



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

Criminal Appeal 248 of 2005

BENSON NJEHIA WANJIRU 1st APPELLANT

ADEN ABDI SIBA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Mombasa (Mwera & Khaminwa, JJ)
dated 25th October, 2005**

in

H.C. Cr. Appeal No. 288 & 289 of 2004 (Consolidated)

JUDGMENT OF THE COURT

The 1st appellant, **Benson Njehia Wanjiru** (1st accused in the trial court), and the 2nd appellant, **Aden Abdi Siba** (2nd accused in the trial court), were charged together with two others with three counts of robbery with violence contrary to **section 296(2)** of the Penal Code thus:-

Count 1: That on 3rd May, 2003 at Tudor area Mombasa jointly with others not before court while armed with dangerous weapons (pistols) robbed Risper Marenya of a motor vehicle registration No. KAL 078V Toyota, cash, a golden chain and a ring and earrings plus sunglasses all valued at Kshs.1,439,000/= and that at the time before or immediately after the robbery they threatened to use actual violence on Risper.

Count 2: That on the same day and place and in the same manner they robbed Kennedy Muchiri of Shs.1,000/=.

Count 3: That on the same day and place in the same manner they robbed Charles Onyango of Shs.3,000/=.

The 4th and 5th counts involved the 1st appellant (Njehia) alone in that on the 3rd May, 2003 at

Kisauni Mombasa, he was found in possession of a firearm, Berretta, without a firearms certificate. And the last count (5th count) read that on the same day and place he was also found in possession of five (5) rounds of ammunition without a firearms certificate. Both counts 4 and 5 were laid under **section 4(1)** of the Firearms Act.

The appellants were convicted by the trial court on all these counts but their appeals to the superior court were partially successful in that it was only the conviction on the second count which was upheld. So that this appeal is in respect of that count alone. The facts of the case as accepted by the trial court and the first appellate court were that on the material day (3rd May, 2003) at about 11.45 a.m., Kennedy Muchiri Kariuki (PW 1 – the complainant in the second count) (Kariuki), a salesman of Kiwi Company, was with senior saleslady called Risper Marenya in the company car registration number KAL 078V, Toyota Hiace. The two went to Tudor Mini Grocers where Kariuki proceeded to the shop to collect some money. After collecting the money, Kariuki went back to the car and found Risper talking to two salesmen from Cadbury's Ltd. When Kariuki opened the car door, he heard somebody shout "lie down." Then Kariuki saw three men who were all armed. One of them went round to Kariuki's side, while another ordered Risper to leave the driver's seat and pushed her aside. Kariuki was able to identify the two appellants as the ones who ordered them to surrender the car keys and that all the three gangsters entered the vehicle. The 1st appellant entered at the back of the car while the 2nd appellant sat in front of the car. The car was driven by the third person towards Nyali and as the incident had attracted attention of many people, the police were immediately informed of the same. The vehicle was chased towards Nyali. While the vehicle speeded towards Nyali, the gangsters demanded money from Risper and Kariuki. The two victims surrendered to the robbers all they had. Kariuki surrendered Shs.1,000/= from his wallet. The 1st appellant who was at the back of the vehicle warned his colleagues that there was a security van following them. The vehicle was then driven towards Kisauni where it suddenly stopped and the 2nd appellant and the other man escaped leaving the 1st appellant trapped at the back of the car. The 1st appellant was then removed from the back of the car where a gun was recovered. Later the 2nd appellant was arrested, placed on identification parade where he was identified by Kariuki.

Okoth Ochieng (PW 3) (Ochieng), testified how he received a report about the robbery and gave chase and saw the vehicle stop, and two people run away while the 1st appellant remained trapped at the back of the car. Ochieng identified the 1st appellant as the man who was arrested by the police from the back of the vehicle.

The appellants' conviction was based on the evidence of the complainant (Kariuki) and Ochieng.

In analyzing the evidence against the 1st appellant, the learned trial magistrate in her judgment said:-

"For accused 1, Benson Njehia there is evidence of PW 1 who says accused 1 entered at the back of the motor vehicle and that when the gangster suddenly stopped and ran, the first accused was trapped in the rear because the door locked itself (page 12 of proceedings) and hence 1st accused could not come out. That PW 1 saw police remove him and arrest him. That when police opened the door he raised his hands and came out."

As regards the 2nd appellant (Aden), the trial court said:-

"For accused 2, the evidence connecting him to these offences charged is that of PW 1, court notes that PW 1's evidence was detailed and clear in facts that it vividly brought the picture of the robbery event to the court's imagination."

He later attended an identification parade where he identified the second accused by facial appearance and picked him. He says he had rode with the second accused who was sited (sic) at his side from Tudor to Kisauni and had ample time to see and master his facial appearance. This court is convinced that the witness, from his vivid description of events was alert and visualized the events as he analyzed them in court. The court is convinced that his identification of the 2nd

accused is without any possibility of error. The circumstances under which the offence was committed favour correct identification.”

The appellants’ conviction on the second count was upheld as the learned Judges of the superior court (Mwera and Khaminwa, JJ) were satisfied that the appellants were properly identified during the robbery.

The appellants now come before us by way of second appeal and that being so, only matters of law fall for consideration pursuant to **section 361** of the Criminal Procedure Code.

When the appeal came up for hearing, Mr. Oguk, the learned counsel for both appellants, raised the issue of non-compliance with **section 200(3)** of the Criminal Procedure Code which provides:-

“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

We called for the trial magistrate’s original file and we observe that the record clearly shows that when the matter came up for mention on 22nd July, 2004, the succeeding magistrate recorded that the trial would proceed under **section 200** of the Criminal Procedure Code. We hasten to add that this mention before the trial court on 22nd July, 2004 had been omitted from the typed proceedings. When Mr. Oguk’s attention was drawn to this fact, he appeared to concede that **section 200(3)** of the Criminal Procedure Code had indeed been complied with.

Mr. Oguk’s main ground of appeal related to identification of the appellants. He submitted that the identifying witness must have been in a state of fear hence he was not in a position to positively identify the appellants. The other issue raised by Mr. Oguk related to the role of Inspector Obadia Kuria (PW 9) who conducted the identification parade in respect of the 2nd appellant. It was Mr. Oguk’s submission that PW 9 was not competent to conduct the identification parade since the witness had been involved in the investigation of the case.

Mrs. Mwangi, the learned Assistant Deputy Public Prosecutor, on her part supported the conviction of both appellants since in her view, there was sufficient light to facilitate positive identification.

As regards the issue of the age of the 1st appellant which matter was raised by Mr. Oguk, it was Mrs. Mwangi’s submission that the issue had never been brought up in the two courts below. She however left the issue to the Court to deal with as it thought fit.

It is apparent that the only substantial point of law raised by this appeal is the issue of identification. We have considered the evidence upon which the appellants were convicted and the submissions of Mr. Oguk and Mrs. Mwangi on this issue of identification. The crucial evidence connecting the appellants to the offence was that of Kariuki. The incident took place in broad daylight at about 11.45 a.m. Both the trial and the first appellate courts were satisfied that the appellants were properly identified as among those who attacked and robbed the complainant of his money. Mr. Oguk raised the issue of a single identifying witness which evidence must be treated with greatest care. We agree that the evidence of a single identifying witness calls for greater care as has been observed in a string of decisions starting from **Abdalla bin Wendo & Another v. R. (1953) 20 EACA 166**, **Roria v. R. [1967] E.A. 583**, **Kamau v. R. [1975] E.A. 139** and **King’ori v. Republic [2003] K.L.R 289**. The two courts below were alive to the fact that the trial court was dealing with the evidence of a single identifying witness. But the incident took place in broad daylight. The witness was with the appellants for a sufficiently long time as to remove any possibility of error.

We must reiterate that a second appeal (like the present one) must be confined to points of law and this Court would not interfere with concurrent findings of fact of the two lower courts unless they are shown to have not been based on evidence – see **Karingo v. Republic [1982] KLR 213**. On our part, we have carefully considered the evidence as recorded by the trial court, the findings made thereon and the

observations of the first appellate court and we are satisfied that there was no mistake as to the identity of the appellants. They were properly found guilty of the offence in the second count (robbery with violence contrary to **section 296(2)** of the Penal Code) and hence we uphold their conviction.

In view of the foregoing, we order that the appeal in respect of the 2nd appellant, Aden Abdi Siba is dismissed, but as regards the 1st appellant, we order that his age be determined by a doctor and that the 1st appellant be brought to this Court in Nairobi on 13th October, 2006 when the question of the sentence imposed on him will be dealt with after his age will have been determined by the doctor.

Those shall be our orders.

Dated and delivered at Mombasa this 28th day of July, 2006.

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR