REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 184 of 1995

GEOFFREY WACHIARA WAHOME …….…….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(An appeal from conviction and sentence in Criminal Case No. 1820 of 1994 at Meru
(Chief Magistrate
Solomon Wamwayi) dated 2.10.1995)

JUDGMENT OF THE COURT

The appellant, Geoffrey Wachira Wahome was the second accused in Meru Chief Magistrate Criminal case No. 1820 of 1994 in which he was jointly charged with Henry Bundi Nkanatha and John Kariithi alias Musa with one count of robbery with violence contrary to section 296(2) of the penal code. The particulars of the offence were that on the **19th day of June 1994 at about 3.00am at Ntugi Market within Ntugi Location in Meru District of Eastern Province, jointly being armed with pangas, knives, rungus and stones, broke into the shop of Geoffrey Mugambi Muriungi and violently robbed him of Kshs. 1,500/=, one radio cassette make Philips, forty packets of sportsman cigarettes and 20 tins of Cadbury chocolate all valued at Kshs. 9,088/= and at or immediately before or immediately after the time of the said robbery, used actual violence on the said Geoffrey Mugambi Muriungi.**

After the trial, the learned chief magistrate found that there was overwhelming evidence against the appellant and proceeded to convict him and to sentence him to suffer death as mandatorily provided by law. The appellant's co-accused, being the 1st and 3rd accused were set free for lack of evidence. The appellant was aggrieved by both the conviction and sentence and appealed to this court. First, we shall briefly deal with the facts of the case. PWI, Geoffrey Mugambi Muriungi told the court that after he closed his shop at Ntugi Market at about 7pm he went to sleep in a room at the back of the shop. At about 3.00am in the night, he was woken up by a loud bang and as soon as he woke up, he started screaming and at the same time ran out of the shop using another door. He went to a store next to the shop. As he opened the door, he saw a person standing next to the door to the store and he hit him with his head; felling the person in the process. He (PWI) was hit with a stone by one of the other robbers, but PWI managed to run to the shop of one Jacob Mbaabu (PW2) who was by then also outside his shop. The two shops are some thirty meters apart.

Together, PWI and PW2, who had their torches with them flashed the torches towards PWI's shop and that is when, according to PWI, he saw four people standing near the broken door of his shop. That he was able to recognize one of the four people who was his neighbour whose name he gave as Henry Bundi. When asked whether the man he identified was in court, PWI pointed to accused No. 2 (the

appellant herein) in the dock.

It was then that the robbers ran away. PWI and PW2 then went to PWI's shop after the two had run away but as they approached PWI's shop, two other people emerged from PWI's shop, through the broken down door. The pair was armed with pangas. PWI could not recognize them but he chased them with the help of PW2. That as they chased the two robbers, the torches for both PWI and PW2 were on and at a distance of fifty metres from the shop, the appellant was arrested. PWI testified that as well as having their torches on, he did not lose sight of the appellant during the chase. As PWI and PW2 ran after the robbers, they also screamed and members of the public answered their screams. After being arrested, the appellant was beaten unconscious by members of the public. Police from Kiirua Police Station, one Police Constable Onesmus Mutunga (PW3) came to the scene and arrested the appellant. None of the stolen items were recovered.

While being cross-examined by the appellant, PWI told the court that the appellant was arrested some fifty (50) metres away from the shop after a chase and that throughout the chase, he did not lose sight of the appellant as there were no corners on the stretch of ground where the appellant was running. He also stated that a panga was recovered from the appellant. PWI denied a suggestion by the appellant that the appellant had come to PWI's shop in answer to the screams.

PW2, Jacob Mbaabu Marete told the court that on the fateful night, at about 3.00am while he was asleep in his shop at Ntugi Market, which shop is next to PWI's shop, he was woken up by screams and the banging of a door. Though he did not know whose door was being banged nor hear what was being said by the person who was screaming was saying he nevertheless armed himself with a panga and a torch and went out. On going out he found PWI outside his (PW2's) shop who informed him of the robbery going on at PWI's shop. The two of them then started walking towards PWI's shop on the side of the front side. They had their torches on and PW2 was able to recognize one of the robbers as Bundi whom he knew before as his neighbour. Soon after that all the four people started running away. Then as PW2 and PWI neared PWI's shop, two people emerged from the shop and they gave chase, managing to arrest one of them some fifty meters away from the shop. The robber who was arrested was armed with a panga and cut PW2 on the left hand using that panga. Members of the public answered to the continued screams by both PWI and PW2. They beat the arrested person senseless. PW2 told the court that the person that he and PWI arrested that night was the appellant whom he also identified in court. He was also able to identify the panga which was recovered from the appellant.

In cross-examination, PW2 told the court that the appellant was one of the two people who emerged from PWI's shop after the first four people who had been seen standing outside the shop ran away and that it is him whom they arrested some fifty (50) metres from the shop armed with a panga. PW2 also said that during the chase, their torches were on and that the appellant who was running on a straight stretch of ground was never lost sight of.

PW3, No. 51555 Police Constable Onesmus Mutunga told the court that on the material date at about 3.30am, he was woken up by fellow officers and informed that www.kenyalawreports.or.ke GGe eeooof fff ffr rre eeyyy WWaaa c cchhi iiaaa r rraaa WWaaahhooomme ee vvv RRe eeppuubbl ll i iic cc [[[222000000555]]] e eeKKLLRR 4 there was a robbery taking place at Ntugi Market. He proceeded to the scene in the company of Inspector Odawo Police Constable Musyoki and police Constable Nyawanga. On arrival at the scene, they found the 2nd appellant having been arrested by members of the public and lying unconscious. The appellant was then arrested from the members of the public and rushed to hospital. PW4 produced P3 forms in respect of PWI and PW2 as exhibits 1 and 2. PW3 also recovered a panga from the appellant and produced the same as exhibit 1. PW3 identified the appellant in the dock as the man whom he had found lying unconscious after being beaten by members of the public.

On being cross-examined by the appellant, PW3 told the court that he found him (appellant) lying some six metres from the shop and that there were many stones lying around the scene of crime. PW3 denied a suggestion by the appellant that PW3 was telling lies to the court. PW3's evidence was strengthened by the evidence of PW4, Police Inspector Joseph Odawo.

PW7, or PW6 (as the record is not clear) Samuel Mwenda Nkanata informed the court that on the material night he was asleep in his house at about 3.00am when he heard a loud bang on a door. Both PW7 and his father Elijah Nkanata woke up and went to the scene of the bang and the screams. He assisted by telephoning Kiirua P/Station and also heard the arrested suspect pleading in Kikuyu that he should not be killed. Other evidence came from PW8, No. 31636 Corporal Samuel Macharia one of the police officers from Kiirua Police Station who went to the scene of crime where they found the complainant in a state of shock. PW8 collected the stone that had been used to break the door to PWI's shop. He is also the one who arrested the appellant and that at the time the appellant was arrested he was in great pain. No identification parade was conducted for the appellant.

Though the record does not show it, the appellant gave unsworn evidence in which he denied the charge. He stated that the complainant and PW2 found him in motor vehicle KWZ 841 in which he worked as a turn boy, pulled him out and started beating him. That the motor vehicle had broken down about half a kilometer from Ntugi Market and that at about 4.30pm (am?) he saw five people flashing at the vehicle with torches. When he opened the window, the five people approached him and asked him if he had seen anybody there. He then opened the door and informed the people that the vehicle had come from Nanyuki. That was then he was told he was one of the robbers, hit with a stone and fell down. He lost consciousness and only came to three days later. He was then charged with an offence he knew nothing about. The appellant denied that the panga produced as exhibit was recorded in the OB of 19.6.94. The appellant called no witness.

In his considered judgment the learned trial magistrate found that the prosecution had proved its case beyond any reasonable doubt against the appellant. The learned trial magistrate warned himself about the evidence of identification and whether the conditions obtaining at the time when the offence was allegedly committed and the appellant arrested favoured proper identification. He warned himself and rightly so in our view, that such evidence must be tested with greatest care, relying on ABDALLA BIN WENDO & ANOTHER V R (1953) 20 EACA 166. The learned trial magistrate was satisfied that both PWI and PW2 were only eight metres away from the door when the appellant and another emerged from inside PWI's shop. They had their torches on and immediately started chasing the appellant and the other robber while screaming and with their torch lights on. That PWI and PW2 did not at all lose sight of the appellant during the fifty meter stretch before arresting the appellant. The learned trial magistrate believed the testimony of PWI and PW2, first as to the arrest of the appellant and second as to the fact that the appellant was armed with a panga with which he cut PW2 on the left hand just before the appellant was over powered.

Regarding the appellant's evidence, the learned trial magistrate concluded that the same was not worth any weight. He dismissed the appellant's allegation of mistaken identity as being false and the claim that he was found inside the motor vehicle a mere concoction. The trial magistrate also considered the impart of the fact of the panga allegedly recovered from the appellant not appearing in the OB for 19.6.94 as of insignificant consequence. In the result, the learned trial magistrate concluded that there was overwhelming evidence against the appellant and proceeded to convict him of the offence and sentenced to suffer death as by law provided.

During his submissions, the appellant faulted the learned trial magistrate on the grounds that the charge of which he was convicted was defective as it did not indicate whether the weapon of the attack was offensive and/or dangerous. That the trial magistrate failed to indicate whether the weapon of the attack was offensive and/or dangerous. That the trial magistrate failed to indicate whether the appellant's evidence was sworn or unsworn and that during judgment the appellants defence was given no consideration at all, but instead, it was rejected outright.

Mr. Oluoch, appearing for the respondent submitted that the prosecution had established its case beyond any reasonable doubt in the lower court and that both the conviction and sentence were warranted. He submitted that the charge was not defective as submitted by the appellant as in fact it set out to mention the dangerous weapons with which the appellant was said to have been armed. It was also submitted on behalf of the respondent that the evidence on record is watertight against the appellant especially the evidence by both PWI and PW2 who chased and arrested the appellant within minutes of the robbery. He

cited the case of **NJOROGE NDUNGU V R – Court of Appeal Nairobi in Criminal Appeal No. 31 of 2000** and stated that the appellants defence was a fabrication since he did not take the earliest opportunity to raise the defence when he cross-examined the prosecution witnesses.

As the first appellate court, we have taken time and evaluated the evidence afresh. The critical evidence in this case is that of PWI and PW2. PW1 stated that after he was attacked he ran to the shop of PW2 which was next to his and on arrival there he found PW2 already outside and armed with a panga and a torch. PWI was also armed with a panga and a torch. They both walked back to PWI's shop and with their three-battery torches on. From a distance of about eight metres from the broken down door, the appellant and another who escaped emerged from the shop armed with pangas. Although PWI could not recognize the two people when he flashed at them, PWI and PW2 gave chase, finally arresting the appellant some fifty metres away from the shop. Both PWI and PW2 maintained throughout their evidence that they did not at any one time lose sight of the appellant during the fifty metre chase and that throughout that time both PWI and PW2 had their torches on. Other members of the public came after the appellant had been arrested and they administered mob-justice on him, beating him unconscious. We have considered this evidence in detail and also considered the witnesses further testimony under cross-examination and we find the evidence clear and candid. When the appellant questioned PWI, PWI maintained that the chase was on a straight stretch of ground and that PW1 did not lose sight of the appellant. The appellant also suggested to PWI that the appellant was among those who had come to the rescue of PWI when PWI raised the alarm, a suggestion that PWI denied. We find that when the appellant crossexamined PW2, he did not put a similar suggestion to PW2, and that omission by the appellant would tend to strengthen the evidence by both PWI and PW2 that the appellant was indeed one of the robbers.

After the appellant was arrested he remained with both PWI and 2 and other members of the public until he was re-arrested by police. In his defence, the appellant alleged that he was pulled out of his employer's motor vehicle by those who arrested him. This is what the appellant said in part on page 23 of proceedings:-

> **"I deny the charge. The complainant and other people found me inside my m/v which had broken down. It was m/v KWZ 841 make Canter. I work as a turn boy in that m/v. The complainant got me out and started to beat me."**

Later on, as he continued with his defence, the appellant stated at paragraph 2 of the same page 23 of the proceedings:-

> **"We decided to park at Ntugi Market. I remained ……. At around 4.30pm (maybe he meant 4.30am). I saw five people flashing the m/v with torches. I opened the window. I told the people that the m/v had from Nanyuki. One of the people said I was one of the suspects. I was hit with a stone. I fell down. I lost consciousness."**

We have examined the appellant's defence as given against the evidence given by PWI and PW2 and are satisfied that the prosecution's evidence against the appellant remains unshaken. Whereas the appellant had suggested to PWI that he (appellant) was at the scene of crime to assist PWI after PWI was attacked by robbers, the appellant's defence is totally silent on that point. Not that the appellant needed to say anything about it; no, it is the duty of the prosecution to prove its case beyond any reasonable doubt against an accused person. Our finding however, is that the appellant's defence was an after thought and infact the scenario he describes surrounding his arrest is, in our view, highly unlikely. What the appellant seemed to be suggesting is that he voluntarily opened both the window and then the door of the motor vehicle as opposed to his earlier assertion that the complainant pulled him out of the vehicle and started beating him. We therefore agree that the learned trial magistrate was perfectly right in rejecting the appellant's defence and in accepting the prosecution's unshaken evidence against the appellant.

The appellant has contended that the learned trial magistrate did not consider the appellant's defence at all and that failure to do this resulted in miscarriage of justice to the appellant. At page 4 of the judgment the learned trial magistrate said the following of the appellant's defence.

"I also find PWI and PW2 honest and credible witnesses and I do dismiss the unsworn statement of accused 2 that he was a victim of mistaken identify as false and his claim that he was found inside the vehicle KW2 841 a mere concoction.

I have looked at the OB of 19.6.94, Kiirua Police Station and the fact that the panga was not recorded therein is not so significant. I further believe PWI and PW2 that the panga accused 2 used to cut them is one produced in evidence as exhibit 1."

That was the treatment the learned trial magistrate gave to the appellants defence. In our view, the learned trial magistrate could and should have done more in analyzing the defence case. The appellant had raised several other possible defences when he was cross-examining the prosecution witnesses, and it was the duty of the trial court to consider the totality of the defence case both from the appellant's own testimony and from the questions he put to the prosecution witnesses.

Our above views notwithstanding the learned trial magistrate's treatment of the appellants defence did not, in our considered view prejudice the appellant in any way since the evidence of both PWI and PW2 against the appellant was unshaken. The appellant and another emerged out of PWI's shop when both PWI and PW2 were only eight metres from him. PWI and PW2 shone their torch light on the appellant and as the appellant made an escape bid, PWI and PW2 gave chase, all the while flashing their torches on the appellant and at no time losing sight of him until he was arrested. In addition to these two witnesses, the prosecution called other witnesses PW3 – PC Onesmus Mutunga and PW4 – inspector of Police Joseph Odawo, both from Kiirua Police Station who, on arrival at the scene of crime found the accused under arrest and lying unconscious. Kiirua P/Station had been informed of the robbery by Samuel Nkanatha, PW5. According to PW4 he talked to the appellant though appellant could not talk much, but at least he was able to give his name as WACHIRA.

We are therefore satisfied that the learned trial magistrate had a good basis for convicting the appellant. The appellant tried to infer that since nothing was recovered from him when he was arrested, then he could not possibly have been one of the robbers. PWI told the court clearly that the other robbers who fled just before the appellant and another emerged out of PWI's shop had fled carrying with them a sack containing the shop goods. It is reasonable therefore that the prosecution could not exhibit any of the stolen items since they had been carried away. We are satisfied that the evidence adduced by all the prosecution witnesses established the prosecution's case against the appellant beyond any reasonable doubt.

Even assuming for a moment that the appellant was pulled out of the motor vehicle by PWI as appellant alleges, would it not be reasonable to expect that the appellant's employer who had left the appellant guarding the motor vehicle overnight would have been called as a defence witness? The appellant made no indication that he intended to call any witnesses. We say this with much caution because in criminal cases, the onus of proof is always on the prosecution to prove its case beyond any reasonable doubt. It never shifts to an accused except in cases where an accused has been charged with handling suspected stolen property. The point we are making here is that the appellant raised an alibi defence. As was held in **NJUKI AND 4 OTHERS V R (2002) IKLR 771,** an accused person does not assume the burden of proving a defence of alibi he may put forward. In criminal cases, the burden lies squarely on the prosecution, except in those cases where the section creating the offences specifically places some burden on the accused to establish a fact to prove a criminal charge beyond any

reasonable doubt. It is the duty of the prosecution to dispose any alibi defence an accused puts forward unless it appears to the court that the alibi cannot be sustained. We have independently and carefully considered the evidence up to the time of the arrest of the appellant on that night. The evidence of PWI and PW2 is, to our minds, clear and candid. The appellant was arrested within minutes of emerging from PWI's shop. The two witnesses never lost sight of him at any time before they finally caught up with him and arrested him. Earlier, the appellant had suggested to PWI that he (appellant) was at the scene of crime as one of the good Samaritans but the totality of the evidence clearly shows that the appellant's alleged alibi cannot be sustained. We have therefore come to the conclusion that the appellant's defence was an afterthought and to a considerable degree, a totally confused afterthought.

The appellant also submitted that the charge against him was defective as it did not state whether the weapons used were dangerous or offensive. In order to deal with this ground conclusively, we refer back to section 296(2) of the penal code which creates the offence. A robbery with violence is committed in any of the following circumstances, namely:-

(i) If the offender is armed with any dangerous or offensive weapons; or

(ii) If the offender is accompanied with one or more other persons, or

(iii) If at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other form of personal violence to any person.

There is no doubt therefore that an offence of robbery is committed in any of the three circumstances aforesaid. Each circumstance is as it were complete in and by itself. In this regard we rely on Criminal Appeal No. 116 of 1995 – JOHANNA NDUNGU V. REPUBLIC (unreported) Criminal Appeal No. 90 of 2003 – SAID BAKARI ALI & ANOTHER V REPUBLIC (also unreported) and Criminal Appeal No. 215 of 2002 – CHARLES OTENO ATUNDA & ANOTHER V REPUBLIC (unreported).

It would appear to us therefore, and from the wording of section 296(2) of the Penal Code that in drafting the charge, the prosecution has to settle for one of the three ways in which the offence of robbery with violence is committed. In the instant case the charge brings out the third ingredient of the offence for it says:-

"…….and at or immediately before or immediately after the time of the said robbery, used actual violence to the said Geoffrey Mugambi Muriungi."

In our view, the charge did not have to specify whether the pangas, knives, rungus and stones were dangerous or offensive weapons. Was any person immediately before or immediately after the time of the robbery wounded, struck or any other form of violence meted out to them? It is the evidence of PWI that during the robbery he was struck on the head with a stone. It is also the evidence of PW2 that at the time of the arrest, the appellant cut him on the left hand with the panga which the appellant had with him. This evidence by both PWI and PW2 remains unshaken. After the looting of PWI's shop, the appellant's accomplices ran away carrying the goods with them. The appellant also made a bid for escape but he was chased and arrested before he could escape then he struck PW2 with the panga. In our view then, the ingredients or robbery with violence were met, in that both at the time of the robbery and immediately after the robbery, the appellant used actual personal violence on both PWI and PW2. We are also satisfied that the learned trial magistrate was perfectly correct in finding that the ingredients of robbery with violence against the appellant were met. There is no merit in that ground of appeal and the same fails.

The other major ground of appeal is that the evidence of identification and of the subsequent arrest of the appellant by PWI and PW2. The appellant contends that the arrest was made under cruel circumstances. It is settled law that evidence of identification must be considered with great caution and tested with the greatest care before the same can be u**sed for convicting an accused person. The learned trial magistrate addressed his mind to this issue when he referred to the case of ABDALLA BIN WENDO AND ANOTHER V. REGINA (1953) 20 EACA 166. In MAFHABI V. REPUBLIC – Cr. Appeal No. 15 of 1983 (unreported) and REPUBLIC V ERIA SEBWAYO (1960) EA 174,** it was held that where evidence against an accused person is entirely that of identification, it must be watertight. In this case, it was PWI and PW2 who gave the critical evidence of identification. The appellant has contended that the evidence of both of these prosecution witnesses is not believable, since the appellant contends the circumstances under which the said witnesses saw the appellant could not be said to be water light and free from error.

The evidence before us is that when both PWI and PW2 were about eight metres from PWI's shop, and a little while after some four robbers had run away carrying a sack, the appellant and another emerged from the shop. Both PWI and PW2 were shining their torches in the direction of the shop and that immediately the appellant and his accomplice started running away. That both PWI and PW2 gave chase, with their

torches on and that at fifty metres away from the shop, the appellant was arrested. We have ourselves evaluated that evidence afresh and have reached the conclusion that the appellant was properly and positively identified by the said PWI and PW2. In **NJOROGE NDUNGU V R – Criminal Appeal No. 31 of 2000**, it was held that evidence of identification has to be considered together with the evidence of arrest. We have carefully considered the evidence of identification together with the evidence of the arrest of the appellant and we are satisfied that the appellant was properly identified and subsequently arrested and would agree with the learned trial magistrate's finding of the same. The appellant raised some other minor grounds in his submissions, but we find that those submissions do not in any way shake the prosecution's evidence against the appellant. No prejudice was caused to the appellant by the learned magistrate's failure to record that the appellant's evidence was either sworn or unsworn. In the body of the judgment the learned trial magistrate stated thus:-

> **"I also find PWI and PW2 honest and credible witnesses, and I do dismiss the unsworn statement of accused that he was a victim of mistaken ……..."**

In any event, the record shows that the appellant was not subjected to crossexamination which would have been a serious violation of his right not to be crossexamined when he had given unsworn evidence. In the result, we have come to the conclusion that the appellant's appeal lacks merit. We therefore find no reason to interfere with the findings of the learned trial magistrate on both conviction and sentence. The appeal is therefore dismissed in its entirety. It is so ordered.

Dated and delivered at Meru this 18th day of May 2005

D.A. ONYANCHA

JUDGE

RUTH N. SITATI

Ag JUDGE