



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**LESIIT, KIMARU JJ**

**CRIMINAL APPEAL NO.114 OF 2009**

*(An Appeal arising out of the conviction and sentence of Hon. U.P. Kidulla, C.M. delivered on 19<sup>th</sup> March 2009 in Thika CM. CR. Case No.3721 of 2006)*

**PETER MUTEMI WANJA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. Peter Mutemi Wanja, the Appellant herein, was charged with two (2) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 3<sup>rd</sup> August 2006 at Kilimambogo, along Thika-Garissa road in Thika District, the Appellant, jointly with others not before court, while armed with a dangerous weapon, namely a pistol, robbed Henry Ngaruiya Mucheru and Joseph Kariuki Kimama of motor vehicle Registration No.KAQ 716Z Isuzu lorry valued at Kshs.5.8 million and assorted shop goods, two Nokia mobile phones, cash and one pullover all valued at Kshs.7,368,076/- and at the time of the robbery used violence to the said Henry Ngaruiya Mucheru. The Appellant was further charged of **being in possession of government stores** contrary to **Section 324(1) and (3)** of the **Penal Code**. The particulars of the offence were that on the same day at Kiganjo Estate Thika, the Appellant was found in possession of two police caps with a traffic cover, a head badge, two police shirts and two reflective traffic police jackets, the property of the Kenya Government. The Appellant was also charged with being **in possession of suspected stolen property** contrary to **Section 323** of the **Penal Code**. The particulars of the offence were that on the same day at Kiganjo Estate, Thika the Appellant was found in possession of motor vehicle Registration No. KAP 906G Toyota Corolla which was reasonably suspected to have been stolen or unlawfully obtained. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was found guilty of the two (2) counts of robbery with violence. He was sentenced to death in a manner prescribed by the law. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

2. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification that was contradictory and inconsistent and did not stand up to legal scrutiny. He took issue with the fact that he had been convicted for robbing the complainants yet none of the robbed items was found in his possession. He was particularly irked that the trial magistrate had failed to consider that he was a person of disability and hence could not have participated in the robbery. He faulted the trial magistrate for reaching the verdict to convict him without taking into account the exonerating evidence that he had adduced in his defence. He was aggrieved that the guilty verdict was reached in the absence of essential witnesses being called to testify. In the premises therefore, the Appellant prayed that the appeal be allowed, the conviction quashed and the sentence imposed upon him set aside.

3. Prior to the hearing of the appeal, the parties to this appeal agreed by consent to file written submission in support of their respective positions. The submissions were duly filed. At the hearing of the appeal, it was agreed that the court would write the judgment on the basis of the said written submission. We have carefully considered the said submissions. Whereas the Appellant doubted that the evidence of identification adduced by the prosecution witnesses could sustain a conviction on the charge of robbery with violence, the prosecution on its part was emphatic that the evidence of identification was such that this court has no option but to uphold the conviction of the Appellant on the charges that were brought against him. We shall refer to the submission made later in this judgment.

4. Before we render our decision, it is important that we set out our mandate in hearing and determining this appeal. As the first appellate court, we are required to look afresh at the evidence adduced before the trial court, re-evaluate it and reach our own independent determination whether or not to uphold the conviction of the Appellant. The court will reach its verdict, of course with the benefit of the arguments made by the parties to this appeal in support and in opposition of the grounds of appeal filed by the Appellant. The court must also be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard (see **Njoroge –vs- Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is essentially one: whether the evidence of identification adduced by the prosecution witnesses was sufficient to sustain the conviction of the Appellant.

5. The facts of this case are more or less straight forward. PW1 Henry Ngaruiya Mucheru (the 1<sup>st</sup> complainant) was employed by PW5 Boniface Njoroge Kangethe to drive his motor vehicle Registration No. KAQ 716 Z Isuzu lorry. The motor vehicle was at the material time hired to transport consumer goods manufactured by Unilever Kenya Limited. In the course of his employment, PW1 was assisted by PW2 Joseph Kariuki Kimama and PW3 John Irungu Kamande. The two were employed as turnboys. On 2<sup>nd</sup> August 2006, the lorry was hired to transport consumer goods from Nairobi to Mwingi. The loading of the goods on the lorry was completed on the evening of 2<sup>nd</sup> August 2006. The value of the goods loaded on the truck was Kshs.1,861,476/-. The weight of the goods was approximately 9.4 tons. PW5 advised PW1 not to travel that day because it was late. PW1 and members of his crew slept in Nairobi. On the following morning, they commenced the journey. At about 9.30 a.m., as they were cruising along Thika-Garissa road near Kilimambogo when they were stopped by two men who were wearing police uniform.

6. PW1, PW2 and PW3 thought the men to be police officers manning a roadblock. They stopped. It was then that one of the men brandished a pistol at PW1 and ordered the three vacate their seats and relocate to the part of the cabin where there is a bed. The three complied. The lorry was taken over by the men. It was driven back towards Thika Township. PW1, PW2 and PW3 testified that they were blindfolded after the lorry had been hijacked. They all testified that they identified the Appellant as one of the two men who stopped them. They described the role the Appellant allegedly played. The three witnesses testified that after the lorry was stopped, the Appellant pretended to inspect the stickers on the windscreen on the passenger side of the lorry. After the other man who was questioning the driver had brandished the pistol, the Appellant entered the lorry through the passenger door. The three witnesses did not however tell the court

how they were able to be certain that they had positively identified the Appellant as one of the robbers. Although it was daytime, they did not give a physical description of the person whom they later identified as the Appellant.

7. They were driven to a residential estate in Thika. They were ordered out of the lorry and transferred into the boot of motor vehicle Registration No. KAP 906 G Toyota Corolla. They were locked in the boot. The three witnesses testified that while in the boot, they heard the lorry being driven off. They were in the boot for about six (6) hours before they heard a shot being fired. After a while, they banged the boot of the motor vehicle and called attention to their presence. The police, who were at the scene, unlocked the boot and released the three. According to the three witnesses, they were ordered to lie on the ground. With them, was the Appellant. They identified the Appellant as one of the men who robbed them. A search was conducted in the compound where the vehicle had been abandoned. According to PW6 IP Benjamin Muhia, then attached to Makongeni Police Station, he searched the motor vehicle and found a bag which contained police uniform. The uniform was in form of shirts and caps. PW7 PC Charles Macharia, who had accompanied PW6 to the scene, testified that the bag was found inside an abandoned lorry. For two officers who were at the scene at the same time, this was contradictory evidence.

8. According to PW6, on the material day of 3<sup>rd</sup> August 2006, he got information that the lorry which had been hijacked from the complainants was hidden at Kiganjo Estate, Thika. Acting on that information, he went to said estate accompanied by several other officers. While within the estate, he saw motor vehicle Registration No. KAP 906 G Toyota Corolla parked. Inside the motor vehicle were three men. He stopped the motor vehicle that he was in. The three men took off. He and his fellow police officers gave chase. One officer fired in the air. Two of the men managed to make good their escape. One of the robbers entered into a compound within the estate. PW6 pursued him. They found him seated on a seat in the compound. They arrested him. Among the witnesses who saw the arrest of the Appellant was PW4 Anne Njoki Nthiga. She testified that she was a tenant in the compound where the Appellant was arrested. On the material day, she was undertaking household chores in the compound. She saw the Appellant enter the compound, go to a well within the compound and take water. The Appellant then took his bicycle and left the compound. He later returned when there was a gunshot. The police arrived soon thereafter and arrested the Appellant. The police suspected her of harbouring criminals. They searched her house. They broke into a neighbouring house and removed motor vehicle parts which had been kept in that house. They found nothing of interest in PW4's house. They arrested PW4 and took her to Makongeni Police Station. She was detained for a few days before she was released. Meanwhile, PW9 PC Cleophas Muteti, then based at CID office Thika Police Station, was assigned to investigate the case. He escorted the Appellant to his house where a search was conducted. Nothing of significance to the case was recovered in the house. PW9 recorded the statements of the three witnesses. He also investigated the case and reached the determination that a case had been made for the Appellant to be charged with the offences for which he was convicted.

9. When he was put on his defence, the Appellant denied committing the offence. He testified that he was arrested by the police when he was going about his normal business. On the material day, he recalled that while he was going to his rented house at Kiganjo Estate, he was shot at. He saw people running towards his direction. One of the men running towards him was holding a pistol. He ran past him. He was followed by the police who were chasing the man. He was frightened. He ran into a compound to seek cover. The police entered the compound and immediately arrested him. He was beaten by the police who demanded that he shows them where the gun is. PW4 confirmed that indeed the Appellant was beaten by the police when demanding that he surrenders the gun that was in his possession. The Appellant told the police that he did not have such weapon. The police did not believe him. They arrested him and took him to the police station where he was detained and subsequently charged with the present offences. The Appellant called DW1 John Kamau Njuguna who confirmed that the Appellant was his tenant and was a trader in the area. On the material day, he also heard shots. He was surprised when he saw the police arrest the Appellant and PW4. He was emphatic that the Appellant was not a criminal.

10. As stated earlier in this judgment, the prosecution's case was essentially hinged on the evidence of identification. Our re-evaluation of this evidence of identification leads us to the conclusion that it was unsafe for the trial court to convict the Appellant based on the said evidence. The complainants, the driver and the two turnboys in the lorry, did not give physical description of persons who hijacked and kidnapped them. They were terrorized by their assailants during the hijacking incident. They were blindfolded. It was not clear from their evidence for what period they were exposed to the robbers to make them to be certain that the Appellant was one of the robbers. In the hectic circumstances of the robbery, and taking into consideration the fact that the complainants were frightened, it was possible that the complainants may have been mistaken that they had identified the Appellant as one of the robbers.

11. PW6 testified that he did not lose sight of the three men that he, and his fellow police officers, were chasing. He stated that he saw the Appellant enter the particular compound. He followed him into the compound and arrested him. His testimony was contradicted by PW7 a fellow police officer. He was not as clear as PW6 regarding the circumstances leading to the arrest of the Appellant. Both PW6 and PW7 did not give the description of the clothes that the person they were chasing was wearing to enable them to be sure that it was the Appellant. From the evidence adduced by the Appellant, it was clear that he had physical disability that would have made it impossible for him to run in the manner narrated by PW6 and PW7. Reasonable doubt was raised in our minds when PW4 testified that she had seen the Appellant earlier that day in the compound riding on his bicycle. This was approximately the time the robbery was taking place. The lorry that was hijacked from the complainant was recovered abandoned in Gatundu. Gatundu is some considerable distance from Thika.

12. From the evidence of the complainants, it was clear that the lorry was driven off from the estate early that morning after they had been abandoned at the said estate. It was inconceivable therefore that, if indeed the Appellant was one of the robbers, he would have waited in the vicinity of the motor vehicle that was used to commit the robbery for the police to arrest him. We are not persuaded by the testimony of PW6 which was to the effect that he never lost sight of the Appellant from the time he ran from the motor vehicle to the time he was arrested in the particular compound. It was apparent from the testimony of PW4 and that of the Appellant and his witness that when the police shot in the air, there was panic. People were running helter-skelter. It would not have been possible for PW6 to maintain sight of the robber in such circumstances. The fact that none of the stolen items or none of the items used in the robbery was recovered in Appellant's possession is more reason why we do not believe that he was properly identified as one of the robbers.

13. The upshot of the above reasons is that the appeal lodged by the Appellant has merit and is hereby allowed. His conviction on the charges of robbery with violence contrary to **Section 296(2)** of the **Penal Code** is hereby quashed. He is acquitted of both charges. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JUNE 2015**

**J. LESIIT**

**JUDGE**

**L. KIMARU**

**JUDGE**