REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 28 of 2006

(From original conviction and sentence in criminal case No. 2087 of 2000 of the Senior Principal Magistrate's Court at Naivasha – M. M. Muya [S.P.M.])

STEPHEN MURIGI……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT OF THE COURT

The appellant, Stephen Murigi was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 16th October 2000 at Kabati estate, Naivasha, the appellant jointly with others not before court robbed John Muthiora Muita of his Seiko 5 wrist watch while armed with a pistol and at or immediately before or immediately after the time of such robbery used actual violence to the said John Muthiora Muita. The appellant pleaded not guilty to the charge. After a full trial, he was found guilty as charged and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant basically raised two grounds of appeal challenging the decision of the trial magistrate to convict him. He was aggrieved that he had been convicted based on the evidence of a single identifying witness made in difficult circumstances. He was further aggrieved that the trial magistrate had not considered that the conditions prevailing at the time of the robbery were such that the complainant could not have identified him. He was further aggrieved that the trial magistrate had considered the evidence of the recovery of a white cap which was allegedly worn by the person who robbed the complainant and which was similar to the white cap which was found in possession of the appellant. He was aggrieved that his alibi defence was not considered by the trial magistrate before he reached the decision convicting him.

At the hearing of the appeal, the appellant, with the leave of the court, presented to the court written submissions in support of his appeal. He urged this court to consider the said submissions and allow his appeal. Mr. Koech for the State did not support the conviction of the appellant. He conceded to the appeal. He submitted that the evidence of identification that was offered by the appellant was not sufficient to sustain the conviction of the appellant. He submitted that the evidence of the identification parade which was carried out by the police was not adduced during trial. He further submitted that the

condition under which the said identification was made was not favourable and therefore it would be unsafe to convict the appellant based on such evidence.

This being a first appeal, this court is mandated to re-consider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (*See* **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved the charge of robbery with violence against the appellant to the required standard of proof beyond reasonable doubt. We have considered the submission made by the appellant and that made by Mr. Koech on behalf of the State. We have also re-evaluated the evidence that was adduced before the trial magistrate.

Mr. Koech has in our view rightly conceded to the appeal. The complainant in this case PW1 Dr. John Muita was at the gate of his house on the 16th October 2000 at about 7.00 p.m. when he was accosted by a gang of robbers. One of the robbers was armed with a pistol. The complainant, who was in his pick-up, was ordered to disarm the alarm in the said motor vehicle, after which the robbers commandeered the said motor vehicle and drove it some distance from the house of the complainant. At that particular time, the complainant had been held hostage. After a short distance, the motor vehicle stalled and stopped. The robbers then beat up the complainant and ordered him to restart the vehicle. In the process of being beaten, the complainant was hit with a wooden plunk on the head. He fell down and became unconscious. When he regained his consciousness, he realized that the robbers had escaped. He immediately sought medical help and was attended to by a doctor. PW4 Dr. Musalia produced the P3 form in evidence which had been filled by Dr. Odhiambo after he had treated the complainant. Dr. Odhiambo was of the opinion that the degree of injury which the complainant had sustained on his forehead was harm.

The complainant testified that he was able to identify the appellant as being among the gang of robbers by the headlights of the passing motor vehicles when his hijacked motor vehicle stalled on the road. He testified that he was able to identify the appellant by the white cap that he was wearing. PW2 Esther Ochora was employed as a house help by the complainant. She testified that when she went to open the gate of the complainant's house on the material evening, he witnessed the complainant being robbed by a gang of robbers who were armed with a pistol. She however was not able to identify any of the robbers because the robbers were wearing disguises or masks. It is evident that although the complainant testified that he identified the appellant during the robbery, he did not give the description of any of the robbers when he made the first report to the police. It is further evident that the police did not conduct an identification parade after the appellant was arrested on an unrelated offence.

The complainant made the identification of the appellant at night. He said that he was able to identify the appellant by the headlights of the passing motor vehicles. Having re-evaluated the evidence on record we are unable to hold with certainty that the complainant positively identified the appellant. The circumstances under which the said identification was made were difficult. It was at night. The source of light was intermittent. We cannot exclude the possibility that putting into account the fact that in the hectic circumstances of the robbery the complainant could have been mistaken that he had identified the appellant. The complainant had just been assaulted by the robbers and had been injured. The Court of Appeal held in **Maitanyi –vs- Republic [1986] KLR 198** at page 200 that;

"Although the lower courts did not refer to the well known authorities Abdulla bin Wendo and another –vs- Reg (1953) 20 EACA 166 followed in Roria –vs- Rep. [1967]E.A. 583, it may be that

the trial court at least did have them in mind. It is important to reflect upon the words so often repeated yet bear repetition:-

"subject to the well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether be it circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."

No identification parade was conducted by the police after the arrest of the appellant. The identification of the appellant by the complainant was therefore dock identification. As was held by the Court of Appeal in **Frederick Ajode –vs- Republic CA Criminal Appeal No. 87 of 2004 (Kisumu) (*unreported*),** dock identification is generally worthless and a court should not place much reliance on it unless it was preceded by a properly conducted identification parade. In **James Tiokoi Koitoi –vs- Republic CA Criminal Appeal No. 138 of 2003 (Nyeri) (*unreported*)** the Court of Appeal held that evidence of a single identifying witness at night must be tested with the greatest care and must be watertight to justify a conviction. In the present case, the identification was made at night under uncertain lighting conditions. We are not prepared to hold that the appellant was properly identified by the complainant in such circumstances. No other evidence was tendered by the prosecution that could connect the appellant to the robbery.

It is clear from the circumstances of this case that the police did not properly investigate this case. The evidence that was offered before the trial court could not sustain the conviction of the appellant on the serious charge of robbery with violence. The upshot of the above reasons is that the appeal filed by the appellant must be allowed. His conviction on the charge of robbery with violence is hereby quashed. The death sentence imposed on him is hereby set aside. The appellant is ordered released from prison and immediately set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 20th day of December 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE