



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

Criminal Appeal 103 of 2004

ROBERT KAMAU KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya
Nairobi (Mbaluto & Kubo, JJ) dated 16th February, 2006 in H.C.CR.A. NO.1142 OF 2001)**

JUDGMENT OF THE COURT

Robert Kamau Kariuki, (the appellant), has come to us on second appeal to challenge his conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the Penal Code, particulars of which allege that on 17th June, 2001, at Ololua Ridge, in Nairobi, jointly with others not before the court, while armed with dangerous weapons, namely pistols, robbed *Miss Laria Juliana Grant* of cash Shs.3,000/=, a mobile phone, a jacket and car keys all valued at Kshs.9,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Laria Juliana Grant.

The alleged robbery was committed at about 12 noon in a residential house in Ololua Ridge in Karen, Nairobi. About six people raided the house. The complainant was outside the house, apparently basking in the sun. Two men accosted her. One of the men was armed with a pistol. At gun point they frogmarched her into the house with eyes closed at their command. There were other people in the house who in her reckoning had come with her two captors. They demanded money. She gave them Kshs.3,000/= which she had. They then demanded the key to a safe which was in the house. She was unable to produce it because she was not the owner of the house. The house belonged to her sister, Isabella Pauline Nicholson, who had gone to church with her children. The robbers then ransacked the house, forcibly opened the safe before their search was interrupted by the sound of a siren. The men then left in a hurry, after which the witness hid herself under a bed in the house.

Meanwhile *Paul Kipyegon Rotich*, who worked in that house as a cook, testified that while in the kitchen he was confronted by a man who was armed with a pistol. The man ordered him to lie down which he did. He was then tied hands together with an electric wire and blindfolded with a sweater. He lay there until the siren blared. He was untied by Laria. It was thereafter that he saw the appellant as he approached the gate. The witness was able to observe him. He had a striped sweater and cap on. One of the men who came into the kitchen where he was working had a striped sweater and cap resembling those

the man at the gate had on.

Martin Wekesa, also worked in the same home, but as a shamba boy. He testified that he saw a man wearing a red and black striped sweater and cap enter the servants' quarters. As he entered the main house the witness saw a man he did not know trailing him. The man ordered him to lie down, which he did. The stranger tied his hands together and at the same time stuffed into his mouth a rag of cloth to prevent him from shouting for help. He was later untied by Kipyegon's wife, and soon thereafter he went and switched on the security alarm.

Like Kipyegon, Wekesa testified that he saw the appellant approach the gate and heard him asking to be shown the way out of that place. It was his evidence that he arrived in the home while the robbery was in progress. He had gone to see the landlord of his employer who was also their neighbour. He saw six robbers in the main house, apparently excluding the one he had earlier seen enter the servants' quarters. The six escaped.

Solomon Kiriae, a security guard with Ultimate Security Firm, responded to the siren with colleagues. He testified that as they entered the home where the robbery occurred he saw six men escaping therefrom. The men confronted him and his party, and ordered them at gun point to lie down. The record is not clear whether or not they complied, but what is important is that the robbers escaped and later Kiriae and his colleagues among other people pursued them. They were however, not able to catch them. The witness saw the appellant after his arrest.

Michael Lawrence Culley, a farmer, was the owner of the property where the robbery took place. He was called by Wekesa and informed of the robbery. He owned a gun, which he armed himself with and proceeded to the scene of the robbery. It was his evidence that as he approached the place, he saw the appellant in a brown khaki jacket which he removed and abandoned as he ran away. He did not state how many robbers he saw, but he was categorical he saw the appellant running alone in a different direction. He fired his gun but missed his target. He testified further that when the appellant removed the jacket, he observed that he had a striped jacket on, which he identified in court.

The appellant was arrested thereafter. Mr. Culley recognized him as the man he had earlier seen separating himself from other robbers and running towards a thicket near the home. A crowd of people had gathered there and the appellant could not escape. The witness was one of the people who arrested the appellant. The appellant was thereafter charged with the offence we earlier stated.

In his defence, the appellant made an unsworn statement. He denied the offence. He stated that he resided at Dandora, Nairobi, and works as a driver. On the material day he had gone to Lang'ata to visit his sister but could not find her. Her neighbour allegedly told him that she had relocated to Matasia, Ngong. He could not follow her there, and he decided to return using a shortcut to Karen Shopping Centre which a herdsman showed him. It was while he followed the path that he went through a certain homestead which had no gate. He was confronted by a crowd of people there who searched him but found nothing material to the offence. He was arrested and charged.

The appellant's conviction was based on his visual identification by, principally, Mr. Culley. Both the trial court and the superior court on first appeal accepted his testimony and acted on it. Both courts rejected the appellant's defence and concurrently held that Culley had ample opportunity in broad daylight to observe and identify the appellant. His testimony was corroborated by Paul Kipyegon Rotich, and Wekesa.

In this appeal, the appellant challenges that finding, on amongst other grounds, that his identification was based merely on his attire, that no description of him was given to the police, nor was any identification parade held; the robbery took a very short time and thus it was difficult for eye witnesses to clearly and unmistakably observe and identify the appellant, and that the appellant's defence was not properly and fully evaluated.

It was common ground that the appellant was arrested within the compound of the house where the

robbery took place. It was broad daylight, the time having been between 12 noon and 1 p.m. Culley testified that he saw the appellant running away with several other people. He however changed course and ran towards a different direction from the others. An issue was raised by Mrs. Gulenywa for the appellant, that six people were seen by guards from Ultimate Security, running out of the compound and six people had been seen inside the house. In her view therefore, the appellant was an innocent passerby. With due respect to her, Wekesa testified that he saw someone enter the servants' quarters, wearing clothes which resembled those the appellant had on. When he entered the main house, he found six people there. From simple computation, there were at least seven robbers. Six of those are the ones the security guards saw. The appellant was seen by Culley running in a different direction. There is clearly no merit in that submission.

The appellant was clearly identified by Culley. The witness was believed by the trial court which had the benefit of seeing and hearing him testify. The first appellate court clearly re-evaluated the evidence as required of it (see **Okeno v. R** [1972]EA 32), considered both the prosecution and defence cases before coming to the conclusion that the appellant's conviction was based on sufficient and acceptable evidence. We have no basis for faulting that court. We agree with Mr. Kaigai, Senior State Counsel that the appellant's appeal has no merit. It is accordingly dismissed in its entirety. Order accordingly.

Dated and delivered at Nairobi this 4th day of May 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR