.m. or so. The incident occurred in an open place. **GODFREY** had been with the robbers for sometime before **BILLY** came to the scene. **GODFREY** assessed the time as 8 minutes. He also said that the Appellant who sat in front but turned back to face him at the back seat was the one talking. He first asked him for the ignition keys. He threatened him with dire consequences if he did not start the vehicle. He also ordered him to pass his watch, any documents and cash which he passed to him. Later on it was the Appellant who went out of the vehicle and shot **BILLY** twice in the chest. Not only were the circumstances of identification good for positive identification even by a single witness, the Appellant's act of shooting at **GODFREY**'s son, in our view, created a lasting impression on **GODFREY**'s mind. We find that **GODFREY** saw the Appellant sufficiently to be able to identify him. Bearing in mind that **GODFREY** had also seen the Appellant, on a previous occasion, before the incident, the Appellant was not a total stranger to him.

BILLY, on other hand, walked to the bonnet of the vehicle hoping to repair a petrol overflow. When he sensed all was not well, he walked back and that was when he came face to face with the robber not in court. He describes him quite well in his evidence. When he threw a bottle and missed him, the Appellant came out of the vehicle and shot him. Subsequently, a month later, he saw the Appellant and another in the local dailies and reported to the Police causing the Appellant's arrest for this offence. Having analyzed **BILLY'**s evidence, it is true he did not describe the Appellant at all by way of facial appearance but he did describe his clothing. He also said that he sat in the driver's seat and that he was the one who shot him twice. In court both Complainants described the Appellant as the one who wore a cap and a leather jacket, in addition to describing him as the one who sat in the driver's seat and also as the one who shot **BILLY** twice.

Despite the lack of describing him to the police at time he recorded the statement, **BILLY** identified the Appellant's photograph to the police among two people who had been photographed after an arrest for a different offence. **BILLY** also said that he had seen the Appellant, before within Ngong area and so he was not a total stranger to him. We agree that the Appellant was convicted on basis of identification by **GODFREY** and **BILLY**. We find that the identification cannot be described as that of dock identification, as the Appellant submitted. It could not qualify as dock identification only since **BILLY** had identified the Appellant's photograph to the police, and that is how the Appellant was sought for and eventually charged with this offence. We find the identification by both witnesses to be that of recognition. Granted the two identification witnesses had seen the Appellant once before. Nevertheless their experience with the Appellant on the fateful day, in our view, left a lasting impression on both witnesses in circumstances that were conducive to positive identification.

In **SAMSON KIPRUTO and 3 OTHERS vs. REPUBLIC CA No. 140 of 1987, NYARANGI, PLATT** and **GACHUHI JJA**, held;

"***Where the previous association is slight and the chances of identification is difficult an***

identification parade is essential since for an accused person to be convicted he must be properly identified… In fact it was identification by recognition which does not require an identification. The contention of each of the Appellants that the lack of an identification parade is fatal in this case is not well founded. Each Appellant was identified partly at night and partly during the day. The identification was not by a single witness as in RORIA vs. REPUBLIC 1967 EA 583.”

Applying the principles in the above case we find that the Appellant was known, even though by slight association, by both Complainants before the incident. The circumstances of identification were good for positive identification. The Appellant's photograph was pointed out to the Police by **BILLY** a month after the incident. Given those circumstances, we are satisfied that the identification was sound and did not require an identification parade. In any event the Appellant declined to participate in one. However, we find that the lack of an identification parade in the circumstances of this case did not create any doubt in our minds as to the correctness of the identification of the Appellant by both witnesses.

The final issue raised by the Appellant was that the trial magistrate did not give due consideration to his defence. He submitted further that he raised an alibi defence. **MRS. GAKOBO** submitted that his defence was dully considered before it was rejected by the learned trial magistrate.

We have re-evaluated the case and considered the learned trial magistrate's judgment. The Appellant did not raise an alibi defence. In fact his defence dealt only on the place he was at the time of his arrest. The arrest was one month after the incident. It did not qualify as an alibi defence. Having re-evaluated the entire evidence including the Appellant's defence, we agree with the learned trial magistrate's finding that the evidence against the Appellant was overwhelming. We agree with the learned trial magistrate's finding and we find no reason to disagree or fault her judgment or finding. Consequently we uphold the conviction and confirm the sentence.

The upshot is that the appeal is dismissed in its entirety.

Dated at Nairobi this 15th day of March 2005.

LESIIT **F. A. OCHIENG'**

JUDGE **JUDGE**

Read, signed and delivered in the presence of;

LESIIT **F. A. OCHIENG'**

JUDGE **JUDGE**