



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 126 of 2005

JOHN MWANGI

KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(arising from the chief magistrate's court at Nyeri in Criminal Case No. 1596 of 2003)

JUDGMENT

The appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 24th day of June 2003 at Kagumoini market in Nyeri within Central Province jointly with others not before the court while armed with dangerous weapons namely pistols robbed Joseph Wanjohi one Mobile phone make Motorola Kenya Cane whisky and cash money Kshs. 152,397.80 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Joseph Wanjohi.

He was tried and subsequently convicted and sentenced to death on the said charge.

Being aggrieved by the said conviction and sentence he filed this appeal and in his amended grounds of appeal raised the following grounds.

- 1. The trial magistrate erred in both points of law and facts and or misdirected himself in both upholding and acting on the identification evidence to base the conviction without warning himself of the harsh and death alarming conditions under which the same was made.***
- 2. The trial magistrate erred in both points of law and facts and or misdirected himself in both in failing to warn himself of the possibilities of error or mistaken in the identification.***
- 3. The trial magistrate erred both in points of law and fails or misdirected himself in both in upholding and acting on the identification parade held in the absence of any first report given giving due descriptions of the thugs.***
- 4. The trial magistrate gravely erred in both points of law and facts and or misdirected himself in both in not giving the defence any weight but dealing with the prosecution case to isolation.***

He therefore prays that his appeal be allowed .

Together with the amended ground of appeal the appellant has filed written submissions which he relied

upon wholly during the hearing of this appeal.

Miss Maundu the learned State Counsel on behalf of DPP opposed the appeal on the ground that the complainants were able to identify the appellant since the attack took place during day light and that the appellant was positively identified at the identification parade and that the robbery took 15 minutes and since the attackers were not masked the victims could positively identify them.

This being first appeal the court is duty bound to reevaluate the evidence tendered before the trial court to come to its own finding while taking into account the fact that it did not have the advantage of seeing and hearing the witness.

We will therefore at the stage before going into the appellants ground of appeal evaluate the evidence tendered before the trial court.

P.W.1 ELIUD WAMAE WACHIRA testified that on 24th June 2003 he was on duty distributing beer accompanied with Wanjohi and Muiro. He was driving lorry registration No. KAG 359G loaded with beer.

At 3 p.m. When they reached Kagumoini they were attacked by people he did not know. He saw six people two of them entered the vehicle and ordered them to lie down. They removed a pistol which they fired.

They went after the salesman who tried to run away and demanded the money and mobile phone from the same and that he was able to identify the robbers since the sunlight was clear and he was facing them directly.

On 4th July 2003 he received information that the attackers had been arrested and he went for identification parade and was able to identify them. He was also able to identify the pistol before the court. Under cross examination he testified that he was able to identify the appellant as they were robbing the salesman.

P.W.2 GEORGE MURI NDUTO testified that they left at 8.30 am for their assignment and at 3 pm. they were at Kagumoini shopping centre where he removed 9 crates of beer when he heard gun shots. The attackers pointed a pistol at him.

That when he received information that some of the attackers had been arrested he went to Nyeri where an identification parade was conducted and he was able to identify two of the attackers and that it was the appellant who had pointed a gun at him and he was able to identify the same properly and that the attackers took about 15 minutes and he was therefore able to see the appellant well.

P.W.3 testified that he was the salesman of the Lorry registration No. KAG 359G that on the material day at 3.30 p.m. They were at Kiamagumoini shopping centre when they were attacked. That he heard gun shots at the drivers side of the lorry registration No. KAG 359G and that the appellant was armed with a pistol which he pointed at him and ordered him to open the safe from which the appellant took Kshs. 100,000/- together with his mobile phone Motorola valued at Ksh. 8000 and that when they reached Mathiraini the attackers abandoned them thereat. They sought assistance and he was able to call his employer and within an hour the manager came with flying squad officers from Karatina. On 3rd July 2003 he participated in the identification parade and was able to identify the appellant.

P.W.4 Cpl. Fabian Wanjohi testified that on 27th June 2003 he received a report about two suspicious characters at seven star bar. He informed the OSC and they went to the said bar where they arrested the appellant who was in possession of a revolver pistol with six rounds of ammunition. He stated under cross examination that they acted on the information from an informer.

P.W.5 IP FRANCIS WERU stated that on 4th July 2003 he was requested to conduct an identification parade in respect of the appellant who had consented to the same and that the appellant was positively

identified by the three prosecution witnesses. He thereafter signed the parade forms.

When put on his defence the appellant tendered in sworn evidence and stated that on 27th July 2003 he went for duty upto 8.00 p.m He went to the stage and found no motor vehicle and that he went to the petrol station where he saw there people who came and asked his name and his place of work. The OCS searched him and found Ksh. 20,800/- on him. He was arrested and taken to Nyeri police station. On 29th July 2005 they went with him to his home where a search was conducted and his photos jacket and identify card taken by the police.

On 4th July 2003 Ip Waweru came to the cells and asked him to go out and he saw P.W.1 P.W.2 and P.W.3 who came and picked on him from the parade. He raised an objection because the members of the parade did not have uniform.

It is upon the above evidence that the trial court convicted the appellant on the ground that the witnesses were able to identify the same positively since they had the opportunity to observe the same and that the identification parade was properly conducted.

It should be noted that the appellant's main ground of appeal is that he was not properly identified. He has submitted that there was no evidence tendered to confirm if P.W.2 was able to identify the appellant. He has further submitted that when a report was made to the police there was no description of the attacker. He has therefore submitted that he was arrested on mere suspicions and in support of his submission he relied upon the case of **OTIENO WAMUGA vs R CR. APPEAL NO. 20 OF 1989.**

We have looked at the evidence tendered before the trial court and found as a fact that the appellant was properly identified by the prosecution witness and therefore find no merit on that appellant's ground of appeal in respect of his identification. The identification parade was properly conducted and the witness were able to identify the appellant.

The appellant's other ground of appeal is that his defence was not taken into account. We have noted that whereas the trial magistrate did not mention the appellant's defence in his judgment on the authority submitted by the appellant we find that the trial court looked at the evidence as a whole and did not look out the appellant's defence in isolation.

We therefore find no merit on the appellant's appeal herein and hold that the prosecution case against the appellant was proved beyond reasonable doubt as is required in law and therefore dismiss the appeal and uphold the appellant's conviction and sentence herein.

Dated and delivered at Nyeri this 4th day of October 2012.

J.K. SERGON

JUDGE

J. WAKIAGA

JUDGE

John Mwangi Kamau - appellant's

Miss Kitoto for the State

J.K. SERGON

JUDGE

J. WAKIAGA

JUDGE