



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: GICHERU, TUNOI & BOSIRE JJ.A)  
CRIMINAL APPEAL NO.140 OF 2000

PETER MWANGI MUNGAI .....APPELLANT  
AND  
REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at  
Nairobi (Porter and Mbaluto JJ) dated 10th November  
1991  
in  
H.C.CR. APP. NO.465 OF 1998)

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**JUDGMENT OF THE COURT**

Peter Mwangi Mungai, the appellant, was charged, tried, and convicted of the charge of robbery with violence contrary to section 296(2) of the Penal Code, and was thereafter sentenced to the mandatory death sentence. His first appeal to the superior court was dismissed, and he now comes to us on second appeal. The appellant's conviction was based on the uncorroborated visual identification evidence of a single witness, and his subsequent identification by the same witness at an identification parade, which parade the appellant said was improperly conducted because the identifying witness was prompted to consider whether or not the appellant was the man who robbed him.

Two main issues are raised in this appeal. First, whether the identification of the appellant as one of the people who robbed the complainant, was free from error. Secondly, whether a failure to call an eye witness to the robbery vitiates the appellant's conviction.

In Owen Kimotho Kiarie v. R. Criminal Appeal No.93 of 1983, (unreported) this court held that dock identification of a suspect is worthless unless it is preceded by a properly conducted identification parade. The principle was re-echoed in the case of Charles O. Maitanyi v. Republic [1985] 2 KAR 75. In that case it was also held that even where the dock identification is preceded by a properly conducted identification parade the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered. The court there said:

"That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and

given a description. His ability to identify the accused is then to be tested on an identification parade ... If one is to test the evidence with the greatest care this was the way that Court of Appeal in England in R.v. Turnbull [1976]3 ALL ER 549 saw the examination. The Judge ... examines closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for

remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance?"

The robbery in this case took place at about 6.00 p.m. along a lane abutting Eastleigh Mosque, in Nairobi. Hussein Mohamed (PW2), the complainant, had parked his motor vehicle, registration No. KYS 258, along that lane and was seated inside it with one Abdi Kadir. The car was a Peugeot 504, Saloon. As they sat there talking a person armed with a pistol approached PW2 and ordered him to come out and leave the ignition key inside, which he did. No sooner had he done so than he was again ordered to return into the car. PW2's recorded testimony is silent on whether he observed the armed man before he returned into his car in compliance with the order to do so. Three other people arrived there, one forced his way into the car through the co-driver's door and sat on Abdi Kadir, two others entered and sat at the back while the one who was armed with a pistol sat on PW2. It would appear that he is the same person who started the car and drove it towards Kariobangi at high speed. The vehicle did not stop until Kariobangi. The complainant was then ordered to move to the back seat.

The gangsters robbed PW2 of cash amounting to Kshs.8000/= which was in the glove compartment of the car, a Seiko wrist watch, a pair of shoes and a pair of socks. They also took Kshs.200/= from Abdi Kadir.

PW2 and Abdi Kadir were later abandoned along Mombasa road. PW2 testified that while he was held captive he severally tried "to look around" but each time" ... they held my head and pushed me down." He identified the appellant as the person who first approached him armed with a pistol, ordered him to get out of and later back into the car; and that he was able to observe him well then and later inside the car before he was abandoned by the roadside with his companion, Abdi Kadir. Under cross-examination his description of the conditions in the car was as follows:

"In the motor vehicle I lay in the space for the gearbox and you sat on my legs. We were crowded on the front seat and you also went with me to the rear seat at Komarock bridge."

PW 2 did not think that those conditions did in any way impede his identification of the people who robbed him, and more particularly, the appellant. But, under cross-examination he did not come out clearly as having indeed unmistakably identified the appellant. This is what he said:

"In my report I told police that if I see the robbers I can identify them by appearance.

I identified you on the ID parade - because of your

appearance - as you are now.

I identified you as one of the people who robbed me.

Police called me on 2/7/88. People can resemble one

another. You told me several times to look down

when I looked at you.

I do not remember the clothes you had on. I identified

you immediately I looked at the line and saw you. I attended 2 parades. In the first one I did not identify any one. I only identified you in the second parade. It is true the parade officer told me to touch the person I recognised. You were in the parade line but I cannot say which position you were."

The complainant reported the robbery, at Pangani Police Station. His evidence is silent on what he told the police as to the description or identity of any of the people who robbed him. Such a report, according to decided cases, is crucial in testing the correctness of the identification of the accused. Such evidence is lacking in this case.

The appellant was not arrested because of any report made concerning this case, but in connection with a different case of robbery. IP Charles Kinoti, (PW5) testified that a police informer reported to him that the appellant in the company of two other people had been involved in a robbery along Juja road and thereafter, escaped into Seldom Hotel. PW5 was among the police officers who arrested the appellant. However, there is no indication as to what happened to the other two suspects. IP Joseph Ringera (PW6), who conducted an identification parade in which PW2 picked the appellant, did not state that he conducted any other parade with PW2 as the identifying witness. PW2 did, however, testify that he attended two parades, the first in which he did not identify any one, and the second in which he identified the appellant. This seems to support what the appellant said that he was subjected to several parades with the likelihood that he was exposed to PW2.

The appellant was arrested on 29th June 1988, four or so days after PW2 was robbed. PW5 testified that PW2 did not record his statement concerning that robbery until 29th June, 1988, and that on the day the appellant was taken to Pangani Police Station soon after he was arrested, PW2 was at the said police station, making a report and recording a statement concerning the robbery.

The evidence as analysed above clearly shows that the identification of the appellant by PW2 is not free from error. That is the more so because on PW2's own admission, the robbery was sudden, he only observed his attackers momentarily, was sat on most of the time he was with the robbers, and each time he tried to steal a glance at any of his attackers his head was pushed to the ground, and the time of the robbery was early evening when visibility might have been poor. The identification parade evidence which would have lent assurance to the correctness of the identification is weak in view of the fact that the appellant might have been exposed to the identifying witness, and that there is a possibility that the appellant was subjected to more than one parade with PW2 as the identifying witness.

In general the conditions under which the appellant was allegedly identified were far from being favourable.

Besides there was an eye witness, Abdi Kadir, who should have, but did not testify. There was no explanation given by the prosecution for their failure to call him as a witness. He was an important witness as the trial was at some stage adjourned to enable the prosecution to get him. But he was not called. The law is clear that the prosecution has a duty to call all witnesses necessary to establish the truth, but where the evidence in support of the charge against an accused is barely adequate the court hearing his case will be perfectly entitled to draw an adverse inference that where a witness who should have been called was not called his evidence would have tended to be adverse to the prosecution case. (see Bukenya and others vs. Uganda [1972] EA 549). We think that this is a proper case for such inference.

For the foregoing reasons we agree with Mr Kiage for the appellant and Mr Gikonyo for the respondent that the appellant's conviction is unsafe. We therefore, allow his appeal, quash his conviction for the offence of robbery with violence contrary to section 296(2) of the Penal Code, set aside the sentence of death which was meted out to him, and order that he be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 8th day of December, 2000.

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR