REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LESIIT, KIMARU, JJ

CRIMINAL APPEAL NO. 260 OF 2012

AS CONSOLIDATED WITH CRIMINAL APPEAL NOs. 259& 258 OF 2012

(Appeal from the original conviction and sentence in Makadara

CM's Criminal Case No. 768 of 2010 by Mr. T. O. Okelo SPM)

GEORGE MUNUHE WASHORI.............................1ST APPELLANT

GEOFREY KIMANI NJERI....................................2ND APPELLANT

SUSAN NJERI...3RD APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

1. The Appellants **GEORGE MUNUHE WASHORI**, **GEOFREY KIMANI NJERI** , **SUSAN NJERI** together with another were charged with two counts **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**.

2. The particulars of Count 1 were:

> **"on the 9th day of January 2010 along Kangundo road Nairobi, while armed with a dangerous offensive weapon namely pistol with others not before court they jointly robbed MARGARET WAIRIMU CHEGE of Kshs. 42,000/-, a mobile phone make Nokia 2611 valued at 6000/- all valued at 48,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said MARGARET WAIRIMU CHEGE**."

3. The particulars of Count 2 were:

> **"On the 8th day of February 2010 along Kangundo road Nairobi, jointly with others not before court and armed with a dangerous offensive weapon namely pistol robbed ROSE MUGOH of Kshs. 32,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said ROSE MUGOH."**

4. The Appellants were found guilty and convicted of both counts and sentenced to suffer death. Being aggrieved by the convictions and sentence the Appellants filed their respective appeals. We have consolidated these appeals as they arise from the same proceedings. The Appellants raised similar grounds of appeal which we have summarized hereunder as follows:

> i. **The Appellants contend that the learned trial Magistrate erred in both law and facts when he found that the evidence of identification of the Appellants was adequate to support a conviction, and that the id parades were properly conducted.**
>
> ii. **That the descriptions of the Appellants did not meet the provisions of Section 137(d) of the Criminal Procedure Code.**

iii. **That insufficient grounds were laid to support the production of documentary exhibits without calling the maker under Section 77 (i) of the Evidence Act.**

iv. **That the trial Magistrate based his conviction on extraneous evidence which had not been adduced in court.**

5. The facts of the prosecution case were that on the 9th January 2010 at about 1.30 p.m., PW1 Margaret Wairimu left her home to visit a friend in Komarock area. Later at about 5.45 p.m. her friend escorted her to the stage along Kangundo Road, and left her there. It was then as she waited for public transport that a vehicle Toyota Corolla registration number KAT 229W came.

6. The vehicle had two men and two ladies inside. The driver inquired from her the way to Ruai bypass, and even offered her a lift, which she took. However as PW1 moved back to enter the rear seats, one of the occupants came out and forced her into the back seat of the vehicle before the driver sped off towards Ruai centre. The person who forced her in then removed a gun and hit her with a fist. The robbers then took her hand bag which had in it her ATM card, cell phone, Kshs. 2000/- and ID card. They asked PW1 for contacts of someone to demand money from. PW1 gave the number of her husband, who they called and demanded Kshs. 50,000/.

7. They then took PW1's ATM card and asked for its pin number threatening her with dire consequences should the card be withheld at the ATM. PW1's phone rung and the person who had forced her into the vehicle answered and told the caller to send the money to PW1's phone number 0722451083 after which the lady at the co-driver's seat ordered that PW1's phone be switched off completely. The group called several family members and friends of PW1 and obtained money from them by threatening the life of PW1. Afterwards PW1 was thrown into a bush in Githunguri at 10pm where the robbers abandoned her.

8. PW1 later reported to National bank to block her ATM card. By then the robbers had already withdrawn Kshs.40, 000/- from her account.

9. PW1 was taken to ID parades on the 15th February, 2010 where she identified the 3rd Appellant in the ID parade conducted by PW6 and the 1st Appellant in the one conducted by PW8. She did not identify anyone in the third parade.

10. In support of count 2 the prosecution adduced evidence to the effect that on the 8th February, 2010 at about 10.00 a.m., PW2 Rose Mugo was at Timber yard stage when a vehicle registration number KAT 229W came and stopped where she was. It had two male and two female occupants. PW2 testified that the driver asked her for the direction to the by-pass. He then offered her a lift to show them the place. PW2 innocently obliged but as she entered the vehicle, she was pushed in and made to sit between two people. PW2 was hit on the back of her head with a gun which one of the men produced from his person. PW2 was tied on the head with a jacket so that she could not see. She was then threatened. Her bag was grabbed from her and ransacked and everything inside was taken including Kshs.10, 500/-. They told her they didn't need her money as they had been sent to kill her and had been paid Kshs.300, 000 /-.

11. The assailants demanded PW2's PIN for her phone and called her neighbour demanding that he sends them Kshs. 90,000/-. One of the robbers beat her as the other made telephone calls demanding for and receiving money from people who knew PW2. After the ordeal the robbers eventually dropped her off at the Railway line near Mwiki at night from where she reported the matter to the police. The robbers retained her ATM card and money. They withdrew money at Ruiru from her account.

12. There was the testimony of PW7 who produced two agreements between him and the 2nd Appellant for hire of the vehicle KAT 229W. The Agreements were dated 11th December 2009 and 20th December, 2009. PW7 testified that the 2nd Appellant paid Kshs2, 500/- per day for the vehicle.

13. The Appellants denied the charges in their defences. The 1st Appellant stated that he was a mechanic and that on the day in question while at his work place he was approached by the 2nd Appellant who was carrying two women, the 3rd Appellant and the 4th accused. The 2nd Appellant asked him to repair the vehicle he was diving saying that it had developed mechanical problems. The 1st Appellant stated that after he repaired the car, the 2nd Appellant offered him a lift back to his work place but that before they could go far, police arrested them.

14. The 2nd Appellant on his part stated that he hired the vehicle KAT 229 W from his long time friend PW7 in order to use it to travel to Kangundo Hospital to see his friend Makau. He said that he travelled there and spent time with his friend. That at Kamulu area, he met the 3rd Appellant and the 4th Accused who stopped him and requested for a lift. He offered them a ride but before they could travel far, the vehicle developed mechanical problems. The 2nd Appellant confirmed the story of the 1st Appellant that he hired his services and after he repaired the car, he gave him a lift and that soon thereafter they were all arrested.

15. The 3rd Appellant stated that on the morning of 11th, she went to Eastleigh to visit her friend the 4th Accused where they spent some time before proceeding to Kamulu Academy where the 4th Accused wanted to pay fees for her child. It was about 5pm when they stopped the 2nd Appellant who was driving a vehicle and asked him for a lift as they had waited for long to get public transport. She confirmed the 2nd Appellant's story that the vehicle developed mechanical problems, that the 1st Appellant was hired to repair it after which they were all arrested by the police as the 2nd Appellant gave the rest of them a lift.

16. The 4th Accused confirmed the story of the 3rd Appellant about the visit and how they found themselves in 2nd Appellant's

car in which they were arrested.

17. As the first appellate court we are aware that our duty is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion. We have a higher duty. In the case of **Kiilu and Anor v Republic [2005] 1 KLR pg 174**, the learned Judges of Appeal, **Tunoi, Waki** and **Onyango Otieno JJA**, held, inter alia that:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."**

18. This position was also pronounced in another landmark Case of **Okeno vs. Republic** **1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."**

19. We have analysed and evaluated afresh the entire evidence adduced by the prosecution and defence, and have drawn our own conclusion, having given due allowance for the limitation of not seeing or hearing the witnesses.

20. The 1st and 3rd Appellants were unrepresented in this appeal. The 2nd Appellant was represented by Mr. G. Kamau. The 1st Appellant made oral submissions in which he urged that PW1 had not given any descriptions of his assailants before identifying the Appellants in the identification parades.

21. Mr. Kamau for the 2nd Appellant urged that the evidence of identification was inadequate to sustain a conviction. Counsel urged that speaking with the driver who only sought for directions to the bypass must have taken only a few minutes, not 10 minutes as PW1 stated in evidence. Mr. Kamau submitted that PW1 did not have sufficient light to see the driver seated in a Toyota Corolla vehicle as it was 6.35 p.m. and therefore getting to night. Counsel urged that once she was seated in the vehicle her head was covered immediately and therefore she did not have the opportunity the driver, identification as the 2nd Appellant. Mr. Kamau urged court to be cautious because the identification parades were conducted one month after the incident.

22. Regarding identification by PW2, Mr. Kamau urged us to consider that PW2 did not participate in a properly conducted identification parade since all Appellants were in the same room when she was asked to identify them. Counsel urged that PW2 was pushed into the vehicle as another inside the vehicle pulled her in and being warned not to look at the assailants, she avoided eye contact and therefore was not in a position to identify anyone. Mr. Kamau submitted that the 2nd Appellant declined to attend any identification parade and so in his respect there was only dock identification.

23. Mr. Kamau submitted that there was doubt regarding the identity of the vehicle involved in the attacks. Counsel urged that the vehicle PW3 who led to the Appellants arrest describes was different from one PW1 and 2 claims were used to rob them.

24. Counsel submitted that PW7 who was the owner of the vehicle produced an Agreement which shows 2nd Appellant hired the vehicle on 28th December 2009 and again on 11th February 2010. Counsel urged that there was no agreement showing that on 9th January 2010 and 8th February 2010, the dates of the two offences it was 2nd Appellant who had the car.

25. The 3rd Appellant relied on written submissions which she presented in court, and which we have considered at length. The 3rd Appellant submitted that the investigating officer produced certain documents without involving the makers.

26. Ms. Aluda, learned prosecution counsel opposed the appeal on behalf of the State. Learned Prosecution Counsel urged that there was sufficient time for each of the complainants to identify the assailants. Counsel urged that the incident took place in broad day light and in regard to PW1, she was able to identify the Appellants in identification parades and also in court at the trial. Learned Prosecution Counsel submitted that the 2nd Appellant was identified by both PW1 and 2 as the one who was driving the motor vehicle at the time of the incident in each of their case.

27. Counsel urged that the prosecution proved that PW7 hired out the vehicle in question to the 2nd Appellant on condition he drove the vehicle himself and that that is what he did.

28. Ms. Aluda cited **Muiruri vs. Republic [2002] KLR 274** and urged court to look at the entire evidence adduced and find that each complainant was able to describe the role played by each of the Appellants and that they each held lengthy conversations with each of them. Ms Aluda urged that the Appellants committed a series of robberies and that they were arrested as they attempted to attack another victim.

29. Regarding identification PW1 identified the 1st, 2nd and 3rd Appellants in identification parades both conducted on the 15th

February 2010 by PW6 and PW8. In court PW1 identified all Appellants and the 4th accused in the case.

30. The period of time the complainant saw the assailants was between 6 p.m. and 10 p.m. That is the period the complainant PW1 spent with the assailants as they drove from Ruai bypass to Githunguri, calling PW1's family and friends and threatening PW1's life so that they could send them money. They got a substantial sum of money that way.

31. PW1 identified the 1st and 3rd Appellants in identification parades one month and one week after the incident.

32. PW1 made two ID parade identifications against the 1st and 3rd Appellants. The 4th accused in the case was not identified in the parade in her respect. The 2nd Appellant declined to participate in any ID parade and so none was conducted in his respect.

33. The evidence of identification in this case is that of a single identifying witness in respect of each incident. There was therefore need to carefully scrutinize this evidence in order to test whether it was positive and free from error and or mistake. In **CHARLES O. MAITANYI VS REPUBLIC(1985) 2 KAR 75** the Court of Appeal held:

> **"It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test are known because they were not inquired into."**

34. We have analyzed and evaluated afresh the evidence of PW1. While it is clear that PW1 spent about five hours with the assailants between 6pm and 10pm, the circumstances of identification were partly difficult because while 6pm was still during the day, from7pm onwards it had definitely become dark. PW1's initial contact with the assailants was not that brief. From her description the assailants first approached her, the driver in particular, seeking to know the directions to the bypass. He even had time to offer her a lift which she accepted.

35. The moment PW1 entered the vehicle, she was harassed, beaten, threatened and eventually she was sat on. By the time she left the company of the four assailants it was already night and she must have been traumatized. There was however a prolonged period of time that PW1 had with her assailants. PW1 described in detail what each of these people did and the roles played.

36. PW1 identified the 3rd Appellant as the one who sat next to her on the right while the 1st Appellant sat to his left. The account of the events of the robbery as given by PW1 shows that she tried to draw attention from oncoming traffic by opening the door near where she sat. That led to the 1st Appellant, according to her testimony producing a gun, beat her up and sit on her.

37. From the evidence of the complainant, PW1 we find that she had time to see the two people who sat with her at the back seat of the vehicle, and the person who was driving the car and who asked her for directions to the bypass. The quality of identification considering the circumstances under which the assailants were identified was strained. This is due to the violence visited upon PW1. As such we are of the view that there was need for other evidence implicating the appellants with this offence.

38. PW1 asked the members of the two parades she attended to speak certain phrases. In the case of **Simeon Mbelle v. Republic [1982] KLR 578 the court held as follows:**

> **"a) That it was the accused person's voice;**
>
> **b) That the witness was familiar with it and they recognized it, and;**
>
> **c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."**

39. The words PW2 requested to be said were: "***Ni uri plot Kamuru***" meaning "***Do you have a plot in Kamulu***" and "***uri ciana cigana***" meaning ***"how many children do you have".*** PW1 did not know the assailants before and therefore the familiarity test cannot be applied to this case, moreover, the words were too few to aid in a positive identification. Voice identification does not apply to this case.

40. The defence challenged the mounting of ID parades before a description of the suspects by PW1, the identifying witness. That challenge is not without merit. In the case of **Gabriel Njoroge vs. Republic (1982-88) 1 KAR** it was held:

> **"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade.**

A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

41. PW2 was not called to any ID parade. In her own words, PW2 stated:

"***On 11th February 2010, I went to Kayole police station. I was able to identify the said suspects. I saw them in an office where there were many people. They were all together. They had just been arrested. They were in custody.........."***

42. PW2 did not know the assailants before this incident and it was important for proper ID parades to have been held in her respect. In **DAVID KARANJA & OTHERS V REPUBLIC CA No.117 of 2005** the Court of Appeal, OMOLLO, WAKI and DEVERELL, JJ.A. held:

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

43. The police broke every rule on proper conduct of ID parades in the **Forces Standing Orders** when they invited PW2 to an office to "identify" suspects who had just been arrested. It is bad enough that the four suspects were hounded together in the room with no other members of the "parade" when PW2 was ushered in to see if he could identify them. That was not a proper conduct of ID parade.

44. We find that the evidence of the two identifying witnesses standing on their own cannot sustain a conviction. What was required was other evidence implicating the Appellants with this case. We shall examine the proceedings to see whether there was other evidence available in this case to implicating the Appellants in this case.

45. Just before we consider the other evidence available in this case, let us first consider some other issues raised by the Appellants. An issue was raised by the 2nd Appellant that the evidence adduced did not meet the requirements of **Section 137(d)** of the **Criminal Procedure Code**. That section provides:

(d) the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as "a person unknown";

46. The 2nd Appellant has not submitted much on this ground other than mentioning it as a ground of appeal. It is therefore not clear what about the description he had in mind. That notwithstanding, Section 137 (d) of the Criminal Procedure Code specifically refers to the description or designation of accused persons in a charge or information and requires it to be as clear as reasonably practicable in the circumstances. We have looked at the charge and are satisfied that it gives proper descriptions of each accused person by name and there is no misapprehension as to who was being referred to therein. We find that nothing turns on this point.

47. The 3rd Appellant submitted that the investigating officer produced certain documents without involving the makers. PW4 produced the exhibits in this case as the Investigating Officer of this case. PW4 produced the M-pesa statement prints outs and Bank Account Statement for both PW1 and PW2, cell phone numbers and bank accounts with consents of the defence which was expressed orally before the court. We looked at the record of proceedings and found that there was express indication by the defence that they would not object to the said documents being produced by the I.O.

48. The other documents produced were Photographs of the subject motor vehicle registration number KAT 229W. The photos were produced in court on 3rd May 2012 and this was not objected to by the Appellants or their counsel. We find that raising objections at this stage was clearly an afterthought on the defence part. Nothing turns on this ground.

49. The Appellants challenged the learned trial magistrate for considering extraneous matters in his judgment. We have perused the judgment and agree that indeed there were extraneous matter which the court considered to draw conclusions. The evidence of PW3 was that a neighbour called him and gave him the reg. no. KAT 229W as one which had been used by two men and two women to hijack and rob another neighbour, both not called as witnesses. He then assisted to have the vehicle and four occupants arrested. PW5 the arresting Officer did not mention PW3 in his evidence but he did mention that one PC Mwasia had called him to assist effect the arrest. PC Mwasia was at the scene of arrest before PW5 and he may be the one PW3 spoke to. The evidence of PW3 that there was an attempted kidnap of another, which the learned trial magistrate made reference to in the judgment, was indeed extraneous matters as the alleged victim was not called as a witness.

50. The Appellants raised issue with the evidence of the prosecution regarding the registration number of the motor vehicle allegedly used in the two robberies. The Appellants contend that each of the witnesses gave different registration numbers of

the vehicle used to rob them.

51. We have looked at the record of proceedings and have confirmed that the original hand written record of proceedings clearly show that the registration number given by the complainants, PW1 and 2; the owner of the vehicle PW7, and the person who assisted in the arrest of the Appellants through the vehicle, PW3, were all consistent. The motor vehicle used in the committal of the offence, according to PW1 and 2, the vehicle hired out to the 2nd Appellant by PW7 and one arrested with PW3's assistance was reg. no. KAT 229W. The errors appearing of the registration number of the vehicle in issue in this case was purely topographical, caused by typists, and had nothing to do with the testimonies of these witnesses. Nothing therefore turns on this point.

52. The Appellants all admit that they were in the vehicle KAT 229W at the time of arrest, 8th February, 2010. They have each given explanations of how they came to be in that vehicle. The 2nd Appellant admits he hired the vehicle from PW7, who was the owner of the said vehicle, on the day of arrest. He does not mention the other days that PW7 in his evidence stated he had given him the vehicle.

53. The Agreements signed by PW7 and the 2nd Appellant were P. Exh. 4 dated 11th Dec. 2009 and 6 dated 28th Dec. 2009. They show that the terms of agreement between them was that the 2nd Appellant would pay Kshs. 2,500/ per day for the vehicle, KAT 229W. The 2nd Appellant was also required to drive the vehicle personally. For 11th Dec. the 2nd Appellant paid Kshs. 7,500/ which is described as advance payment. For the one for 28th he paid Kshs. 12,000/ advance.

54. PW7 testified that he gave his vehicle to the 2nd Appellant on 11th December and he returned it. PW7 is not specific of the date the vehicle was returned after the 2nd hired it on the 11th of December. However going by the Agreement, the 2nd Appellant had paid for three days hire from 11th December. Likewise for 28th the 2nd Appellant had paid for 5 days hire. In both instances the Agreement clearly provides that the payment made was a deposit which means the 2nd Appellant was taking the vehicle for a period longer than the date of hire. The other fact is that there is no Agreement in respect of 8th February, 2010 the day that the 2nd Appellant he was found driving the vehicle with the co-Appellants/Accused.

55. PW7, the owner of the vehicle in question is clear he gave his vehicle to the 2nd Appellant on several occasions but he fell short of being specific of the exact days the vehicle was in 2nd Appellant's control. It is however quite clear to us that the 2nd Appellant had the vehicle for more days than PW7 wished to admit. PW7 said that the 2nd appellant was his friend of many years. We find that PW7 was vague concerning the actual days that he gave the vehicle to the 2nd appellant. This may be in an attempt to assist his friend.

56. We find that the 2nd appellant hired the vehicle KAT 229W from PW7 with an express term of the agreement that he must drive it personally. The 2nd appellant was indeed the driver and was identified by PW1 in court as the one who asked her for directions to the bypass, as he sat on the driver's seat. The 2nd appellant was the one driving the vehicle on the day of his arrest, a fact he does not deny. We find that the fact the vehicle PW1 described to the police as the one used in the robbery fitted the vehicle in which the appellants were found provided independent evidence implicating the appellants with the offence.

57. The evidence of arrest in the subject vehicle provided sufficient corroborative evidence to the evidence of identification by PW1 in respect of the 1st and 3rd appellants. In regard to the 2nd appellant who was not identified in a parade as he declined to participate, we find the evidence of PW7 that he had hired the vehicle to drive it personally on several occasions including the date of his arrest, provided independent evidence implicating the 2nd appellant to the offence. The fact PW1 identified him in court was also supportive evidence, even though that of dock identification, and was not worthless in the circumstances.

58. Having considered the evidence against the appellants in support of count 1, we are satisfied that the evidence adduced against the appellants proved the case against them beyond any reasonable doubt.

59. In regard to the evidence adduced in support of count 2, we find that the police botched up their investigations by conducting a bogus ID parade for identification of the appellants by PW2. That charge therefore failed.

60. The result of this appeal is that the appeal in respect of count 1 fails and is dismissed in its entirety. The appeal in respect of count 2 succeeds and is allowed, the convictions in respect of count 2 quashed and the sentences set aside.

61. The end result is that the conviction in respect of count 1 is confirmed, the sentence up held and the appeals in its respect dismissed.

DATED AT NAIROBI, THIS 4TH DAY OF JUNE, 2015.

LESIIT, J.

JUDGE

L. KIMARU,

JUDGE