REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 26 OF 2009

MAXWELL MUCHIRI GATIMU……..……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 2989 of 2007 delivered on 10th February, 2009)

JUDGMENT

The appellant was charged in the subordinate court with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code, Cap. 63**. The particulars were that on the 20th day of September, 2007 at Karatina township in Nyeri district within Central Province, the appellant jointly with others not before court, being armed with dangerous or offensive weapons, namely, AK 47 rifles robbed Lucy Njoki Mwangi of a motor vehicle registration number KAS 348A make Toyota Carina valued at Kshs 750,000/=, a mobile phone, make nokia 6120 valued at Kshs 12,000/= and cash Kshs 4,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Lucy Njoki Mwangi.

The appellant pleaded not guilty to the charge but after his trial the learned magistrate held that the state had proved its case against him beyond all reasonable doubt; he was thus convicted and sentenced to death. He appealed against the sentence and conviction on three grounds; these were that:-

1. The learned magistrate erred both in law and fact when she convicted the appellant based on insufficient circumstantial evidence;

2. The learned magistrate erred both in law and fact in convicting the appellant yet the charges against him were not proved beyond reasonable doubt;

3. The learned magistrate erred in law in rejecting the appellant's defence which was not challenged by the prosecution.

When the appeal came up for hearing, the appellant sought to rely on his handwritten submissions which he filed in court on the 17th September, 2013. The state, on its part, opposed the appeal and urged this court to uphold both the conviction and the sentence.

While considering submissions by the appellant and counsel for the state, I have had to look at the evidence proffered at the trial and analyse it afresh, as I am bound to, and come to my own conclusions on matters of fact but bearing in mind that the learned magistrate had the advantage of hearing and seeing

the witnesses.

The complainant was a businesswoman in Karatina town. On 20th September, 2007, at about 7.15 pm she drove home after work. Her home had two gates separated by a distance of about 200 metres. She saw a stranger at the first gate. He was standing near the road leading to the home. As she drove on, she saw another stranger. Her gateman, **Joseph Kiptanui (PW3),** opened the second gate for her but as she drove to park the car she saw Kiptanui from the side mirror being chased by two men. A man came to her car and opened the driver's door; he ordered her to move to the front passenger seat. Another man entered the car through the passenger door and sat on the same seat that the complainant had been pushed to; she was therefore sandwiched between the two men. Two other men entered the car from the back doors and sat at the back seat. The men in front were armed; according to the complainant, each of them had "a big gun". They wore civilian clothes and caps which they had pulled down to conceal their faces.

The men sped off with her; she was moved to the back seat. The men at the front beat her up and covered her head with a black polythene paper. They also demanded money, the complaint's phone and her ATM card. Somewhere along the road they stopped and one more man entered the vehicle.

One Dennis Maina called the complainant on her phone; they gave her the phone and asked her to answer. She told him that she had been hijacked. One of the men took the phone from the complainant and demanded Kshs 500,000/= before they could release her. They continued beating the complainant and threatened to shoot her. At one point they took the complainant to the forest and left her under the guard of two other men who threatened to rape her. They later came for her and locked her in the car's boot. The complainant stayed in the boot until 4.30 am when she was rescued by policemen who were accompanied by her husband, her brother in law and her son. She was then driven to Karatina police station. She discovered that the Kshs 4,000/= she had in her handbag, together with the handbag itself, her phone and a wrist watch had been stolen. Although the complainant's assailants were strangers to her she gave their description to the police when she reported the case at Karatina police station. She, however, admitted that she could not identify any of them if she saw them.

The following morning, she went back home, Kiptanui (PW3), recovered a national identity card from the complainant's compound. She recalled one of her hijackers looking for his identity card in the car; in fact at one point he asked everybody to get out of the car and turned over the car mats in search of this document. He had even found the complainant's watch; apparently she had removed it and dropped it on the floor of the car. The identity card, so the complainant testified, was taken to the police by her husband.

The second prosecution witness, one **Karugi Kihara (PW2)** testified that he operated a matatu business. On 20th September, 2007 at about 7 PM he was at a place called Kiamabara when his brother, **James Muraya Kihara (PW4),** called and informed him that his wife had been hijacked. He joined his brother at his home and together they called the police to inform them of the kidnap. The police asked them to assist and search for the complainant's car. At about 4 AM they spotted the complainant's vehicle speeding at Kerugoya-Kutus junction; they pursued the vehicle and when they finally caught up with it they found the complainant locked in the its boot. Together they drove to Karatina police station.

Joseph Kiptanui Keter (PW3) testified that he was employed at the complainant's home and that he had worked there for 14 years. He recalled that on 20th September, 2007 he was at home together with the complainant's husband who was in the house. As he waited for the complainant at the gate, he saw the motor vehicle, registration number KAS 348 S coming with its lights on. He opened the gate for the vehicle to enter; however, as soon as it entered he saw two people running after it. They were armed with guns which they pointed at him. He raised his hands in shock but as they pursued the vehicle, Kiptanui ran and hid himself behind the house. He remained hidden there for about half an hour when he heard his employer calling him out. He came out of the hiding and told his employer what had happened; his employer, in turn, informed him that his wife had been hijacked. He later saw police come to his employer's house. Thereafter they left to look for the complainant as he guarded the home. His employer, together with his brother and his wife came back the following morning at 6 AM.

The witness also testified that as he walked around the compound that morning, he recovered a black wallet; the wallet contained sim cards, a national identification card and other pieces of paper. His employer took these items to the police; the witness was able to identify the identification card as the one he recovered. He testified that he could not identify the people he saw because darkness had set in when they attacked and also because he was in shock.

Corporal Musa Kiptoo (PW4) was attached to the flying squad at Karatina at the material time. On 20th September, 2007 at about 8 PM he was with chief inspector of police, Munga, inspector Ndubai, and corporal Murusi when he received a report of robbery at the home of **Mwangi Kihara (PW5)**. They rushed at the scene where they were informed that the complainant had been hijacked. They started searching for the complainant's vehicle; at about 2 a.m. the following morning, they spotted it at Karumandi near Kerugoya. The occupants of the vehicle started shooting at them and in the course of the shootout, one of the thugs was injured. They found him next to the vehicle but he later died in hospital apparently as a result of the injuries he sustained.

The police conducted a search of the vehicle and found the complainant locked inside its boot; they took it to Karatina police station. The following morning the complainant's husband came to the police station with a wallet. He reported that the wallet had been recovered by **Kiptanui (PW3)** at his compound. There was an identity card in the wallet bearing the name of **Stephen Gichira Gatimu.** The officer identified the identification card and the wallet. Inside the wallet was also negative which revealed the appellant's image when it was developed.

Upon investigations, the police established that the identity card belonged to the brother of the appellant who was then serving a prison sentence at Mwea prison. They managed to arrest the appellant on 11th October, 2007. The officer identified both the negative and the photograph in court.

The complainant's husband, **Mwangi Kihara (PW5),** testified that he had two employees; Wambui and **Joseph Kiptanui (PW3)**. On 20th September 2007, at around 7 PM, he was at home with them when he heard his vehicle arrive but it suddenly turned apparently in the opposite direction. He saw his watchman running. His house girl told him that there were armed men pursuing the watchman. He locked the house and hid himself. He called the police and informed them of the incident. The police and his brother came. The officer in charge of police division told him to go to the police station. The police joined him and together they started searching the vehicle in which his wife had been hijacked.

His wife telephoned him and told him that the hijackers demanded a ransom of Kshs 3,000,000/=. She also told him that they were travelling towards Kirinyaga. One of the thugs spoke to him and asked him why he could not produce the money if at all he loved his wife. He answered and said that he was still looking for the money. As they were looking for the vehicle, they spotted it being driven at a high speed. They turned to pursue it; somewhere along the road, and its occupants started running away although driver was arrested. The witness heard gunshots. Soon thereafter the police came with his wife. The vehicle was driven to the police station.

The following morning **Kiptanui (PW3)** told him that he had recovered a wallet in the compound. He asked for the wallet and took it to the police station. He identified it in court and also identified the photographs of his motor vehicle.

Chief inspector of police **Samuel Wambugu (PW6)** testified that he was stationed at the provincial criminal investigation department as a scene of crimes officer. He also testified that he was gazetted to take photographs. The photographs of the complainant's motor vehicle which were produced in court were taken at his instructions.

Police Constable Benjamin Ngei (PW7) was the investigations officer. In the course of investigations, he took a wallet from inspector Ndubai. According to his evidence, it was a dark brown wallet. It contained an identification card of one Stephen Gichira Gatimu and a negative. He also testified that it had four sim cards; three of those cards were for Safaricom line while one was for the airtel line. On 22nd September, 2007, while he was in the company of police Constable Edgar, he escorted the complainant's

motor vehicle to Nyeri scenes of crime's office for its photograph to be taken. It was photographed by police Constable Masake. On the same day he handed over to chief inspector of police Wambugu the negative to develop. Later Wambugu handed over the photographs **that** had been developed to him. He identified both the negative and the photographs in court. On 11th October, 2007 the appellant was arrested by corporal Kiptoo and other police officers.

The investigations officer and his colleagues established that the identification card belonged to the appellant's brother who had been jailed in criminal case number 2805/01 at Kerugoya law courts. According to the investigations officer, he was still serving a prison term when he testified.

The appellant opted to give sworn testimony when he was put on his defence; he testified that on the 11th October, 2007, he was in the course of his business when two armed men approached him. They asked him if he was the brother to Stephen Muchira. When he answered in the affirmative, they asked him to take them to his home. He closed his shop and took them home where he showed them Stephen Muchira's house; Muchira himself was not there. They then took him to Karatina police station where he was charged with the offence for which was convicted.

The appellant admitted that the negative which was presented in court was his but that the police had taken his photographs when they arrested him. He also said that they took his phone also.

Faced with this evidence, the learned magistrate held that the prosecution had proved beyond reasonable doubt that the offence of robbery with violence had been committed. I would agree with her in this respect because the evidence that the complainant was violently robbed by four armed men was not controverted. The circumstances under which she was attacked and robbed met the threshold of **section 296 (2)** of the **Penal Code, cap 63**. That section provides as follows:-

> ***296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

The major issue at the trial was whether the appellant, together with others not before court, perpetrated the crime. The learned magistrate found the answer to this question in the recovery of the wallet at the complainant's compound; in particular, she accepted the evidence of the contents of the wallet implicated the appellant in the commission of the offence mainly for two reasons; first, the identity card in the wallet belonged to the appellant's brother who was serving a prison sentence, and second, the negative in the wallet revealed the appellant's photograph after it was developed. According to the learned magistrate, the wallet and its contents placed the appellant at the scene of crime.

In a nutshell, the learned magistrate relied on circumstantial evidence. **Section 164** of the **Evidence Act, Cap. 80** appear to make reference to this sort of evidence where proof is sought of any particular fact; it states as follows:-

> ***164. Circumstantial questions to confirm evidence When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.***

According to this provision of the law, where there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances that may have been observed at or near the time or place the fact in issue occurred. If the circumstances are proved beyond reasonable doubt, the court may convict in the absence of direct evidence; however, circumstantial evidence must be narrowly examined before drawing any inference and coming to any conclusion. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused person. The leading

decisions on this issue are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715.**

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa quoted **Wills on Circumstantial Evidence** and held that:

> "***In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

In **Simon Musoke versus Republic**, this principle was extended when the same court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that:-

> ***"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

Only the complainant and **Kiptanui (PW3)** could possibly have identified the robbers; however, the complainant admitted that she could not identify her assailants. Though she gave their description in her statement to the police, she admitted in her testimony that she could not identify any of them even if she saw them. She was categorical that none of the people who had attacked her was in court at the time she testified. **Kiptanui (PW3)** for his part was clear from the very beginning that he was not able to identify the attackers because darkness had set in at the time they attacked. In the absence of any direct evidence linking the appellant to the offence, the learned magistrate had to rely on circumstantial evidence to convict him; it is necessary that this court interrogates this piece of evidence to satisfy itself that the court came to the correct conclusion in its assessment of this evidence as the basis for the appellant's conviction.

One important aspect of this circumstantial evidence was the recovery of the wallet on the complainant's compound. **Mr Kiptanui (PW3)** testified that he picked a black wallet at the home of the complainant at around 6 AM on 21st September 2007, a day after the attack. He passed the wallet to his employer who in turn gave it to the police. The witness identified in court the wallet together with the identification card that was found in it. His evidence was uncontroverted.

Mwangi Kihara (PW5) corroborated Mr Kiptanui's evidence and testified that the latter gave him a wallet which had an identification card of one Stephen Gichira Gatimu; in cross-examination, he said that there was also a negative in the wallet. He took the wallet together with its contents to the police. He was also able to identify and the identification card in court when he testified.

Still on this evidence, **Mr Benjamin Ngei (PW7)** testified that he took over a wallet from one Ndubai; the wallet had sim cards, an identification card and a negative. The negative was developed by **CIP Wambugu (PW6)** and it revealed the photograph of the appellant.

On her part, the complainant recalled the appellant searching for an identification card in the car. In the course of the search, the appellant had even recovered her watch which she had dropped on the floor of the car. Her evidence was also not controverted; in fact the appellant never asked her any questions in cross-examination. There was no basis not to believe her testimony.

I agree with the learned magistrate that the evidence of the complainant, together with that of Kiptanui (PW3) and her husband (PW5) coupled with the outcome of the investigations by **Mr Ngei (PW7)** linked the appellant with the possession of the wallet in issue and therefore placed him at the scene of crime, where it was recovered. The recovery of the wallet together with its contents from the complainant's compound soon after she was robbed coupled with the fact that the appellant had been looking for an

identity card in the car after they left the complainant's home are inculpatory facts. Though the identification card was eventually established to be that of his brother, the latter could not possibly have been at the scene of crime because he was in prison at the material time.

I agree with the learned magistrate that these facts are incompatible with the innocence of the appellant, and they are incapable of explanation upon any other reasonable hypothesis than that of the appellant's guilt. I am convinced, the state discharged satisfactorily the burden of proving these facts which justify the drawing of this inference of guilt on the part of the appellant. Having said so, I am satisfied that the appellant was properly convicted. I do not find any merit in his appeal and I hereby dismiss it.

Signed, dated and delivered in open court this 4th November, 2016

Ngaah Jairus

JUDGE