



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, AGANYANYA & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 334 OF 2007

BETWEEN

PETER IRUNGU KINUTHIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.)*

*dated 20<sup>th</sup> December, 2005*

in

H.C.Cr. A. No. 897 of 2003)

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**JUDGMENT OF THE COURT**

The appellant, **Peter Irungu Kinuthia** was convicted by the Principal Magistrate's Court at Makadara for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. It was alleged that on 12<sup>th</sup> day of March, 2003 at Dandora Phase II Estate within Nairobi area jointly with others not before the court and while armed with a dangerous or offensive weapon namely a pistol robbed **Teresa Wanjiru Njaramba** of cash money Kshs.1,000/=, a bag containing two bibles, seven books, National Identity Card and a driving licence all valued at Kshs.1,200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Teresa Wanjiru Njaramba.

When the substance of the charge was read to the appellant by the Court on 21<sup>st</sup> March, 2003, he denied it and the prosecution called seven (7) witnesses in support of the charge. **Teresa Wanjiru Nyaramba** (PW1) was at the house of **Elizabeth Kavutha** (PW2) when **Josephine Ngula Matheka** (PW3) telephoned PW2 to tell her that her sister was sick and needed to be taken to hospital. PW1 joined PW2 in her vehicle to go and take her sister to hospital. The name of PW1's sister was not revealed. When they reached Kingdom Hall Church in Dandora Phase II Estate three people emerged and one pointed a gun at PW1. They demanded that PW1 releases the car keys she was holding to them. She screamed and members of the public came around and the three people ran away but were chased by members of the public. The members of the public caught up with the attackers and two of them were stoned to death while one survived. He is the appellant. In the course of the attack on PW1, a handbag containing two bibles, seven books, Kshs.1,000/= and spectacles was stolen from her. This bag was recovered later together with Kshs.1,000/= and a bible and books. The spectacles were, however, missing.

**Elizabeth** (PW2) was with PW1 when the robbery occurred. She had left the car with PW1 inside to check on PW3 who had called PW2 to come and take her sister to hospital. It was during day time and she was at the gate of Kingdom Hall when the appellant came there to ask if that was Kingdom Hall. When she answered in the affirmative the appellant and his colleagues went to where PW1 was and started struggling with her. PW2 rushed to where PW1 was in an attempt to help but the appellant pushed her down and threatened to shoot her with a pistol he held in his hands. She took cover in front of the motor vehicle. Many people came round and started chasing the suspect robbers. PW2 followed them. In the course of the chase two of the suspects were stoned to death by members of the public.

PW3 also testified about what happened at the scene. She had telephoned PW2 and told her to come and take her sister to the hospital. She saw PW2's car arrive and park at the gate of Kingdom Hall at Dandora Phase II. As she hurried to go there, she saw three people emerge and hold PW1. Then she heard a gunshot and raised an alarm. Many pupils from surrounding schools and members of the public came round and chased and killed two of the suspect robbers. The appellant was arrested. PW1, 2 and 3 identified him through his facial appearance.

**Thuku Njoroge** (PW5) is a resident of and businessman at Dandora. On the day in question he was at his work place at Jua Kali when he heard screams of *mwizi! Mwizi!*. He joined members of the public in chasing the alleged thieves up to Kamorock road leading to Hon. Mwenje. According to him two of the suspect robbers were heavily built while one was slender and he held a gun. PW5 pointed out the appellant as the slender man who ran on but threw away the gun which PW5 picked and later handed over to the police who arrived where he was. According to PW5, the appellant ran to Mowlem Police Post to take cover.

**Pc. Timothy Mugania Karagania** (PW7) was on duty at Mowlem Patrol Base on 12<sup>th</sup> March, 2003 when the appellant was taken there at 11.30 a.m. by members of the public who had badly beaten him. The witness booked the appellant at the station and later handed him over to Criminal Investigation Officers.

**Lindsay Kipkemboi** (PW4) was a firearm expert, who received a US Colt Revolver Serial Number 39032 from **Pc. Wycliffe Mwaka** on 8<sup>th</sup> April, 2003. He examined it and formed the view that it was a revolver in good mechanical condition capable of being fired.

When the appellant was placed on his defence he made an unsworn statement and said he was a taxi driver living at Kayole Estate. That on the date in question he woke up to go to his place of work at Huruma Estate roundabout but did not find his employer who had gone away with the taxi, so he turned to go back home. Then he decided to go to Korogocho Market to buy some fruits for his wife's pudding business. After buying the fruits, he started to go to his way to his wife's place but met police officers who started beating him up and calling him a member of mungiki sect. That he was beaten until he became unconscious. He was then handcuffed and taken to Mowlem Patrol Base and placed in cells for two hours. When he was removed he was taken out by the same police officers who told the public to say he had the gun. He was then taken to Kinango Police Post then to Buruburu Police Station. Later he was charged with offence.

The learned Magistrate (C. O. Kanyangi) who heard this case concluded in his judgment delivered on 4<sup>th</sup> July, 2003 as follows:-

***“The accused appears to say that a policeman planted the gun on him over a case of unpaid pudding debts. The court doesn't believe the accused at all. He was clearly identified to have been one of the robbers. He ran away with the gun and was chased by a hostile crowd who killed his two colleagues but he escaped alive. He threw away his gun (as it could not fire) and went into hiding. He was arrested and taken to Police Station alive. The court finds that the case against the accused person is proved beyond any reasonable doubt. He is guilty of the offence charged and is convicted accordingly.”***

Upon such conviction the appellant was sentenced to death as provided by law. His appeal to the superior court (*Lesiit & Makhandia, JJ.*) was dismissed in its judgment dated 20<sup>th</sup> December, 2005. Still dissatisfied with the decision of the superior court, the appellant lodged the present appeal through a homemade memorandum of appeal which has 6 grounds as follows:-

- 1. That the learned appellate judges erred in law when they upheld conviction and sentence in the instant case by relying on the evidence of identification yet failed to find that there wasn't any chance to a positive identification.***
- 2. That the learned appellate judges (sic) in law when they upheld conviction and sentence in the instant case relying on purported identification yet failed to find that the same was not supported by a properly conducted identification parade.***
- 3. That the learned appellate judges erred in law when they acted on the evidence of mode of arrest without observing that there was no a sound of chase (sic).***
- 4. That the learned appellate judges erred in law when they upheld conviction and sentence in the instant case without finding that the evidence by the prosecution witnesses was not sufficient to secure a safe conviction and sentence due to lack of essential witnesses.***
- 5. That the learned appellate Judges erred in law when they dismissed my plausible defence contrary to the provisions of section 169(1) of the (sic).***

The appeal was heard before us on 22<sup>nd</sup> March, 2011 when **Mr. Oira**, learned counsel for the appellant submitted on the inadequacy of the appellant's identification for lack of an identification parade. He also complained that without members of the public testifying on the appellant's identification in the course of the chase it was not possible to ascertain that the appellant was one of the robbers. In counsel's view the case was not proved against the appellant beyond reasonable doubt. **Mrs. Ouya**, Deputy Prosecution Counsel opposed the appeal and submitted that the robbery was committed during the day and that from the time of its commission to that of the appellant's arrest, his sight was not lost.

This is a second appeal and as such, and by virtue of **section 361(1)** of the Criminal Procedure Code only matters of law fall for this Court's consideration. So far as we can see, the only issue raised in this appeal was that of the identification of the appellant. In the judgment of the superior court, the learned Judges had this to say:

***“In the circumstances of the appellant's arrest, we find that even though the police did not carry out an identification parade for witnesses, however there is no doubt at all in our minds the appellant was one of the 3 men who robbed the complainant in this case. Since the 3 witnesses followed in the chase until the time the appellant was arrested all in one long sequence of events that were not broken, it was absolutely unnecessary to conduct the identification parades. We also find that contrary to the appellant's submissions, that his arrest had everything to do with the robbery; the only difference was that the appellant was cornered by the complainant witness and the mob and that his only means of escaping the immediate threat to his life was to surrender to the police at the nearest police station and that is what he did. We are certain that he saw what befell his two friends at the hands of those who also chased him. He cannot be heard to say that his arrest was unrelated to the robbery incident in issue.”***

This part of the superior court judgment succinctly answers the issue of the appellant's identification and implication in the robbery committed against PW1 by the three people who included the appellant and whose intention was to take the car keys from her and drive away the motor vehicle. Fortunately PW1 did not release the car keys but her handbag containing bibles, books, Kshs.1,000/= and a pair of spectacles was snatched from her by one of them. Though it was later found without spectacles, PW1 had been deprived of its control for some time, thus satisfying an act of robbery. She was also threatened with a gun in the course of the struggle. The robbers were more than one and were armed with a pistol, a dangerous or offensive weapon.

This robbery was committed in broad daylight. The robbers were not masked. PW1, PW2 and PW3 saw the robbers and spoke to them. PW1 in particular struggled with the robbers for some time. The appellant's facial appearance was fresh in their minds by the time he was arrested.

It was not true for Mr. Oira to submit that there was no arresting officer for the appellant's case. PW7 was clear that he received the appellant from about 100 members of the public. When such number of people accompany a suspect robber to the police station his handover to the police is not smooth. Thus when PW1, PW2, PW3 and PW5 testified that the appellant ran to Mowlem Police Patrol Base, they were exposing the ideal situation.

It is true the appellant made a long unsworn statement in his defence but both courts below dismissed it as unbelievable. This is not to say it was not considered at all. It was considered but rejected as untrue. As to why members of the public were not called to testify, **section 143** of the Evidence Act states as follows:-

***“143 No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact.”***

The evidence of PW1, PW2 and PW3 regarding the act of robbery against PW1, that of PW5 as to how the accused was chased by members of the public and/or how he dropped the pistol and that of PW6 and PW7 was in the circumstances of this case sufficient to implicate the appellant with the commission of the offence with which he was charged. We find no merit in this appeal which we order to be dismissed. This is the order of this Court.

***Dated and delivered at Nairobi this 6<sup>th</sup> day of May, 2011***

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**