

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 285 OF 1998**

WILSON MWANGI KARIUKI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The Appellant was charged and convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code. He has now preferred an appeal and has cited 4 grounds which touch on the identification and the arrest. BAALI IDI BAALI (PW.1) was on 17.7.97 Sitting in motor vehicle KAJ 095G talking to a fellow employee when someone struck his hand through the window, in an attempt to take the ignition keys. PW.1 then looked up and the person opened the door and held a gun to PW.1's waist leading him to the back seat. Two others got into the car. One in the drivers seat while the third sat at the passenger seat. PW.1 was pleading with them to spare him and the one sitted next to him told him they would not hurt him as they were police officers. They eventually dropped him at King'orani. On 20.8.97 he was called to Diani police where he identified the motor vehicle although it had a different registration number but the engine and chassis number tallied with that of the stolen motor vehicle.

On 20.12.97 he was once again summoned to Central police station where he identified the robber who pointed a gun at him and sat with him at the back seat. In cross-examination he told the Appellant that he could never forget his face and that he had given his description to the police.

P.C. PATRICK MWAURA (PW.3) while on duty at Central police, received a report from PW.1 and his employer PW.2 that their vehicle had been stolen. In cross-examination by the Appellant he said PW.1 had given a description of his attackers and said he could identify the one who pointed a gun at him and further sat with him at the back seat.

IP. ISAACK ONYANGO (PW.4) was on 20.12.97 requested to arrange an identification parade in which Appellant participated. He said he got the participants mainly from the cells but does not say where the others were from. He then asked Appellant if he wanted a friend or an advocate to attend the parade but he declined. PW.1 was then asked to touch the robbers if he saw any and he touched the Appellant. The Appellant then signed the parade Form and raised no complaints at all.

P.C. WILLIS OTIENO (PW.6) was at Diani police station when he received a report of a robbery at a boutique at Diani Beach and that they had escaped in motor vehicle KAC 059M. Later they found the motor vehicle abandoned at Gombani area and on searching found several number plates KAE 198N, KAC 095G, UAQ 2641 AND 2638. In it was a stock list and telephone bill of the Boutique in which the robbery had taken place. CPL RAPHAEL NDOND attached to C.I.D. Headquarters was on 11.12.97 at 8.00 a.m. led to a kiosk at Sabasaba by an informer together with corporal Kamau. They had information that a person wanted for robberies by the alias name of Kamau A.P was in the said kiosk. They called him by his alias name and when he answered to it they arrested him. Later on 16.12.97 IP. KILIAN KYAMBA was asked to record a statement under inquiry. The statement was retracted by the Appellant but admitted after a Trial-within- Trial although it related to another robbery.

The Appellant chose to give an unsworn statement saying he was a vegetable dealer at Kongowea market and had gone to Sabasaba kiosk to buy sugar. In his submissions he said the prosecution had failed to produce the motor vehicle and no description of the robber was given to the police.

The State Counsel supported both conviction and sentence as the evidence of PW.1 was watertight and

had picked the Appellant from an identification parade without any problem.

We have considered the evidence on record as we are bound to. PW.1 had informed the police on reporting the incident that he could identify the robbers and especially so the one who had pointed the gun at him and sat with him at the back seat. This was corroborated by PW.3 who said PW.1 had given descriptions of the robbers. Five months later, PW.1 had no problem picking the Appellant from the parade and went further to say in cross-examination by the Appellant that he could not forget his face. The Appellant was arrested on information of an informer and indeed when the police called him by his alias name, he answered positively. He was arrested in connection with other robberies one of which involved the use of the stolen motor vehicle. This fact was not in dispute. The Appellant had attacked the identification on the ground that the evidence of PW.1 was uncorroborated. The trial court found that the evidence of PW.1 was unshaken and since the magistrate had the opportunity to observe the demeanor of the witness, we have found no reason to doubt her observation.

The Appellant was also picked out from an identification parade 5 months later which parade he was satisfied with.

On the issue of his arrest, we are inclined to agree with the State Counsel's submission that the same was not in issue as even the Appellant had conceded that he had been arrested in connection with another robbery.

In all we find no good reason to depart from the finding of the Trial Court and consequently dismiss the appeal.

Dated at Mombasa this 31st day of July 2001.

P.N. WAKI

JUDGE

P.M. TUTUI

COMMISSIONER OF ASSIZE