



**PETER NDUNGU NJOROGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL 207 OF 2005**

**SOLOMON THUKU KUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction (s) and Sentence(s) in Criminal Case No. 867 of 2004 of the Senior Resident Magistrate's Court at Githunguri (Lucy Mutai – SRM)**

**J U D G M E N T**

**PETER NDUNGU NJOROGE**, hereinafter referred to as the 1<sup>st</sup> Appellant and **SOLOMON THUKU KUNGU**, 2<sup>nd</sup> Appellant were both convicted in one count of **ROBBERY** contrary to **Section 296(1)** of the **Penal Code** and each sentenced to 7 years imprisonment. They were both aggrieved by the conviction and sentence and therefore lodged their appeals. I have consolidated the appeals for convenience of hearing.

The Appellants raised similar grounds of appeal in which they challenged the conviction on the basis of identification by a single witness, botched identification parades and the rejection of the defence without giving it due consideration. There were other technical issues raised concerning the conduct of the prosecution case and the prolonged duration in which the 2<sup>nd</sup> Appellant was kept in police custody before being charged in court.

The facts of the prosecution case were that on 10<sup>th</sup> January 2004, at about 9.30 p.m. the Complainant, PW1 was approached by two people. They asked the Complainant who was a taxi driver, to drive them to Kiarie Centre. The Complainant charged Kshs.200/- for the trip. On the way to Kiarie Centre, the two men turned hostile, with one whipping out a pistol and ordering him to stop. They removed the vehicle's spare wheel, jack, radio and other assorted vehicle spare parts. They also stole the Complainant's mobile phone and cash Kshs.850/-. They left him on the road with his vehicle. Six months later, the Complainant identified the Appellants in an identification parade.

The 1<sup>st</sup> Appellant gave an alibi defence and so did the 2<sup>nd</sup> Appellant. Each also called witnesses to corroborate their defences.

In this appeal, the Appellants represented themselves while **Mr. Makura** represented the State and opposed both appeals.

Going directly to the evaluation of the evidence, I find it expedient to deal with both identification and identification parades together.

The Appellants' written submissions on the issue of identification was that the circumstances of identification were difficult and therefore not conducive to positive identification by a single witness. The Complainant's evidence was that he met the two hirers at 9.30 p.m. and claimed that there were lights nearby. The Appellants contested that evidence submitting that there was inadequate evidence to establish whether from the distance of the alleged source of electricity lights, to the vehicle where the Complainant was when approached there was sufficient light and opportunity to see and identify his assailants.

**Mr. Makura** for the State urged the Court in his submission to go by the Complainant's evidence that there was light at the locus in quo which enabled him to see and subsequently identify the attackers.

In **GABRIEL KAMAU NJOROGE VS. REPUBLIC [1982-88] KAR 1134** it was held that: -

***"... it is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weight conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for it..."***

The learned trial magistrate, at page 5 and 6 of the judgment stated that she was satisfied with the evidence of identification because the Appellants had both been identified by the Complainant in two separate identification parades.

In **GIKONYO KIRUMO VS. REPUBLIC 1980 KLR 33** the Court of Appeal held: -

***"Where the conviction depends upon the identification of the defendant by a single witness, the evidence must be always tested with the greatest care. The Court must satisfy itself that it is safe to act upon that evidence. Whether its safe is a question of mixed law and fact."***

The Complainant's evidence was thus: -

***"The scene was well lit and I could see their faces well. 1<sup>st</sup> accused sat on the back seat and 2<sup>nd</sup> accused sat next to me."***

Apart from making a passing remark concerning the conditions of lighting at the scene where his attackers boarded his vehicle, the Complainant did not describe the light, its intensity, its distance in relation to the attackers or the time he had them under observation. From the Complainant's evidence it is clear that the two men told him where they wanted to go and after he quoted the price, they immediately boarded the vehicle. Clearly the Complainant had a fleeting glance at them under lighting conditions which remained unclear by the close of his evidence. The Complainant stated that the head lamps of his car were on where he was robbed. He said he was asked to "turn the other way". He did not in his evidence claim to have had any further opportunity to see and observe the attackers. In the circumstances it does appear that the identification the Complainant was relying on was at the point the attackers boarded his vehicle.

In **ABUBAKAR MUSA YAKUBA vs. REPUBLIC CA No. 85 of 2000 (unreported)** the Court held: -

***"It is an error to sustain the conviction solely based on identification of one person in unfavourable circumstances and in the absence of corroborative evidence. In our judgment it is unsafe to say the least, to sustain a conviction based on such circumstances."***

The Complainant was the sole identifying witness. The circumstances of identification were difficult. There was no evidence that the Complainant gave any description of his attackers to the police as an

indication of who he could be able to identify if the assailants were arrested. In the circumstances the Complainant's evidence of identification was far from being safe and positive and in the circumstances needed corroboration.

The issue is whether the identification parades provided that needed corroborative evidence.

The Appellant's complained that the identification parades were botched for two reasons. One, the fact that the members of parades were similar except for the two Appellants who were the suspects under investigation in this case. The second reason given is different for each Appellant. The 1<sup>st</sup> Appellant stated that his photograph was taken from his house on the day of arrest and shown to the Complainant before the identification parade. The 2<sup>nd</sup> Appellant on his part said that after his arrest, one police officer **Muganda** took him to an office at the police station where he was shown to the Complainant before the identification parade.

I considered the clear evidence of the prosecution that the identification parades were conducted over six months after the date the offence was committed, alongside the evidence that the members of both parades were exactly the same apart from the Appellants. The lapse of time between the date of offence and date of identification parades is so long as to create a bit of anxiety concerning the safety of the identification. When one considers that the Complainant had a fleeting glance at his attackers under difficult circumstances, that the attackers were total strangers, the lapse of six months is long enough to cause the identification in the parades to be of no material importance given all the circumstances of the case. The lack of prior description of his assailants, the fact that he never led to their arrest all, erode the weight that can be given to the identification by the Complainant. The use of the same members of the parade in the identification conducted on the same day further eroded the quality of the Complainant's visual identification of the Appellants and the weight identification parades could receive in the case. Having carefully tested the Complainant's evidence of identification I find that it was not watertight, was unsafe and could not sustain a conviction. The identification parades also did not provide corroboration to the Complainant's evidence for reasons I have given.

The Appellants gave alibi defence and called a witness each who corroborated their defences that each was at his home, with his family, at the time of the alleged offence. The learned trial magistrate trashed the alibi defences and found that the defence evidence was doctored on the basis that their witnesses were their father and mother, respectively, and not their spouses. In **WANGOMBE VS. REPUBLIC [1980] KLR 149** the Court of Appeal held: -

***“When an accused person raises an alibi as an answer to a charge made against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution ought to test the alibi whenever possible but different consideration may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution..”***

The learned trial magistrate grossly misdirected herself by trashing the alibi defence without weighing it against the prosecution case even though the prosecution failed to test it as required. The available evidence in this case shows that the alibi defence was raised at the trial during the defence case. That does not excuse the failure by the prosecution to test the alibi defence as required of them. The Appellants' alibi defence was strong and unrebutted by the close of the defence case. Had the learned trial magistrate correctly directed her mind? One, this issue I believe that she would definitely had come to a different conclusion than the one arrived at in this case.

I must in passing comment on the reduction of the charge from Capital robbery contrary to **Section 296(2)** of the **Penal Code** to Simple Robbery contrary to **Section 296(1)** of the **Penal Code**. It was a serious misdirection. The learned trial magistrate stated that since no violence was used in this case then the Capital charge was not proved.

In **MWACHANJE & 2 OTHERS VS. REPUBLIC [2002] 2 KLR 341** at page 348 it was held:

*“We however point out that in drawing such charge, the prosecution have the liberty, taking: into account the relevant circumstances of the case, to base the same on any of the three limbs of Section 296(2) of the Criminal Code. the three limbs are*

*(a) Armed with any dangerous or offensive weapons or*

*(b) Is in company with one or more other person or persons.....*

*(c) At or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence.....”*

It is clear that a capital robbery charge can be maintained on any one of the three limbs cited in **Mwanchanje’s** case.

In **JOHANA NDUNGU VS. REPUBLIC CA 116 OF 1995 (unreported)** the Court of Appeal held:

*“But instead of finding the Appellant guilty under sub-section (2) of the Section the trial magistrate made a further finding that (to quote again) “...the offence was not that aggravated to warrant a capital robbery charge”. The Word “aggravated” is not used anywhere in subjection (2) of the section. That clearly was an introduction of a qualifying factor which there is no mention in the sub-section – not even an iota of hint to warrant the type of interpretation put by the trial magistrate. It constitutes a grave misdirection on a point of law. Unfortunately the judge of the 1<sup>st</sup> appellate court over-looked this misdirection.*

*We agree with Mr. Gacivih that unless strong directions are sent to the subordinate trial courts and the judges of the 1<sup>st</sup> appellate court they will continue at their whim to tamper with the strict declaration of law and thereby make a mockery of the purpose for which Section 296(2) was introduced in the Penal Code.”*

*If proved facts show that robbery under Section 296(2) has been committed then the trial magistrate is obliged to convict the accused under this section and impose the sentence of death. Use of terms such as the one used in this case by the magistrate is not fitting to change facts so as to justify a conviction under Section 296(1) when the proved facts show that the charge under Section 296(2) has been proved. The same message also goes to the judges of the 1<sup>st</sup> appellate court who, because their judgments are binding authorities for the subordinate courts to follow, have a duty to give correct guidance in strict accordance to law.”*

The use of words such as “since no violence was used at the time I proceed to find the accused persons guilty under Section 296(1) of the Penal Code...” are a gross misdirection on a point of law, do not appear anywhere under **Section 296(2)** of the **Penal Code** nor are they at all hinted or alluded to under that section. Such terms should not be used to justify a reduction of the Capital Charge. See **page 9 and 10 of judgment.**

Having said this, for reasons I have given in this judgment, I find the appeals have merit and proceed to allow them, quash the convictions and set aside the sentences. The Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 14<sup>th</sup> day of March 2007.

.....

**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellants present

Mr. Makura for State

Tabitha: CC

.....

**LESIT, J.**

**JUDGE**