REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

Criminal Case 831 of 1997

(From Original Conviction and Sentence in Criminal Case No.58 of 1995 of the Senior Resident Magistrate's Court at Kiambu)

BENSON IRUNGUNJUGUNA.. APPELLANT

VERSUS

REPUBLIC.. RESPONDENT

JUDGEMENT

The appellant Benson Irungu Njuguna was charged of the offence of Robbery, contrary to Section 296(1) of the Penal Code. He denied the offence but was nevertherless convicted of the offence and sentenced to Serve 6 years imprisonment plus 10 strokes of the cane. He was also ordered to be under police supervision for 5 years after release.

The appellant was dissatisfied with the conviction and sentence, and filed the present appeal, through his advocate, Messrs Omware and Co. Advocates who filed 9(nine) grounds of appeal complaining about the unreliability of the evidence of the prosecution witnesses, the identification of the appellant the Magistrate's shifting of the burden of proof from the prosecution to the appellant, and the excessive sentence meteored out to the appellant.

According to the prosecution evidence on record, the complainant Igak Estevivaty, an Isreal National who is a farmer in Naivasha, Kenya was on 11th May, 1995, driving his motor vehicle a Mitsubishi cant No.KAB 367 U, from Naivasha to Jomo Kenyatta Airport, Nairobi. He was alone in the car, and on arrival at the junction of Kikuyu-Nairobi at about 2.00 p.m. in the afternoon, a white subaru car pulled up, and 2 occupants showed him two machine guns. They ordered him to stop his car and he did so. They pulled their car in front and blocked the complainant's way. They came out of their car and got into the complainant's car and ordered him to go to the back seat, as they drove his car. They searched him and asked him for a gun, but he told them he had none. Again they asked for money, and the complainant gave them Kshs.20,000/= and US Dollars 20,000.

The car was driven for about one mile when the 2 men ordered the complainant out of the car. He came out through the back left door of the car. The subaru car which he had pulled up at the beginning arrived again and the complainant asked the driver for help, but the latter just laughed. The complainant nevertheless stopped another car which took him to Parklands police station in Nairobi where he reported the matter. He was referred to Kikuyu police station where he also reported the matter. The complainant identified the appellant as the driver of the subaru car which blocked his way at first. Again, he was the one who laughed at the complainant when he (the complainant) asked him for help. The complainant gave the police the description of the person who robbed him, and stated further that he had seen the faces of the 2 people who robbed him in the newspapers.

Later on 26.6.96 at an identification parade held at Kasarani police station, the complainant identified the appellant as one of those who robbed him. PW2, PC Fredrick Njalenye of Kasarani police station recalled the 11th May, 1995 at about 3.00 p.m., whilst accompanied by PC Joshua Tusuma and a complainant, in respect of a volvo saloon car, he went to Mururui village for enquiries. On the way back to the station and whilst near Roy Sambu petrol station, they saw 2 vehicles with their engine running, and there were about 5 men removing parts from the vehicle. One vehicle was a Mitsubishi Gallant, white in colour Reg. No. KAB 367 U, and the other one was a subaru white in colour, whose registration number he could not remember.

PC Fredrick and his companion became suspicious as the Mitsubishi vehicle had no front number plate. He opened the door of his vehicle so as to go and see what was happening when he heard the voice say "Ndio hawa" - ie "These are the ones". He saw one man standing and he had an AK 47 rifle. PC Frederick says "He shot at us", and he returned to the car and shut the door and he told his driver to go on. They drove upto Safari Park Hotel and returned towards Kasarani police station where he found a road block commander and asked for help and the officers who had guns accompanied him back to the scene a where they were shot at but only found the vehicle Mitsubishi Gallant saloon car alone, with the engine running. He saw 3 empty cartridge and he noticed that the Registration number of the Mitsubishi gallant saloon car was gone. The speakers had been removed from it, and there were scattered documents in it.

PW2 told his companion PC Tsuma that he knew the man who shot at them, "He was a tout in route No.44 Kahawa West. I had seen him when coming from the court for 4 years". In court, PW2 identified the appellant as the man who shot at him. He had seen him on route No.44 for 4 years. He shot at them 3 times. From the documents in the vehicle, PW2 found the name of the owner of the vehicle, which was towed to Kasarani police station. PW2 met the appellant coming to Kasarani police station on 20.6.95 and placed him under arrest. Later, an identification parade was conducted by PW3, Inspector Philip. The appellant was identified by PWl who touched him in the Identification parade. The appellant was satisfied with the parade. To several questions put to PW2 by the appellant's Counsel during the trial in the lower court, the record at page 9 gives the answers, ie that,

"the 2 cars were about 1.5 meters from us when I tried to open the door, the accused stood up and fired once then we moved away".

PW2 answered further that the appellant worked as tout in a vehicle called "AND LIFE CONTINUES". About the arrest of the appellant, he answered that the appellant had come to the station to report about a person who had been beaten in a vehicle in which he had been working. PW2 arrested the appellant 40 days after the incident. PW5 and 6 were police officers. PW6 was with PW2 as they went out on enquiries and on the way back to the station, and whilst near the City Council Water tank, PW6 too, saw 2 motor-vehicles Reg. No. KAB 367 Mitsubishi Gallant white in colour and a Subaru, whose numbers he did not get. The Mitsubishi had no front number plates.

PW6 recalled that they were shot at 3 times. PW2 recognised one of the men who was near the man who was near the vehicle as one of the conductors who operates on route No.44 Kamiti. PW6 too was able to identify one man who stood near the subaru car. PW2 and 6 went for reinforcement, and that is when PW5 and others, were directed by the controller to go to Garden Estate where there was a shoot out. PW5 went to the scene where he found PW2 and 6. Also he found a vehicle Reg. No.KAB 367 U Mitsubishi Gallant. It had no front number plates. PW2 straightaway said that he could identify one of the thugs, who is a conductor in a matatu on route No. 44 Githurai.

The Mitsubishi vehicle was towed to Kasarani police station where it was photographed and subsequently released to the owner PW7 produced the motor vehicle as an exhibit in court.

PW4 Inpsector Francis Ngunda, then at Kabete police station received the complainant at his station with

a report of a robbery having occurred the previous day. Inspector Francis circulated this information and the Registration Number of the complainant's vehicle to all the stations in Kenya. He opened a file for the case. The complainant was later escorted to Kasarani Police Station to identify a suspect, and he identified the appellant as the one who was driving the subaru car which carried the people who robbed him. This was information given by the complainant in his further statement.

PW4 collected the appellant from Kasarani police station and charged him with the present offence. The appellant made an unsworn statement in defence during the Trial in the Lower court. He denied any knowledge of this case. He claimed that he was in Kenyatta National Hospital when the offence occurred, and upon discharge he went to Kasarani police station where he was arrested and charged.

Arguing the appeal on behalf of the appellant, Mr. Omware the evidence of PW2, 3 and 4 (police officers) was not credible, and was not sufficient to warrant the court to convict the appellant. He referred to page 8 of the proceedings, where PW2 said that they went back to the scene and found 3 spent cartridges, meaning that they were shot at 3 times, yet on cross-examination on page 9, he said they were shot at once and they moved away in a hurry. He said this was a material contradiction which goes to the identification of the appellant by PW2 who also said that the entire event took only one minute. He submitted further that in view of this, PW2 could not have had a chance to see and identify the appellant as the one who had fired at them. Mr. Omware also took issue with the non production in court of the forensic results of the finger prints on the vehicle. He said that this meant that the results were negative.

That evidence of PW2 was that he recognised the appellant whom he had known for four years, yet he did not go out of his way to look for him he only arrested him at the police station, when appellant went to report the assault of his friend. Mr. Omware submitted that if the appellant had committed the offence he would not have gone anywhere near the police station. That the police officer must have seen somebody else whom he mistook for the appellant. That to this effect there is a doubt whose benefit should be given to the appellant. That the fact that the appellant was originally charged with capital robbery which was subsequently reduced to a charge of simple robbery showed the uncertainty of whether the appellant committed the offence or not.

Turning to the evidence of PW5 at page 16 of the record Mr. Omware pointed out that this witness said he saw more than one person yet previously he had said that he only saw one person at the scene. That that evidence was self contradictory and went forth to show that the witness was not truthful. Mr. Omware then examined the evidence of PWl in detail. He started with page 5 of the record when the witness referred to 2 people who confronted him. He did not mention the appellant. He referred to the Judgement at Page 5 and said that it was not clear how the driver of the Subaru left his car and took off with PWl's car which was 1st being driven by 2 other assailants. That PWl admitted at page 6 of the records that he was very scared at the sight of the gun. That the evidence of identification was doubtful as to whether PWl could identify the appellant. Mr. Omware submitted that PWl did not identify the appellant. That evidence of identification in this was that of a single witness, and the Legal position regarding this was found in the case of GIKONYO KURUMA and MBURU MBUGUA, VR (1980)KLR P.23.

Taking a completely new point, Mr. Omware submitted that the appellant was not given a chance to hire another lawyer after his previous Counsel Mr. Gatumuta of Messrs Ndungi & Co. Advocates had ceased to act. Finally, he submitted that the sentence was excessive and he urged the court to set it aside and also quash conviction of the appellant.

Mrs. Oduor Senior State Counsel supported conviction and sentence of the appellant. According to her, the Magistrate should not have relied on evidence of PW2, as it did not conclusively confirm that he knew the appellant because he never recorded this and never looked for the appellant. Mrs. Oduor submitted further that the issue here was identification by a single witness, PW1. She submitted further that this identification was proper as the circumstances were favourable. PW1 was able to identify the appellant at an identification parade after appellant had been arrested. The parade forms show that the appellant was satisfied with the parade. Mrs. Oduor distinguished the facts of this case with those in the authority quoted by Mr. Omware the case of GIKONYO KURUMA & MBURU MBUGUA V R, where identification was by a single witness and the Magistrate remarked that there was no light, or at least there

was no evidence to show that there was electric light at the scene as the time of the robbery was given as 9.00 p.m.

Mrs. Oduor found that on page 9 of the Judgement the Magistrate warned himself of the danger of mistaken identity. Mrs. Oduor found that the quality of evidence of identification was proper and the court could rely on it. Mrs. Oduor submitted further that the alibi defence was considered but rejected by the Magistrate.

On the issue of representation Mrs. Oduor submitted that the appellant chose to proceed with the case without an advocate. No injustice was cause to him. As for the sentence, she submitted that it was legal and was within the jurisdiction of the Trial Magistrate. Mr. Omware in reply still went further on the issue of identification.

From the submissions of the two Learned Counsels, what comes out is that evidence of PW2 on identification of the appellant was not conclusive because first, he did not look for the appellant until the appellant went to the police station to report about assault on his friend, and secondly according to Mr. Omware, there was contradiction in his evidence as regards the number of times they (the police) were shot at by the robbers. The Learned Magistrate in dealing with evidence of PW2 at page 5 of the Judgement said;

"The evidence of PW2 very well corroborates the complainant's story well as regards identification".

In the 1st place, PW1 and PW2 did not see the appellant at the same time and place. PW1 saw him at the time of robbery, on the highway and according to the evidence on record PW2 appears to have seen him purely by chance, because he was not looking out for him. He had gone on enquiries with a different complainant in that complainant's vehicle in a village called Marurui village. He was with PC Joshua Tsuma, PW2 continued on page 7;

"When we finished our enquiries on out way back near Roysambu Petrol Station we found 2 vehicles having the engine running following each other. There were 5 men removing parts from the vehicles. One was a Mitsubishi Gallant white in colour Reg. No. KAB 397 U. The other was a Subaru, white in colour. We became suspicious to see what was going on.... When I tried to open the door

PW2 told PW3 straightaway that he recognised the man who shot at them, that he had seen him in court and also on route 44 Kahawa. That was on 11.5.95, the same day PW1 was robbed of his vehicle. Now PW2's further evidence was that he arrested the appellant 40 days after the incident.

I find evidence of PW1 and PW2 to have been so independent of each other that they do not have to corroborate each other. They can be considered on their own and either be accepted or rejected independently of the other evidence. What I find makes the evidence of PW2 "weak" is why he kept quiet for 40 days after the shoot out incident, where he said he saw the appellant whom he knew and even knew the route where he operated? If the appellant had not gone to the police station to report the incident, would PW2 have ever arrested him? I find that the evidence of PW2 was doubtful and could not therefore be relied on to corroborate the evidence of PW1. The Magistrate therefore erred in relying on this evidence to corroborate the evidence of PW1 on identification of the appellant. But as I have already found, the evidence of the two witnesses was completely independent of each other, and to this extent therefore, I am in agreement with the Learned State Counsel that the identification of the appellant by PW1 was that of a single witness. Reading through the authority quoted to me of GIKONYO KARUMA & MBURU MBUGUA v REPUBLIC, I find as was rightly pointed out by the Learned Senior State Counsel, Mrs. Oduor that the decision is easily distinguishable from the facts of this case, where circumstances favoured identification. The offence occurred in broad daylight at about 2.00 p.m. and according to PWl, he saw the appellant whom he described as the driver of the Subaru car which blocked his way. Again, the appellant caught up with him after he had been ordered to come out of his car. PWl asked the appellant for help he was still driving the Subaru. The appellant just laughed at PWl. That evidence which the Magistrate accepted showed that the appellant was in company of other people during the robbery. It is true that PWl said he was scared at the sight of the gun. However, I find that this did not

stop him form seeing and marking the appellant's face so as to identify him at an identification parade soon after the incident.

I find that identification of the appellant by the single witness, PWl was safe and the Trial Magistrate could safely rely on it without looking for any further corroboration.

According to the records, the trial in the lower court started on 5.9.95 with the taking of the plea. The appellant was at first represented by the late Ndungi, Advocate. Recording evidence started on 5.3.96, the appellant was represented by Mr. Gatumuta who appeared for him upto the date PW7 gave evidence and Gatumuta asked for time to file written submissions then a date for the Ruling.

The court ruled that there was a case to answer on 24.3.97. On that day Mr. Waweru advocate appeared for Gatumuta advocate. On a resumed hearing, on 6.5.97, the appellant said the following at page 22 of the record,

"I will proceed with the case although Mr. Gatumuta is not here. I know he has left the employment (deceased), who had employed him".

In these circumstances therefore, the plea by Mr. Omware that the appellant was not given time to engage another lawyer, does not hold any water. That ground of appeal has no merit, like the others which I have considered.

The records in this case show that the appellant was first charged with the offence of Robbery with Violence, contrary to Section 296(2) of the Penal Code, as such, he was denied bail as the offence is not bailable.

After that on 8.1.96, the prosecution substituted a new charge sheet, with the offence of simple robbery contrary to Section 296(1) of the Penal Code, which was read to the appellant and he denied the charge. On that same day, his Counsel the late Mr. Ndungi successfully applied for the appellant to be released on bail. The Trial Magistrate then released him on a bond of Kshs.300,000/= with one surety. From then on he was and remained on bond until he was sentenced to 6 years imprisonment after trial.

I am unable to find that the change of the charge from capital robbery to simple robbery either showed that there was no evidence or that it caused any injustice to the appellant. If anything, the appellant benefited from the change of charge because he was released on bond.

I have considered the evidence on record both from the prosecution and defence, and I find that the prosecution proved the case of robbery against the appellant beyond reasonable doubt. The appellant's "alibi" defence was rightly rejected as it did not cause any doubt in the prosecution. case.

The appellant was rightly convicted of robbing the complainant. He committed the offence jointly with others not in court. His appeal has no merit and I proceed to dismiss the same against both conviction and sentence I find the sentence was well merited.

Dated at Nairobi this 23rd Day of october 1998.

JOYCE ALUOCH

PUISNE JUDGE