



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI**

CORAM: TUNOI, AGANYANYA & NYAMU, J.J.A.

CRIMINAL APPEAL NO. 120 OF 2009

BETWEEN

KIMANI MACHARIA APPELLANT

AND

REPUBLIC RESPONDENT

**(An appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ)
dated 11th May, 2009**

in

HCCRA NO. 84 OF 2007)

JUDGMENT OF THE COURT

The appellant, **KIMANI MACHARIA**, was charged with two counts in the trial court.

In the first count, he was charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code** and in the second count he was charged with attempted robbery with violence contrary to **Section 297 (2) of the Penal Code**. The trial court acquitted him on the first count but convicted him on the second count and this resulted in trial court sentencing him to suffer death.

In his defence the appellant claimed to have been carjacked by robbers and dumped in a coffee plantation after the robbers had caused him to break his leg as they forced him to enter into the boot of the car they were reversing. The incident is said to have taken place on 21st November, 2005.

Unfortunately for the appellant his claim was put to the test almost immediately because at Kianduma village in Nyeri District, a Mr Peter Macharia was wounded and robbed of KShs.15,000/-. Almost at the same time within the vicinity of the first robbery a second robbery against Margaret Wanjiru took place. At an identification parade conducted after the two incidents, Margaret Wanjiru (PW 2) was able to identify the appellant as one of the robbers. Lydia Njeri Maina, a fourteen year old girl and the daughter of PW 2 was also able to identify the appellant as the robber. In addition, the appellant was also identified by Peter Macharia Gichau who had tried to go to the rescue of PW 2. However, he did not take part in the identification parade.

Following conviction and sentence by the trial court the appellant appealed to the superior court which upheld both conviction and sentence hence this second and final appeal.

During the hearing of the appeal, the appellant was represented by Mr Kirubi, advocate and the state was represented by Mr Kaigai, Senior Principal State Counsel. Mr Kirubi wholly relied on the grounds set out in the supplementary memorandum of appeal filed on 4th March, 2011. The grounds are:

1. *The learned judges erred in law in their failure to re-evaluate the evidence of identification offered in the lower court which was unclear, assailable, unreliable and unclear thus arriving at the wrong decision.*
2. *The learned trial judges erred in law in relying on an identification parade which was flawed and held in a manner contrary to the rules set out in the Kenya Police order and approved by the court of appeal.*
3. *The learned judges erred in law in their failure to note the evidence offered in the lower court against the appellant was inconsistent, contradicting, (sic) unreliable and unsafe to convict the appellant.*
4. *The learned judges erred in law in shifting the burden of proof to the appellant which is contrary to the laid down law.*
5. *The learned judges erred in law in their failure to note and hold that the appellant's constitutional rights under S.72 (3) of the constitution (as it then was) had been contravened as the appellant who had been arrested on 27/11/2005 was arraigned in court on 16/12/2005 having stayed in police cells for a period of 19 days and no explanation at all by the prosecution as to the prolonged custody.*

In his submissions learned counsel for the appellant contended that the identification of the appellant was not safe as the nature of the lamp used was not specified and the intensity of the light it emitted described; that the time the lamp was hit by the robbers was not indicated; that the time the identification took place was also not indicated; that the appellant was described as a tall brown slender person whereas he does not bear any such description; that the only evidence against the appellant was that of suspicion when found in PW 1's farm and finally that the conduct of the identification parade in which the appellant was picked by PW 2 and PW 5 was not conducted in accordance with the relevant rules in that the injured leg had a plaster of Paris and that in an effort to conceal the defect, the officer conducting the parade placed a table to cover the legs of those who took part in the parade including the appellant and that since PW 2 and PW 5 were instructed by the police to attend the parade it is possible that the police could have mentioned to the witnesses that they had arrested a person who had suffered injuries and therefore, the table was not fit for the purpose.

In his brief submissions, Mr Kaigai, in conceding the appeal stated that the appellant had been arrested for being a stranger and on mere suspicion that he took part in the robbery.

On our part, we consider that the challenge on identification cannot be sustained because the evidence of PW 2 and W 5 was found credible by the two courts below and was in fact not challenged in cross examination by the appellant although he was accorded an opportunity to do so.

As regards the conduct of the identification parade, since the table concealed the legs of all those who took part in the robbery we find that there was satisfactory compliance with the identification parade rules.

On the contention that the evidence offered was contradictory, unreliable and unsafe, we consider that there is nothing at all on the record in support of this ground. Similarly on allegations that the trial court had shifted the burden of proof, there is again nothing in the record upon which the ground is based.

Finally, as regards the alleged breach of **Section 72 (3) of the retired Constitution**, nothing was raised in the superior court pursuant to the requirements of **Section 84 of the retired Constitution** and therefore,

nothing turns on this.

All in all and with respect to learned Principal State Counsel, we find ourselves unable to place much weight to his concession and for the reasons specified above, the appeal is accordingly dismissed.

Dated and delivered at Nyeri this 7th day of July, 2011.

P. K. TUNOI

JUDGE OF APPEAL

D. K. S. AGANYANYA

JUDGE OF APPEAL

J. G. NYAMU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR