REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 142 of 2005

PARATOTI OLE TEMA ……...…….. APPELLANT

AND

REPUBLIC …….…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Khaminwa & Maraga, JJ) dated 24th May, 2005

in

H.C.CR.A. NO.87 OF 2004)

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JUDGMENT OF THE COURT

The appellant, **Paratoti Ole Tema**, was charged and tried before the Chief Magistrate's Court at Mombasa with three counts, two of attempted robbery with violence contrary to **section 297(2)** of the Penal Code, and the third count of grievous harm contrary to **section 234** of the Penal Code. At the conclusion of the trial he was found guilty of the first two counts and was thereafter sentenced to suffer death as is mandatorily required by the penal provision. No finding was made on the third count as no evidence was adduced on it by the prosecution. The appellant was, accordingly, acquitted of that count.

The prosecution case as presented to the trial court was short and straightforward. On 12th December, 2002, **Caroline Abiero** (*Caroline*) then a secretary with Kisegi Agencies, was at the firm's offices in Mombasa, when at about 12.15 p.m. Three men entered and requested to see the director of the firm one **Suleiman Ouma** (*Ouma*)**.** She was in the office with **Gladys Washuka Kinyanjui** (*Gladys).* Ouma had clients in his office and so the three men were asked to wait for those clients to leave before they would be allowed in. Caroline testified that she was able to observe and talk to these three men. Eventually the clients in Ouma's office came out and Caroline asked the three gentlemen who were waiting to go in. Two of the men went in leaving one with Caroline. Caroline testified that the man who was left behind was the appellant. He was seated near the main door. His explanation for not accompanying his two companions into Ouma's office was that the "**two were enough**."

As soon as the two gentlemen entered Ouma's office, some explosion as that of gunshots was heard from inside. Caroline stood up wanting to go out of the office to find out whether it was an electric fault which had caused the explosion. She was however prevented from leaving her office by the appellant who blocked her way and pushed her back. Soon thereafter the gentlemen who had gone into Ouma's office came out. One of them had a firearm in his hand which he pointed at Caroline and at the same time commanded her to raise her hands. A client of the firm who was waiting to see Ouma was likewise ordered to raise his hands. Both complied. The appellant then immediately sped out of the office. Caroline checked on Ouma and found him lying on the ground with a bullet wound. She made arrangements and the injured man was rushed to hospital for treatment. Unfortunately he succumbed to his injuries and died.

It is in evidence that Caroline raised an alarm when she found her boss lying on the ground. Many people responded to the alarm. The people saw the appellant and his confederates escaping. They pursued them shouting "**thief, thief**". Police constable **Kennedy Karobi** (*Kennedy*) who was on duty with a colleague, police constable Wanjala, heard the shouts and saw three people running towards them. The three ran past where he was and he decided to join in the chase. He saw the three people confront a motorist one Rashid Mohamed Farah *(Farah*) who had yielded at a roundabout, pulled him out of his car, a Toyota Corolla, KAG 224X, and tried to drive it off. Kennedy ordered them to stop and when they defied his order he fired his weapon aiming at the person who had sat behind the steering wheel. The man was fatally injured. The others came out and ran away. Kennedy testified that he observed the two as he pursued them and never lost sight of them. He fired his weapon again and shot one of them in the buttocks as a result of which he fell down. The third man fired back and injured one of the people who were pursuing them. The person whom Kennedy injured was the appellant.

On 15th December, 2002, an identification parade was organized with Caroline and Gladys as the identifying witnesses and the appellant as the suspect. Both witnesses picked the appellant as the person they had seen at their office in the company of two others who fatally shot their boss. Caroline testified that she was able to remember the appellant because he sat in her office for long, she was able to talk to and observe him, she was sure he was the person as he remained in her office for long and it was broad daylight. Gladys testified to the same effect. Farah on the other hand did not observe the appellant as to be able to identify him before the appellant was arrested. Nor did the witness say he identified any of his attackers. He saw the appellant after he was arrested.

In her judgment the trial magistrate (*U.P. Kidula*), after setting out the facts found as fact that Caroline, Gladys and Kennedy, among other witnesses, were witnesses of truth. She believed their evidence that the circumstances which they outlined as to how they identified the appellant favoured a correct identification of him as the person who with two others went to Ouma's office and shot him and later attempted to rob Farah of his motor vehicle. She was also satisfied that the evidence before her established beyond any reasonable doubt that both counts of attempted robbery with violence had been proved. She was however not satisfied the third count of grievous harm was proved as the complainant in that count did not testify. She then proceeded to convict him of the first two counts but acquitted him of the third count. She then sentenced the appellant as earlier on stated. The appellant was aggrieved and appealed against his conviction and sentence to the superior court.

Khaminwa and Maraga JJ. heard the appeal. Like the magistrate, they found as fact that both Caroline and Gladys were with the appellant and his confederates for long in broad daylight. They talked to them and therefore had ample opportunity to observe the appellant. The learned Judges, quite properly, held that even without the evidence of Caroline and Gladys, the evidence of Kennedy alone was sufficient to sustain the appellant's conviction in the second count. They found as fact and held that Kennedy pursued the appellant and his confederates with a view to arresting them. He never lost sight of them. He shot and killed one of them and shot and wounded the appellant. They were satisfied Kennedy was a witness of truth and accepted his evidence. The learned Judges had misgivings regarding the appellant's conviction on count one which alleged that the appellant and his confederates had attempted to rob Ouma of Kshs.250,000/=. They held, correctly in our view, that the trial magistrate having found that the prosecution had failed to show the existence of Kshs.250,000/= in Ouma's office or possession, should not have proceeded to convict the appellant on that count. They therefore, allowed the appellant's appeal

on that count. They however upheld the appellant's conviction on the second count and thus provoked this appeal.

The main ground raised in this appeal is identification. Mr. Aboubakar for the appellant submitted before us that the appellant's conviction in the second count was mainly based on his identification by Kennedy, the complainant in that count having testified that he was not able to identify any of his attackers. Mr. Aboubakar was of the view that the conviction was essentially based on the testimony of a single identifying witness and was in his view unsuitable without independent corroborative evidence. He cited the case of **Libambula V. R. [2003] KLR 547** as authority for his submission. With due respect to him that case is distinguishable from the present one as the robbery in that case was committed at night time and the only source of light was a torch. Conditions favouring a correct identification were difficult. But when this was pointed out to Mr. Aboubakar, his response was that, true, in that case limited light was the difficult situation, and in his view there are other difficult situations which if considered will create a doubt as to the correctness of a suspect's identification. In the instant case, he said, the difficult situation arose when the suspects mingled with people who were milling around the street where the offence charged was committed.

It was also Mr. Aboubakar's view that the evidence of Caroline and Gladys could not provide corroboration to that of Kennedy as in his view these two women were called to the scene after the appellant had been arrested. He thus implied that the appellant had been exposed to both witnesses.

In answer to those submissions Mr. Ogoti, Principal State Counsel, expressed the view, that the evidence of constable Kennedy did not, as a matter of law, require corroboration. Besides, he said, the law does not require any particular number of witnesses in ordinary cases to establish a fact. In his view the evidence against the appellant was not only overwhelming, but it was clear and acceptable.

This is a second appeal. As we have endeavoured to show both courts below made concurrent findings of fact that Caroline, Gladys and Kennedy, among other witnesses, were witnesses of truth, they graphically gave an account as to how they were able to identify the appellant. The offences he faced were committed in broad daylight, and the witnesses had the appellant under observation for long. None of the witness's testimony required corroboration as a matter of law. Corroboration is a technical term, and is required only in specific cases for instance where the main witness is a child of tender years. It may also be required as a matter of practice where, as in the **Libambula** case, circumstances favouring a correct identification are difficult. We do not think the circumstances under which the appellant was arrested were difficult. Kennedy testified that he saw the appellant and two others in broad daylight trying to rob Farah of his motor vehicle. He was about 50 metres away. He fired his weapon and hit one of the three men. He was close enough otherwise he would have easily missed his target. He saw the appellant running away with another person who escaped. He was able to shoot the appellant and disabled him. The circumstances cannot be said to have been difficult as to create a doubt as to the correctness of the identification of the appellant by constable Kennedy.

Besides the evidence of Caroline and Gladys is not worthless as Mr. Aboubakar would want us to believe. The attempted robbery at Kisegi Agencies and the one in which an attempt was made to rob Farah of his motor vehicle were so closely interrelated that the testimony of the two women cannot be isolated. The appellant according to the prosecution was arrested as he escaped from Kisegi Agencies. The appellant and his confederates wanted to escape fast and hence the attempt to rob Farah of his motor vehicle. The two offences were part of the same **r*es gestae*** and the evidence on one is relevant to the other. We agree with Mr Ogoti that the evidence of both Caroline and Gladys was properly taken into account and, contrary to what Mr Aboubakar said, these witnesses independently went to the police station to make a report about the incident at their premises and were not therefore present at the scene where the appellant was arrested. They picked the appellant in an identification parade which, to our mind, was well conducted.

Mr Aboubakar raised other issues, more specifically, that some essential witnesses were not called and that the plea was not properly taken. These are clearly flimsy grounds. The prosecution is not bound to call more witnesses than are necessary to establish a particular fact. The principle of law is that the

court may only draw an adverse inference that had the uncalled witnesses testified their testimony would have been adverse to the prosecution case where the evidence adduced is barely sufficient to support the charge **[Bukenya v Uganda 1972 E.A 549]**. As we stated earlier the evidence against the appellant is overwhelming with the result that the submission by Mr. Aboubakar on this issue is with due respect to him, without merit.

We also come to the same conclusion on his submission that the plea was not properly taken. Although the record is silent as to whether the charge was explained to the appellant, the same record is clear that the appellant responded to each charge. He pleaded not guilty to each count. The case was thereafter listed for hearing. Witnesses testified. He was given an opportunity to cross-examine them and he himself presented his defence. We do not see how the appellant was prejudiced, if at all.

We have said enough to show that the appellant's appeal against both conviction and sentence is without merit. In the result we hereby dismiss it.

It is so ordered.

Dated and delivered at Mombasa this 21st day of July 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR