REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 44 OF 2011

JOHN GICHERU MWANGI……..…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 1085 of 2009 in the Chief Magistrate's Court at Kiambu – (Mrs.) D. A. Okundi (PM) on 09/02/2011)

JUDGMENT

1. The appellant was charged with four counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The brief particulars in which he was convicted were that on 18th June 2009 at Kinale Forest Kiambu West District of the Central Province, jointly with others not before the court, while armed with dangerous weapons namely knives he robbed

Bowman Omondi Onyango Kshs.3,000/=, 700 US Dollars, 10 billion Zimbabwe dollars and a mobile phone make T. D. Bluetooth valued at Kshs.10,400/= and Andrew Kipngeno Soi of cash Kshs.20,000/= and a mobile phone make Motorolla valued at Kshs.1900/=. That at or immediately before or immediately after the time of such robbery used actual violence to the said victims.

2. Six witnesses testified for the prosecution while two testified for the defence. The prosecution's case simply put, was that a public service vehicle registration No. KBA 005 N, was on a routine journey enroute from Kendu Bay to Nairobi on the night of 18th -19th June 2009 when it was car-jacked at Kinale area of the then Kiambu District. It was diverted to the forest where passengers were robbed of their phones and cash by a gang of six robbers who hitherto had posed as bona fide passengers.

3. Thereafter the driver made his way to Uplands and Tigoni Police Stations where he reported the robbery. Subsequent investigations led to the arrest and arraignment of the appellant.

4. The appellant testifying on oath and with the support of one witness put forward a defence of

alibi. His defence was basically that he could not have committed the offences with which he was charged because he was away in Mombasa tending his sick sister (DW1), on the date and time those offences were said to have been committed.

5. At the close of the trial the learned trial magistrate analysed the evidence before her and found that the prosecution had proved two out of the four counts brought against the appellant to the required standard. These were **count II** and **IV** respectively. She convicted the appellant accordingly and sentenced him to death as by law prescribed. The appellant then filed this appeal.

6. In the appeal the appellant complained that the circumstances of the robbery were not conducive to positive identification; that the evidence of **PW1** and **PW2** was not credible and that the parade officers' evidence was inadmissible. He also averred that his defence should not have been rejected as it was plausible and that the conviction was based on a remote ground. The appellant also filed written submissions in which he sought to prove that the prosecution evidence fell short of the required standard of proof.

7. In response M/s. Aluda, learned state counsel submitted that the ingredients of robbery under **Section 296 (2)** of the **Penal Code** had been proved. That the appellant had been identified by torch light and by his voice. That the appellant was not able to explain the five mobile phones, a multi-purpose screw driver, a car registration No. KAD 512 W, in his possession or the contents of his bank accounts.

8. After submitting the evidence to a fresh analysis as is our duty as the first appellate court, our conclusion is that it is not sufficient for several reasons to sustain the conviction in any of the counts in which the appellant was convicted.

9. First, we agree with the appellant that the circumstances of identification were not conducive to positive identification. We note that the robbery occurred at 2.30 a.m. in the dead of the night. There were no lights inside the bus and the observation of the robbers by **PW1** and **PW2** who purported to identify the appellant was fleeting and in the light of a spotlight.

10. It is not clear from the record where the witnesses were in relation the appellant and how far the other robber who is said to have shone a light on his face was, so that the court can determine if it was possible to make a true impression of the appellant in those circumstances. **PW1** said the appellant was inside the bus when the spotlight was shone upon him, while **PW2** said he was in the process of lighting from the bus when this happened.

11. We also observe that no identification parade was arranged in respect of **PW1**. **PW2** said he identified the appellant by height, face and voice. To his recollection he heard the robber that he identified utter the following words.

"The police who had searched us should go back to Kiganjo for training"

That all parade members were told to repeat those words during the parade. **PW4**, the parade Officer on his part said the parade members were made to utter the words **"toa pesa"**. It shall be remembered that the said parade was arranged about a month and a half after the robbery.

12. It is also instructive to note that both **PW1** and **PW2** testified that the robber when they identified was a stranger to them and further, that **PW1** had been so deeply asleep that he was not aware the bus had been car- jacked and diverted into the bushes, until the robber came up to him and ordered him to produce money and the phone.

13. Of note also is the fact that no recoveries were made from the appellant that were linked to the robberies in question. We agree with both, **PW6** CIP Kirui and M/s Aluda that the impressive list of exhibits found in the appellant's possession when he was arrested casts suspicion upon his occupation. We hasten to add however, that suspicion alone is not sufficient to sustain a

conviction against an accused person.

14. The appellant's defence appears to be concocted since it is at odds with that of his witness **DW1**. For example, whereas she said that he came to Mombasa to nurse her at the material time because he was the only unmarried sibling she had, he testified that he had a wife who operated a kiosk and also charged people's mobile phones to generate income. This he said was the reason he had five mobile phones when he was arrested.

15. Luckily for the appellant however, this being a criminal trial the onus of proof lies with the prosecution and the deficiencies in the defence case cannot be used to resuscitate an otherwise weak prosecution case. Only after the prosecution has proved its case beyond reasonable doubt can the defence evidence be examined, in the context of all other evidence on record to see if it creates a reasonable doubt in the mind of the court, that he may not have committed the offence.

16. All that having been said, we find that the prosecution's case is too weak to sustain a conviction in any of the two counts in which he was convicted. We therefore quash the convictions and set aside the sentences flowing therefrom. The appellant is set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this 5th day of May 2014.

A. MBOGHOLI MSAGHA **L. A. ACHODE**

JUDGE **JUDGE**