



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

**Criminal Appeal 255 of 2004**

**DAVID MAINA MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

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

*Nairobi (Lesiit & Ochieng, JJ) dated 21<sup>st</sup> October, 2004*

**in**

**H.C. CR. APPEAL NO. 635 of 2001)**

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**JUDGMENT OF THE COURT**

DAVID MAINA MWANGI, the appellant, was charged before the Chief Magistrate’s Court, Nairobi, with the offence of robbery with violence contrary to section 296(2) of the Penal Code, with an alternative count of handling suspected stolen property contrary to section 322(2) of the Penal Code. He was convicted on the main count but no finding was made on the alternative count, properly so in our view.

In convicting the appellant, the trial Magistrate found as fact that the appellant was positively and satisfactorily identified as the person who, jointly with another who was not before the court, violently robbed *Benjamin Mutahi* (PW 1) of Kshs 3,000/=, one leather jacket, one wrist watch, a pair of leather shoes and a motor vehicle registration No. KYC 517, a Peugeot 305. The court also found as fact that the appellant was found in possession of a car radio cassette player, which was removed from the aforesaid motor vehicle, a day after it was stolen.

The superior court on first appeal affirmed the decision and thus provoked this appeal.

Only one broad ground was raised by Mr. Masara, learned counsel for the appellant. His submission was that the circumstances under which the witnesses said they identified the appellant were difficult with the result that the appellant was mistaken for another person who committed the offence charged.

This being a second appeal, only issues of law fall for consideration. The prosecution case as can be gleaned from the recorded evidence was short and straight forward. *Benjamin Mutahi* (PW 1) attended a pre-wedding party on 1<sup>st</sup> July 2000, at Baseland Inn along Thika road, and did not leave that venue until

about 3.00 a.m. He was in the company of his sister **Miriam Wanjiru Mutahi** (PW 3) and **Stephen Wanguru Maina** (PW 2). He then owned a car, registration No. KYC 517, a Peugeot 305 grey in colour which had a radio cassette player, Sanyo. He used that car to the pre-wedding party. He gave PW 2 and PW 3 a lift as he drove back to his residence. He decided to drop PW 2 first. All the three people lived at Kayole Estate, but in different houses. At PW 2's residence, PW 1 drove right to the entrance. PW 2 then alighted. As he waited for the door to be opened, PW 1 reversed the car to the gate. As he did so, with the driver's window open, a person who approached the car from the rear side pointed a gun at his head and ordered the witness to jump to the back seat which he did. There was a second man on the left side of the car who was also armed with a pistol. He moved to the front of the car, caught hold of PW 2 and forced him onto the back seat. This second man forced PW 1, PW 2 and PW 3 to lie on the back seat and he then sat on them. The first armed man started the car and drove away towards Njiru. After covering some distance, he stopped the car at an isolated place in the Njiru area. The two men ransacked the pockets of their victims and took away from PW 1 Kshs.3,000/=, his leather jacket, wrist watch and shoes. They caused PW 1 and PW 2 to drop off and drove away with PW 3. They, however, dropped her off a short distance away from there.

PW 1 testified that he was able to identify the person who sat on them through the rear lights of the car at the time he was ordering them to lie down and during the time he ransacked his pockets for money. It was his evidence that he knew the man before as a conductor of matatus plying route No. 17 and as a person who used to frequent a bar the witness used to operate at Kayole. He was not able to identify his companion. It was further his evidence that he later informed the police that he had recognized one of their attackers and that he knew him to be a frequent patron of a certain bar in Kayole.

PW 2 likewise testified that he was able to identify the person who forced him back into PW 1's car because he was a person previously known to him. He used to see him working with matatus operating route No. 17 and which he regularly used to travel to various destinations in the city. The witness was categorical that he was able to identify the appellant as the man who forced him back into PW 1's car, using the parking lights of that car. He later observed him using the same light, at the time he ransacked their pockets and he was sure it was the appellant.

PW 3, did not know the appellant before. Her evidence was that she was able to identify him through the headlights when he attacked PW 2 at his door. He observed him as he forced PW 2 into PW 1's car and was thus able to identify him. She was later able to pick him at an identification parade which was held 5 days later at the Buruburu Police Station.

The foregoing was the only evidence of identification which was presented by the prosecution. Had that been the only evidence, no doubt the case against the appellant would have been quite weak. Conditions favouring a correct identification were difficult. But there was other evidence. The appellant was arrested on the same day the robbery took place. PW 1 spotted him crossing a road in the Kayole area and pointed him out to the police who then arrested him. The police led him to his house from where a Sanyo radio cassette was recovered. PW 1 identified it as his. It had been taken out of his car with its speakers after the robbery before the car was abandoned within Kayole estate where it was found parked with doors ajar. PW1 pointed out to the court a dent mark on it which he used to identify the radio cassette and its speakers as his property. The trial and first appellate courts believed him and found as fact that the radio cassette was his. The two courts below also believed the three identifying witnesses. We have no reason to differ. The trial court unlike ourselves observed and heard the witnesses testify. They were better placed to rule on matters of credibility of witnesses.

We too believe these witnesses. We particularly accept PW 1's evidence that he knew the appellant before. He pointed him out to the police. The correctness of his identification of the appellant was confirmed by the recovery of the radio cassette in his house. **Constable Stephen Mwangi Kiama** (PW4) made the recovery. The appellant opened his house for him from whence the radio cassette player was recovered.

We agree with Mr. Kaigai, Senior State Counsel that the evidence against the appellant is overwhelming. The appellant was obliged to, but did not explain how he came to be in possession of the

radio cassette only a few hours after its theft. The presumption raised under **Section 19** of the Evidence Act, is that he was the thief. The presumption is a rebuttable one, but in absence of any rebuttal evidence, we are of the view that the appellant was properly convicted of the offence of robbery with violence contrary to **section 296 (2)** of the Penal code. Accordingly, his appeal fails and is dismissed. Order accordingly.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of October, 2007.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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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