IN THE COURT OF APPEAL

AT ELDORET

CRIMINAL APPEAL 219 OF 2006

LOWAYAKARU EJUROTO ELIMLIM ……..... APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Kitale (Karanja & Dulu, JJ) dated 5th May, 2006

in

H.C. Criminal Appeal No. 71 of 2004)

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JUDGMENT OF THE COURT:

Lowayakaru Ejuroto Elimlim, the appellant, has come to this Court on second appeal, challenging his conviction and sentence by the Senior Principal Magistrate's Court, at Kitale, of three counts of robbery with violence contrary to **section 296(2)** of the Penal Code and one count of being in possession of a firearm without a firearm's certificate contrary to **section 4(2)** of the Firearms Act, Cap 114 of the Laws of Kenya. In convicting the appellant, the trial Magistrate, H.I. Ong'udi relied on visual identification evidence, identification parade evidence, and DNA profile evidence.

The appellant's first appeal to the superior court was dismissed by a bench of two comprising W. Karanja J. and George Dulu J. This being a second appeal, only issues of law can be raised. But the appellant, in his home made memorandum of appeal, which he has titled "**GROUNDS OF APPEAL**, complains that his conviction was based on insufficient, contradictory and unreliable evidence. He also complains that his defence was rejected without any proper basis. Had that been the only memorandum of appeal on record, this appeal would have been a non-starter. But there is a supplementary memorandum of appeal which was filed with leave by Mr. Kiplagat J. Misoi, advocate, who was instructed by the Court to represent the appellant. The only issue of law raised in that document is identification. The appellant complains that evidence on identification is not only insufficient but also unreliable. To effectively consider that issue, it is important to set out the background facts.

The charges against the appellant arose on 13th October 2002 along Kitale – Lodwar road. According to the evidence adduced before the trial court, Japheth Ekidor, the deceased, was travelling in his

Landrover Defender, registration No. KAD 632J, from Lodwar, intending to go to Nairobi to attend a KANU political rally there. David Evans Echoto (Echoto) was his driver. Along with the deceased in the said vehicle were Lazaro Ekeno (Ekeno), Halima Osman (Osman), William Abongon Anyalla (Anyalla), Josephine Asmin (Asmin) and Alfred Moss Nagai (Nagai). There were other people who were in two different vehicles which were trailing the deceased's motor vehicle, and who were going to the same rally. The deceased and his party left Lodwar at about 7 a.m. At about 8.25 a.m. when the group had gone past Lokicharing, they met two gunmen. One was kneeling in the middle of the road aiming his gun against the deceased's motor vehicle. The other was also doing the same but he was standing by the roadside. Echoto was forced to stop his vehicle. The men immediately went to the vehicle and stood, one on the left and the other on the right side of the car and demanded money. Osman opened the window and gave them Kshs 500/=, the deceased Kshs 1,000/= and Anyalla Kshs 200/=.

Anyalla and Asmin testified that they saw the deceased aim his gun at one of the two men and fired. At that point the man shot back and hit the deceased who immediately collapsed onto his seat. The deceased's assailant also fell down. Nagai who was also in the same vehicle with the deceased testified that he saw the deceased's assailant bleeding. He did not state from where he was bleeding. He was however, categorical that the man he saw bleeding was the appellant. Mathew Lemunya (Lemunya), an Assistant Chief, who arrested the appellant confirmed that when he arrested the appellant he observed a fresh wound on one of his cheeks, and he was spitting blood. The arrest was effected on 20th October, 2002, which was about seven days after the incident. The appellant was arrested with a gun which was later produced in court as an exhibit. A spent cartridge which was recovered in the deceased's motor vehicle could not be distinguished as it had been fragmented and therefore was unsuitable for comparative analysis.

Some blood samples were collected from the sand where the deceased's assailant was standing, which was later analysed by the government analyst, Mrs. Rose Nabwama Shikuku (Shikuku). The DNA profiles of that sample and the blood sample taken from the appellant matched.

Several eye witnesses identified the appellant as the person who shot the deceased. Echoto testified that he observed the gunman who shot the deceased. It was his evidence that the man had no covering on his face, had tattoo marks on his face, and was wearing a cap, Khaki shirt and was short in stature. He later picked him in an identification parade as the man he saw on the material date kneeling in the middle of the road.

Ekiru Adek also identified the appellant. Unlike Echoto who had never met the appellant before, Ekiru Adek testified that he knew the appellant before. "He is a boy from my home" he said. "I knew you when you were young". Other than Echoto, Lazaro Ekeno, Paul Esokhon and Osman, also testified that they identified the appellant as the man who shot the deceased and later identified him in an identification parade.

The identification parade was conducted by Martin Juma, a Chief Inspector of Police. Echoto and Osman were the identifying witnesses in the parade held on 21st October, 2002. In the parade held on 28th October, 2002, the identifying witnesses were Ekeno and Anyalla. All these witnesses picked the appellant as the person who shot the deceased on 13th October, 2002.

We earlier stated that Lemunya arrested the appellant. It was his evidence that he received a report that suspects who allegedly shot the deceased were residents of his sub-location. He went to look for them. He did not state who gave him the name of the appellant as one of the suspects, but on the basis of the information he received he visited a *Manyatta* in his sub-location on 20th October 2002. Two people tried to escape from the *Manyatta* when they saw him enter the *Manyatta*. One of the two people was the appellant. The second person escaped. The appellant had a gun but no ammunition. The gun was later examined by Reuben Ndiwa, a firearms examiner, and in his view, it was a firearm within the meaning of the Firearms Act. The appellant admitted in his unsworn statement to the trial court that he was arrested by Lemunya, but he denied possession of the gun.

In his first appeal the appellant put in written submissions which ran to twenty four typed pages, in which he analysed the evidence of all the witnesses and concluded that the evidence was contradictory in material aspects, and that the evidence, taken as a whole, did not prove the charges he faced beyond any reasonable doubt.

The superior court did not, however, agree with him. It concluded that the robbery counts were committed in broad daylight, the assailants stood close to the witnesses who thus had ample opportunity to observe the appellant and his accomplice, both who were unmasked, their observation was unhindered and the appellant had unique markings on his face which made his identification unmistakeable. In addition, there were the clothes he had on; the fact that a gun shot grazed his cheek and the wound it caused was clearly visible on the appellant. Besides, blood samples lifted from the scene of the robberies matched that of the appellant. On the basis of that evidence, the superior court was satisfied that the appellant's conviction on all the four counts was safe and dismissed his appeal.

We earlier stated that the appellant's appeal before us challenges the correctness of his identification as the person who committed the offences. Mr. Misoi, for the appellant, in a very short submission largely adopted the appellant's submission before the superior court.

Mr. Chirchir, State Counsel, in supporting the appellant's conviction in all the four counts reiterated what the superior court said in its judgment.

The main, if not the only issue in the appellant's trial, was identification. The robbery counts were committed in broad daylight, along a public road.

The English case of **R v. Turnbull and others [1976] All ER 549**, enunciates the test to guide the court when considering the correctness of identification of an accused person. The case has been cited severally by courts in this country and there is no doubt that the English approach has been accepted without any variation by courts in this country. Bearing in mind the test in that case, we are satisfied that the circumstances obtaining at the scene of the robberies under consideration favoured a correct identification of the appellant. As correctly pointed out by the superior court and reiterated by Mr. Chirchir, State Counsel, the offences were committed in broad daylight. The appellant stood in the full view of the witnesses for more than a moment. He demanded money, and waited to receive it. Several witnesses saw him right from the time he was seen aiming his gun at the deceased's vehicle up to the time he escaped into the bush. The lapse of time was not momentary. Besides, the appellant's face was uncovered. One witness knew him before. Additionally, the appellant stood infront of the witnesses and there was nothing which hampered their observation of him. He stood by the window of the deceased's car, which then means that he was quite close that it cannot be said that the witnesses were unable to closely observe him. It is instructive that many of these witnesses picked him in identification parades which were held within fifteen days of the robberies. The appellant complained that the witnesses were not in agreement on the number of parade members and in his view that fact weakened the evidential value of identification parade evidence. That is not a fundamental issue. The fundamental issue is whether the witnesses were able to identify him.

The correctness of the witnesses' identification of the appellant was confirmed by the DNA profile. The appellant, as we stated earlier, was shot at by the deceased. The bullet grazed his cheek. He bled at the scene and as he escaped therefrom. The police successfully lifted blood samples from the scene which matched the appellant's blood. The appellant owed the court a duty to explain how his blood came to be at the scene of the three robberies. The duty is cast on him pursuant to the provisions of **section 111** of the Evidence Act. The presence of his blood at the scene places the appellant at the scene and raises a rebuttable presumption of fact that the appellant was one of the two people who attacked the deceased and his party. The appellant did not offer any explanation to rebut that presumption. He merely denied he was at the scene.

On the basis of the evidence on record, which both courts below analysed and accepted, we have no basis for holding that the identification of the appellant was mistakeable. There is overwhelming evidence to show that the appellant committed all the four counts he stands convicted; and it is our

judgment that he was properly convicted. We have no basis for interfering with his conviction and, accordingly, we dismiss his appeal.

There is no appeal on sentence, and in any case, no such appeal would lie in view of the provisions of **section 361(1)** of the Criminal Procedure Code. However, we note that in sentencing the appellant, the trial Magistrate ordered that the appellant would suffer death in each of the first three counts and to serve a term of five years imprisonment in the last count. She ordered those sentences to run concurrently. The superior court relying on the decision of this Court in **Boru & Another v. R. (2005) KLR 649** reviewed the sentence by ordering the sentence in count 4 to be in abeyance. That court did not however note that it is quite anomalous for death sentences to be ordered to run concurrently. We do not see the practicability of it. The usual practice which this Court has on several occasions pointed out, is that where an accused has been convicted in more than one capital offence in the same trial, he should be sentenced in one count only as a person cannot be hanged more than once. That being our view of the matter, we set aside the sentence of death in the 2nd and 3rd counts and also the order directing that sentences run concurrently. Order accordingly.

Dated and delivered at Eldoret this 11th day of April, 2008.

S.E.O BOSIRE

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR