



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI, PCA, MWERA & MURGOR JJ.A)**

**CRIMINAL APPEAL NO. 375 OF 2007**

**BETWEEN**

**JOHN NJOROGE KAMAU .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ)  
dated 19<sup>th</sup> September 2006*

*in*

***H.C.CR.A. No. 154 of 2004)***

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**JUDGMENT OF THE COURT**

In this second appeal, *JOHN NJOROGE KAMAU*, the appellant was charged together with **Robert Gacheru Ngunjiri** before the Principal Magistrate's court at Kibera Nairobi, with one count of the offence of robbery with violence contrary to *Section 296 (2)* of the Penal Code to which they both pleaded not guilty. The particulars of the charge were that on the 7<sup>th</sup> of November, 2002 along Kiambu Road in Kiambu, within the Central Province, jointly with others not before court, while armed with dangerous weapons namely pistols, robbed **Peter Kimani Njoroge, (PW1)** of a motor vehicle, registration number KAN 480M of make Toyota RAV4, one mobile phone make 3330 and cash of Kshs.400/=, all valued at Kshs.1.1 million and immediately before or immediately after such robbery used personal violence to the PW1.

Briefly, the facts of the case were that, at about 7.30 am on 7<sup>th</sup> November 2002 the complainant, PW1 an employee of Bridges Travel Ltd. was designated to pick up a customer from Hurlingham Shopping Centre, drive him to Runda where he was to pick up other clients and thereafter proceed to the Airport. At Hurlingham, the appellant was introduced to PW1 by **Winfred Ngina Musau, (PW6)**, who also runs a travel company known as Air Tracks Company. According to PW1, the customer who was introduced to him was a *Mzee* (elderly man) whom he identified in court as the appellant. The appellant entered the vehicle and sat in the front passenger seat of motor vehicle registration number KAN 480M, a Toyota RAV4 driven by PW1. Along Valley Road on the way to Runda, the appellant requested PW1 to stop by Sagret Hotel to pick up his two sons. At the Sagret Hotel, the appellant alighted from the motor vehicle,

and soon returned with two young men each carrying two brief cases, who entered the rear seat. When approaching Ridgeways Road along Kiambu Road on their way to Runda, PW1 was told to slow down as they would shortly be turning into the house where they would pick up the other passengers. As PW1 slowed down, the appellant suddenly grabbed his arm and pressed a pistol into his ribs. The appellant's sons then grabbed PW1, and pulled him onto the back seat, while the appellant stopped the motor vehicle using the handbrake. PW1 was forced in between the legs of the appellant's sons. The doors were unlocked, and Robert Ngunjiri (the co-accused) entered the driver's seat, while the appellant entered the back seat. They drove off and after about 20 minutes, they stopped. PW1 was pulled out of the motor vehicle, led away tied to a tree and gagged. There, Robert Ngunjiri searched him and took his mobile phone Nokia 3330 together with Kshs.600/-. The appellant and the other two robbers then drove off in PW1's motor vehicle. After about 3 hours, PW1 was able to remove the masking tape from his mouth and call for help. A Good Samaritan untied him and took him to Kiambu Police Station, where he filed a report. He was referred to Parklands Police Station where he recorded a statement. One month later, PW1 was called to Kilimani Police Station to attend an identification parade, where he identified Robert Ngunjiri, the person who had tied him to a tree and stolen his property.

A day before the robbery, **Alice Wanjiru Wagathua, (PW4), (Alice)** a travel consultant employee at Air Tracks travel and PW6, were in their office when the appellant, in the company of an elderly woman, visited their office to hire a motor vehicle. The couple hired out a Toyota RAV4, and following payment of Kshs.7000/- they were issued with a receipt in which the appellant's name, *Stephen Mwaniki Waigwa*, and identity card no. **[particulars withheld]** were included. It was agreed that the motor vehicle would be collected the next morning. When she reported for work the next day, Alice found that the motor vehicle had already been collected. On 8<sup>th</sup> December 2002, following the robbery, she was called to attend an identification parade. She identified the appellant, as he had been in their offices for one hour and his elderly appearance stood out.

**Police Sergeant Bernard Gacheru, (PW9)**, the investigating officer testified that he arrested the appellant and Robert Ngunjiri following a tip off from an informer. In the course of their investigations, the police discovered that the appellant had hired another vehicle KAN 872 P a Suzuki Escudo from another company, where he had left behind a copy of his identity card, bearing the same names as those used to hire the subject motor vehicle. The Escudo motor vehicle was hired on 7<sup>th</sup> December 2002, and an informer who later saw the motor vehicle in Kiambu town alerted PW9 and his colleagues, and subsequently led them to the house of Robert Ngunjiri where they arrested him. The house was searched and a wallet which contained 2 notebooks, a driving licence, an identity card and Tanzania shillings 1,500/- were recovered. Robert Ngunjiri then led them to the house of the appellant in Kinunga village who they also arrested. When searched, a mobile phone Siemens C 30, a pin card and his photograph were retrieved and were all taken to Kiambu Police Station, and charged. PW9 testified that when he compared the names appearing on the copy of the identity card, he found them to be similar to those appearing on the receipt. Likewise, the photograph on the identity card resembled the image on the photograph collected from the appellant's house.

Once placed on his defence, the appellant in his unsworn statement stated that he was arrested at his house at 2 am. The police had broken down the door of his house, when he had refused to open, believing that they were robbers. They accused him of being a motor vehicle thief, who was armed with pistols. His house was searched, and Kshs.571,000/- taken together with his personal documents, and his photograph. He was taken to Kiambu Police Station and later to Muthaiga Police Station where he was jointly charged with Robert Ngunjiri. He stated that he did not know Robert Ngunjiri.

Robert Ngunjiri also gave an unsworn statement of defence. He stated that he was arrested in his house at 10.30 pm, and later informed of the robbery of which he denied any knowledge or involvement. He too denied knowing the appellant.

Upon evaluating the evidence, the trial magistrate found them jointly guilty of the charge and sentenced them to death as is mandatorily provided by the law.

Being dissatisfied with the conviction and sentence the appellant then filed an appeal in the High Court,

where *Makhandia, J* (as he then was) and *Lesiit J.*, re-evaluated the evidence before the trial court. Robert Ngunjiri his co-accused was acquitted, while the conviction and sentence of the appellant were upheld, and his appeal dismissed.

Being further dissatisfied with the High Court's decision, the appellant filed this appeal which is before us.

The appellant's appeal to this Court is based on 4 grounds of appeal as follows:-

1. ***That there was a crucial irregularity in the course of the trial which rendered the entire proceedings a nullity in that originally the trial was withdrawn under section 87 of the C.P.C as per the coram of 21/11/2003 and a fresh trial commenced before the senior resident magistrate Hon. Ms. Siganga but no plea was taken neither was I the appellant called upon to plead to the charge as per the provisions of section 207 (1) of the C.P.C***
2. ***That the identification parade (exhibit 7) was unfair and unsatisfactory as the police was in possession of my photograph and the possibility of the same being shown to the identifying witness (PW4) highly existed hence the reasons why I the appellant refused to sign the parade form.***
3. ***That the High Court made an error in law by failing to observe that the burden of proof was not discharged by the prosecution that the allegations of having hired a motor – vehicle KAN 872 P from a firm which wasn't disclosed wasn't proved.***
4. ***That the high court made an error in law by acting upon the identification evidence by PW6 whereby in law the evidence was no more than mere dock evidence which was worthless and not capable to have been relied upon as a basis for a conviction.***

When *Mr. Rombo*, learned counsel for the appellant, appeared before us, he stated that he would rely on the appellant's supplementary grounds of appeal on the record, but that he would more particularly argue ground 4 in respect of identification. He submitted that there had been no proper identification of the appellant, as PW1 claimed to have identified *Robert Ngunjiri*, which the High Court had found unsafe and acquitted him. Yet PW1 had failed to pick out the appellant in an identification parade; that the High Court had relied on evidence of PW4 who did not give any description of the appellant, and PW6 who issued a receipt of the person hiring the motor vehicle as, *Stephen Wagiwa Mwaniki*; that PW4 had relied on dock identification to identify the appellant; that the trial court did not warn itself of the perils of single identifying witness. PW4 should not have been involved in the identification parade. PW4 identified the appellant from the identity card obtained from the other car hire company. Counsel argued that the motor vehicle was not recovered from the appellant, and therefore the prosecution relied on circumstantial evidence that it was the appellant who hired the vehicle; that the identity card and photograph did not belong to the appellant, but were of some other person; that the appellant was not arrested immediately, and that it was *Robert Ngunjiri* that was arrested and led the police to the appellant. Counsel urged this Court to quash the judgment of the lower court and allow this appeal.

For the State, *Ms. Nyamosi*, learned Senior Principal Prosecution Counsel, opposed the appeal, and contended that the case had been proven to the required standard, as the identification of the appellant by PW1 was proper, and that the High Court was convinced by the identification by PW4 as it could not be faulted. PW4 recalled that the hirer was an elderly person who had been in their office for about an hour. Counsel submitted that, there were other circumstances that connected the appellant to the robbery, more particularly the details of the appellant's identity card; that the witnesses recalled that this was the same person who hired the first vehicle. Counsel urged the court to uphold the conviction and sentence.

We have carefully considered the submissions and the Record of Appeal. This being a second appeal only matters of law may be considered – **see section 361(1)(a) of the Criminal Procedure Code**. It is trite law that in a second appeal the appellate court will not normally interfere with concurrent findings of fact by the two courts below unless it is apparent that on recorded evidence no reasonable tribunal could have

reached that conclusion – see M’ RIUNGU V. REPUBLIC [1983] KLR 455; and KARINGO V. REPUBLIC [1982] KLR 213. It is also trite law that an appellate court would not normally interfere with the findings by the trial court which are based on credibility of witnesses unless it be shown that no reasonable Court could have made such findings - see REPUBLIC V. OYIER [1985] KLR 353.

The central issue in the instant case turns on the identification of the appellant. This issue was dealt with extensively by both the trial Court and the High Court.

In concurring with the analysis and findings of the trial court, the High Court stated thus,

***“We think that the trial magistrate sufficiently considered the issue of identification in the light of the above directions with regard to the 1st appellant, She carefully assessed and evaluated the evidence on record and came to the conclusion that the identification of the 1st appellant was positive and free from all error and mistake. We are satisfied on our own evaluation of the evidence on record that the learned magistrate was right in reaching this conclusion.”***

We consider that the judgment of the High Court succinctly deals with the question of the appellant’s identification. The appellant was positively identified by PW4 and PW6, when he came to their office to hire a motor vehicle. The appellant gave them his identity card from which, they obtained both his name and identity card number. This information was included in the receipt for Kshs. 7000/-. PW6 again saw the appellant the next morning, when introducing him to the driver of the motor vehicle, PW1. On both occasions the appellant was seen in broad daylight, and more particularly, PW6 observed that the appellant was an elderly man. Given these circumstances it can only be concluded that he appellant was properly identified by the witnesses.

Mr. Rombo argued that, the identification by PW4 was inadequate, and she did not provide a description of the appellant, and therefore only dock identification was relied on in her case. This argument was comprehensively addressed by the High Court when it stated thus:-

***“The 1<sup>st</sup> appellant faults his identification on the identification parade on the basis that there had been no first report to the police by PW4 in which his description was given. That that being the case, his subsequent identification was dock identification. It is trite law that dock identification is generally worthless, and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the suspect and the police would then arrange a fair identification parade. See GABRIEL KAMAU NJOROGE VS REPUBLIC (1982 – 88) 1 KAR 1134. The Court of Appeal has however held in the case of MUIRURI & 2 OTHERS VS REPUBLIC (2002) KLR 274, that not all dock identification are worthless, and further that a court may base a conviction on the evidence of dock identification if it is satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the Court warns itself of the possibility of danger of mistaken identity. Yes PW4, admitted that she never gave a description of the appellant in her first report. However considering all the circumstances of the case in particular the fact that she had been with the 1<sup>st</sup> appellant the previous day prior to the robbery for an hour, that PW6 who was together with her during the negotiations also managed to identify him in Court and on the basis of the particulars of the appellant’s identity card that were similar to those given by him and on which basis a receipt Kshs.7,000/- being the hiring charges for the subject motor vehicle was issued by PW6, we are persuaded that the evidence of identification of PW4 and PW6 were safe and free from error or mistake.”***

We have taken the liberty of reproducing the extract of the judgment of the High Court at length, which shows that the issue was exhaustively addressed. Consequently, we are satisfied that the evidence of PW4 was sufficiently corroborated by the evidence of PW6, which, when considered in conjunction with the

particulars obtained from the identity card given by the appellant, decisively identified the appellant as the robber.

*Mr. Rombo* has argued that, there is no evidence to link the appellant to the robbery, as the motor vehicle was not recovered from him. The prosecution therefore relied on circumstantial evidence to secure a conviction given, that he hired the motor vehicle, using an identity card. Counsel argued that the appellant had denied that the identity card and the photograph retrieved from his house belonged to him, and therefore there was nothing to connect him to the robbery. The appellant was connected to the robbery by virtue of the fact that he was the person who visited the office of PW4 and PW6, for the specific purpose of hiring a motor vehicle. He requested for the particular motor vehicle type, a RAV4, which PW6 sourced and secured for him. The driver of the motor vehicle then picked the appellant and was to drive him to various places, and finally end up at the airport. In the course of the journey, the appellant robbed the motor vehicle from the PW1 after threatening him with a pistol, had him tied to a tree, and gagged. A few hours later, the subject motor vehicle that was last seen in the hire of the appellant was reported stolen. This evidence pointed to a robbery carried out by the appellant, where all the ingredients for the offence of robbery with violence were fully satisfied.

It was the appellant's identity card details that played a significant role in the identification and subsequent arrest of the appellant, and which connected him to the robbery. PW4 and PW6 testified that it was the appellant's identity card in the name of *Stephen Mwaniki Waigwa*, and identity card number no. 1540288 that were utilized to hire the subject motor vehicle. The appellant gave PW6 the identity card, from which she wrote the particulars on the receipt. When this information was compared with the copy of an identity card provided by an informer, the photograph resembled the appellant, while the details were the same, thereby linking the appellant to the robbery. There is no evidence to show that the appellant denied that the identity card and the photograph belonged to him, and therefore, it formed a material part of the evidence relied upon by the trial court and the High Court. Being a court of record, we have no jurisdiction to consider matters of fact, but only matters of law see **section 361(1)(a)** of the Criminal Procedure Code, and in ***M'RIUNGU V. REPUBLIC*** (supra). These are matters of fact, and it follows that this Court has no jurisdiction to interfere with the concurrent findings of fact that were relied on and believed by the courts below.

Having considered the issues raised in this appeal and the submissions by the appellant, we are satisfied that the appellant was convicted on sound evidence and his conviction was indeed safe. In the result, this appeal is rejected and is hereby ordered dismissed.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 17<sup>th</sup> day of JANUARY, 2014.**

**P. KIHARA KARIUKI**

**PRESIDENT, COURT OF APPEAL**

**J. W. MWERA**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original..*

**DEPUTY REGISTRAR**