



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CORAM. D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 112 OF 2019**

**BETWEEN**

**MARTHA WANJIRU MWANGI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the original conviction and sentence dated 31<sup>st</sup> October 2016 in Criminal Case No. 1008 of 2010 at the Magistrates Court in Kiambu before Hon.T. Ole Tanchu, SRM)***

**JUDGMENT**

1. The appellant, **MARTHA WANJIRU MWANGI**, was charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the laws of Kenya)**. The particulars of the charge were that on 22<sup>nd</sup> September 2010 at Red Hill area of Kiambu West District within Central Province, jointly with others not before the court, while armed with dangerous weapons namely pistols, a kitchen knife and a chain cutter robbed **MERCY WANJIRU MAINA** of a motor vehicle registration number KAU 243M, Toyota Starlet valued at Kshs 350,000/-, a mobile phone Nokia flip valued at Kshs. 6,500/-, Kshs. 4,200/- in cash and at immediately before or immediately after the time of the said robbery threatened to use actual violence against the said **MERCY WANJIRU MAINA**.

2. As this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour [see ***Okeno v Republic*** [1972] EA 32, ***Kiilu and Another v Republic*** [2005] 1 KLR 174).

3. The complainant, Mercy Wanjiru Maina (PW 1), was the main witness. She recalled that on 22<sup>nd</sup> September 2010 at about 10.30am, she was driving the motor vehicle registration number KAU 243 M (“the vehicle”) to Nairobi from Red Hill, Limuru. As she was proceeding, she suddenly saw the three people standing across the road; a woman and two men. The man who ordered her to stop was pointing a gun at her. The woman was holding a sack which PW 1 identified in court. PW 1 stopped and they entered the vehicle and ordered her to go to the rear seat. She sat with the woman who took her handbag and ransacked it. She demanded her ATM card and when she responded that she did not have it, the woman shouted back at her and accused her of lying. As they kept driving the woman removed Kshs. 4,500/- cash. As they headed to Limuru, the vehicle was intercepted by a G4S vehicle from behind. The assailants stopped the vehicle and ran out. Since the woman was seated in the back seat she had some difficulty to get out of the two-door car. She nevertheless ran out with the sack she was carrying. Police officers arrived shortly and launched a search for the assailants. She proceeded to the police station and as she was recording her statement, the woman who was part of the gang was brought into the police station holding the sack she had in the vehicle. PW 1 identified the woman as the appellant in this case.

4. Paul Nganga Kamau (PW 2) told the court that on the material day at about 10.00am, he was driving to go to his client’s home to do electrical installation. As he was about to enter the home, he was alerted by the workers that a lady had been hijacked. Together with the employees, they followed the vehicle. As they proceeded they saw a G4S vehicle and informed the occupiers about the incident. The G4S vehicle gave chase but the assailants abandoned PW 1 and the vehicle. He later saw the appellant after she had been arrested along a road.

5. Sergeant Fred Ngome (PW 3) recalled that on the material day, he was on patrol when he met G4S personnel who told him that that a vehicle had been stolen. Together with another officer, they proceeded with the G4S personnel to follow the vehicle. They found the vehicle had been abandoned. They also found a woman carrying a sack had been apprehended by a mob and Administration Police (AP) officers. He arrested her and took her to the police station where PW 1 identified her as the woman who was with the two male assailants.

6. At the material time, Stephen Kitheka Kinia (PW 4), testified that he was working with G4S in Limuru. They were in a company vehicle on duty when they were informed that PW 1, a daughter of their client, had been carjacked and her vehicle stolen. The message was related

to the control room and they followed the vehicle which they found abandoned. PW 1 told then what had transpired. In the meantime, AP officers managed to look for the assailants and arrested the appellant.

7. Corporal Stephen Ndereba (PW 5), the Investigating Officer, gave an account of the investigation and produced the exhibits which included the sack the appellant was found with. The sack contained a kitchen knife and chain cutter.

8. The appellant denied the offence in her unsworn statement. She told the court that she was a businesswoman buying and selling tea. On 22<sup>nd</sup> September 2010, she had boarded a matatu to go and purchase tea at Karirana Tea Factory. She alighted at Githiga-Limuru junction where she found people in a commotion. As she waited to cross the road, she was confronted by AP officers who asked her to go to the police station where she was arrested and assaulted.

9. The main issue in this appeal is whether the appellant was identified as one of the assailants. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, Oluoch v Republic [1985] KLR 549*** and ***Ganzi & 2 Others v Republic [2005] 1 KLR 52***).

10. I am satisfied that the prosecution established all the elements of the offence of robbery as I have set out above. PW 1 narrated how three people, one of them with a gun stopped her and commandeered the vehicle. She told the court how the woman slapped her and took her purse, money and her phone before taking off and abandoning the vehicle.

11. The question before the court in this appeal is whether PW 1 identified the appellant as one of the assailants. The prosecution case was based on the direct testimony of one witness and in dealing with the evidence I am guided by what the Court of Appeal stated in ***Kiilu and Another v Republic [2005] 1 KLR 174*** as follows:

*Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.*

12. This is a case where the incident took place in broad daylight. PW 1 was going to work when she was hijacked and the vehicle commandeered. The appellant sat next to her as they were driving, they spoke, she slapped her and when the vehicle was intercepted by the G4S vehicle she struggled to get out of the vehicle. In light of the close interaction and proximity, the length of time the assailants drove with her, I am satisfied that the circumstances were favourable for positive identification.

13. Where the assailant is a stranger, the proper course to affirm the identity of assailant is to conduct an identification parade. In ***James Tinega Omwenga v Republic NKU CA Criminal Appeal No. 143 of 2011[2014] eKLR*** expressed the view that:

*The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.*

14. However, there may be circumstances where an identification parade may not be necessary. In ***Bernard Mutuku Munyao and Another v Republic NBI CA Criminal Appeal No. 222 of 2004 [2008] eKLR*** the Court of Appeal observed as follows;

*It follows therefore that there was no error in law or in principle made by the two courts in relying on the evidence of the two complainants in this case despite the absence of an identification parade. Evidence of identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and considering the surrounding circumstances as stated in ***R v Turnbull [1976] 63 Cr. App. R. 132***. The absence or presence of it goes to the weight to be placed on the available evidence and does not make such evidence inadmissible or of no probative value. One may think of circumstances where lack of an identification parade would seriously weaken the evidence of visual identification where there is a solitary witness or it is the only evidence available and the identification was made in difficult circumstances. We have no reason to doubt the findings of the two courts below that the two witnesses positively identified the two appellants at the scene in circumstances that were conducive to such identification. Fortunately, that evidence does not stand alone as there was further circumstantial evidence which, on its own, could sustain the conviction. We reject the first ground of appeal.*

15. The incident took place in broad daylight in circumstances that I have held were favourable for positive identification. When the appellant was brought into the Police Station within hours of the incident, PW 1 was able to identify her immediately. In my view, those circumstances did not require an identification parade and it was in fact impossible to conduct the ID parade since PW 1 saw the appellant when she was brought to the police station. Further assurance of the appellant's complicity was confirmed by the fact that the appellant was found with the same sack, which contained implements for robbery, that PW 1 saw her with in the vehicle. The appellant's defence was a bare denial. She admitted she was arrested by AP officers which is consistent with the prosecution case but in light of the positive evidence of identification, her defence was weak tea. I accordingly affirm the conviction.

16. The appellant was sentenced to death as required by **section 296(2)** of the **Penal Code**. As the death sentence is no longer mandatory following the decision of the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR*** (see also ***William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR***), I set aside the sentence of

death. From the record, that the appellant was arraigned in court on 27<sup>th</sup> January 2010 and remained in custody except for a brief period she jumped bail. She has remained in custody since.

17. I dismiss the appeal on conviction which is hereby affirmed. However, the sentence of death imposed on the appellant is quashed and substituted with a sentence of **fifteen (15) years imprisonment** from **28<sup>th</sup> January 2010**.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KIAMBU this 16<sup>th</sup> day of JANUARY 2020.**

**R. N. SITATI**

**JUDGE**

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.