REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 273 OF 2008

PATRICK NGUNJIRI KARIUKI..................................APPELLANTS

Versus

REPUBLIC…...RESPONDENT

(Appeal from conviction and sentence in Nyeri Chief Magistrate's Court (Hon. M.K.Serem SRM) delivered on 23rd October, 2008)

JUDGMENT

1. The appellant was among (5) accused persons charged with six (6) counts of robbery with violence contrary to section 296(2) of the Penal Code

2. The particulars of the offences were that on 13/7/06 at Solio Ranch within Nyeri District of Central Province jointly with others not before the court and being armed with dangerous weapons namely 2 AK-47 Rifles robbed Earnest Murigu Muratiri one mobile phone make Sumsung A 800 valued at Kshs.7,000 and Count II, robbed Purity Wanjiku Muratiri one mobile phone make Nokia and assorted clothes, Count III robbed Joseph Muratiri Murigu a motor vehicle registration no. KAP 154 P Toyota Corona Biege in colour, cash Kshs.22,000 and a mobile phone make Nokia valued at Kshs.12,500. In Count IV robbed David Mukora Onyancha, one mobile phone make Motorola valued at Kshs.2,500 and Kshs.5,000. In count V robbed Leonard Agweni Ahila one mobile phone make Nokia 1600 valued at Kshs.7,000 and cash 2,000 and in count VI and robbed George Onduko Nyangau cash, Kshs.6,000 and in all incidences and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the above mentioned complainants in Count I-VI.

3. In count VII and VIII the appellant and accused No. 4 were jointly charged with the offence of being in possession of a fire arm without a certificate in force issued by a firearm licensing officer contrary to section 4(1) as read together with section 4(3) of the Firearm Act Cap 114 the laws of Kenya. Particulars of the offence were that on 18/7/2006 at Kingongo within Nyeri District of Central Province was found in possession of 2 AK-47 rifles without a valid firearms certificate in force issued by the firearm licensing officer.

4. In Count VIII the appellant and accused No.4 were charged with the offence of being in possession of ammunition without a fire arm certificate contrary to section 4(1) as read with section 4(3) of the firearms act cap 114 laws of Kenya.

5. Particulars of the offence were that on 19/7/06 at Kingongo Estate within Nyeri District of Central Province was found in possession of 22 rounds of 7.62 mm special caliber ammunitions without a valid fire arm certificate.

6. In the alternative charge, accused No. 5 was charged with one offence of handling stolen goods contrary to section 322(2) of the Penal Code.

7. Particulars of the offence were that on 19/7/06 at Kingongo Estate in Nyeri District of Central Province when in the course of stealing, dishonestly received and retained one pair of open shoes knowing or having reason to believe them to be stolen goods.

8. Accused 4 was also alternatively charged with the offence of handling stolen goods contrary to section 322(2) of the Penal Code.

9. Particulars of the offence were that on 18/7/06 at Kingongo Estate in Nyeri District of Central Province, otherwise than in the course of stealing dishonestly, received and retained one camera make Minolta, one complete kitenge, one kitenge skirt, one free dress, one lady skirt, one t-shirt, four petite coats, two pairs of kitenge materials, one lady perfume, one mango juice, empty tin, knowing or having reason to believe them to be stolen goods.

10. Complainants in respect of counts II and VI were not called hence the trial court only determined counts I, II, IV and VII.
11. At the conclusion of the trial, the Court below found the appellant guilty of as charged in counts I, III, IV and V under section 296(2) of the Penal Code sentenced to suffer death.

12. It is this conviction and sentence that the appellant now appeals to this court.

13. In his home made petition of appeal he faulted the finding of the lower court as follows:

    a) The trial magistrate erred in convicting him without considering that the prevailing circumstances at the scene of the crime were not conducive for positive identification.

    b) That the learned magistrate erred in not finding that no identification parade was conducted to test the ability of the of the complainants to identify their assailants.

    c) The learned magistrate erred in not finding that none of the exhibits that were before court were recovered in his possession.

    d) The learned magistrate erred in rejecting his alibi defence without assigning any reasons.

14. In his submissions before us the appellant stated that Purity Wanjiku, one of the complainants was never called as a witness to testify. He argued that the said Purity claimed to have been robbed on 13th July, 2006 but in her evidence she stated that she was robbed on 13th November, 2006. On the latter date the appellant claimed he was at King'ong'o. It was his contention that the other prosecution witnesses were unable to identify their attackers. According to him, Purity stated in her evidence at the trial that the attack was abrupt and she was shocked in the process. The appellant further complained that the investigating officer did not appear in court to give evidence and that no identification parade was conducted.

15. Mr. Makunja for the DPP supported the conviction and sentence and argued before us that the evidence against the appellant was overwhelming. Counsel submitted that the environment in which the alleged offence took place was conducive for identification in that it took place in daylight and the appellant was clearly identified by PW5.

16. Regarding calling of witnesses, Mr. Makunja submitted that the number of witnesses called in a trial does not matter but the quality of their evidence. Concerning exhibits, Counsel submitted that it was the responsibility of the appellant to show that the exhibits produced in court did not relate to him. He contended that the 3rd accused in the trial court claimed that the phone in issue was given to him as security by the appellant. Regarding the firearm, he submitted that the same was

tested and found to have been the one that fired the spent cartridges.

17. In our usual duty as a first appellate court, we have to review the evidence vis a vis the findings of the trial court and determine whether the conclusions reached by the trial court are sound and sustainable. We are of course disadvantaged because we do not have the advantage to listen to witnesses and watch their demeanour.

18. This appeal turns one main issue that is the question of identification and as a corollary the effect of the omission to conduct an identification parade.

19. On identification, PW5 was a star prosecution witness whom the appellant claimed was not able to identify him considering the circumstances under which the attack took place. So what was her evidence in the court below?

20. She testified as follows:

> On 13/11/06 I was on the way from Nyahururu to Nyeri with my husband (PW3) and my son Ernest. We were in a private motor vehicle KAV 154P saloon. At Solio Ranch, we met a bread vehicle and a small motor vehicle on the way having stopped. The two motor vehicles were on the opposite side of the road off the road. Two people emerged in police clothes and stopped our motor vehicle. Two men rushed to where our motor vehicle was. The two men were armed with rifles. The two men had no masks initially but as they approached our motor vehicle the men put on masks. The two men pointed guns at our motor vehicle and ordered us out and robbed us of our mobile phones. I lost Nokia phone 1100. The robbers led us to the bread van where I met another 3rd robber-accused 1 herein who was not masked. Accused 1 told me to open my hand bag and he took Kshs. 200 from me. Accused one stood at the door of the van. The robbers then locked us inside the bread van then they sped off the vehicle of PW3...I saw the accused 1 at the scene on his face and he revealed to me and abused me that I am a dog and I enter the van. Accused 1 was not masked. I saw the face of accused 1 at the scene. Accused 1 had chocolate like colour. It was broad daylight. **In cross-examination by the appellant she states**: I saw you at the scene with the other robbers armed with guns. You robbed me of Kshs. 200/- and abused me. I was shocked. The other two robbers were masked...You were not masked. I saw you physically.

21. It emerges from the testimony of PW5 that she was positive that she saw the appellant at the scene of the robbery and actually it is the appellant who robbed her of 200 shillings and abused her. It is however not clear in her evidence if she was called by the police to identify the appellant when he was arrested. No evidence is on record if any identification parade was ever conducted. In the circumstances PW5's identification of the appellant would appear to us to be dock identification.

22. In the case of **Gabriel Njoroge v R [1982-88] 1 KAR 1134** the Court of Appeal held that dock identification of a suspect is generally worthless unless other evidence is adduced to corroborate it. The same court explained the rationale in the case of **Amolo v R [1991]2 KAR 254** as follows:

> "The reason for the Court's reluctance to accept a dock identification is part of the wider concept, or principle of law that it is not permissible for a party to suggest answers to his own witness, or as it is sometimes put, to lead his witness"

23. The Court of Appeal further elaborated in the case of **Muiruri & 2 Others v. R [2002] 1KLR 274** as follows:

> "It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.

> But the holding in Gabriel Njoroge case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep [1953] 20 EACA 166, Roria v Republic [1967] EA 583 and Charles Maitanyi v R [1986] 2 KAR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The Court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.

24. In his judgment the trial magistrate observed that the appellant was positively identified by PW5 in that the conditions for identification by a single witness was favourable since the offence took place in broad day light. PW5 saw the appellant physically at the scene and in fact he demanded Kshs. 200 from her at the scene. There was no chance for a mistaken identity. She further observed that the appellant 's alibi defence was lacking in both evidential and persuasive value as the appellant never called any witness in support of his alibi defence.

25. From the foregoing, it is clear to us that the trial magistrate was alive to the fact that he was relying on the evidence of a single identification witness and was persuaded that the circumstances were favourable for identification. It can therefore be said as it were that PW5 was not meeting the appellant for the first time in court for it to qualify as dock identification. In any event, as the Court of Appeal observed in ***Muiruri's case*** cited above, not all dock identification are worthless and cannot be relied upon.

26. In the circumstances we are persuaded that the appellant's conviction was safe and we hereby decline to upset it with the consequence that the appeal is hereby disallowed.

27. It is so ordered.

Dated and delivered at Nyeri this 6th day of November 2013.

OUGO R.E

…..

<u>JUDGE</u>

ABUODHA N.J

…...

<u>JUDGE</u>

Delivered in open Court in the presence of......................... for the Appellant and................................... for the Republic.