

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.323 OF 2012

(An Appeal arising out of the conviction and sentence of T. NGUGI - SRM delivered on 27th November 2012 in Makadara CM. CR. Case No.395 of 2011)

EMMANUEL KASANGA

MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Emmanuel Kasanga Musyoka 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 16th January 2011 at Meta Meta in Huruma Nairobi County, the Appellant, jointly with another not before court, while armed with a pistol violently robbed Agnes Wanjiku Maina of Safaricom scratch cards valued at Kshs.3,000/- and cash Kshs.20,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Agnes Wanjiku Maina (hereinafter referred to as the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial he was convicted of the lesser but cognate offence of simple **robbery** contrary to **Section 296(1)** of the **Penal Code**. He was sentenced to serve six (6) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the Appellant raised several grounds challenging his conviction and sentence. He was aggrieved that he had been convicted essentially on the evidence of identification which had been obtained in circumstances that did not favour positive identification. He faulted the trial magistrate for relying on dock identification in the absence of actual identification made in an identification parade by identifying witnesses to convict him. He was aggrieved that his defence had not been taken into consideration before he was convicted. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. Ms. Atina for the State opposed the appeal. She submitted that the prosecution had adduced sufficient evidence of identification to secure the conviction of the Appellant. She urged the court not to disturb the conviction and sentence.

Before giving reasons for its determination, this court will set out the facts of this appeal albeit briefly. The complainant in this case owned a retail shop at Huruma. On 16th January 2011 at about 9.30 p.m. she was at her shop selling goods. She recalled that two customers came to her shop and requested to be given change of Kshs.100/-. She obliged and gave them the change. She testified that the two men later returned and bought milk of Kshs.15/-. She was given a note of Kshs.100/-. She gave them change of Kshs.85/-. The complainant testified that at the time she was in the shop with her niece PW2 Beatrice Njeri Wachira. It was shortly thereafter that one of the men locked the door of the shop and robbed her of Kshs.20,000/- and Safaricom airtime scratch cards of Kshs.3,000/-. She was subdued when a pistol was pointed at her by one of the men. After the robbery, she raised alarm. The men rushed out of the shop. They shot in the

air two times to scare away those who had come to assist the complainant. PW4 Selina Mutua, a neighbour recalled that at about 9.00 p.m. at the particular night she went to the complainant's shop to purchase some groceries. She saw two men in the shop. After purchasing the groceries she went back to her house which was on the 2nd floor of the same building. Before she reached her house she remembered that she had forgotten to purchase margarine. She went back to the shop. She found the door of the shop slightly opened. One of the men was standing outside the door. The other was inside the shop. The complainant signaled her that she was being robbed. She went and sought help from neighbours. When the neighbours attempted to confront the men, a shot was fired in the air. This scared away those who intended to come to the help of the complainant.

The complainant, PW2 Beatrice Njeri Wachira and PW4 Selina Mutua testified that they identified the Appellant as being in the company of his accomplice in the robbery. Interestingly, other than stating that they had identified the Appellant in the course of the robbery, they did not give the description or the physical features of the robbers in the first report that they made to the police. The complainant testified that prior to the night of the robbery she had seen the Appellant in the neighbourhood. The complainant testified that in the first report that she made to the police, she told the police that she would identify the robbers if she had the opportunity to see them again. PW2 and PW4 also testified that they were certain that the Appellant was one of the two-man gang that robbed the complainant. Similarly, they did not give the description of the robbers in the first report that they made to the police.

Three days later, on 19th January 2011 at about 5.00 a.m. while PW3 David Kibet Rono and another officer were on patrol within Huruma Area, they arrested the Appellant. He told the court that he arrested the Appellant because he was in a dark area and was behaving suspiciously. He took him to Huruma Police Station where he was detained. Later on the same day, the complainant and PW2 were called to the police station where they identified the Appellant after he had been brought from the cells. No identification parade was conducted. PW5 Corporal Nicholas Mulira investigated the case. After concluding his investigations, he formed the opinion that a case had been made for the Appellant to be charged with the offence for which he was convicted. In his defence, the Appellant declared his innocence and denied that he was involved in the robbery in question. He testified that he was arrested while he was in the normal course of life.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court before reaching its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses as they testified and cannot therefore comment on the demeanour of the witnesses. (See **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination in this appeal is whether the prosecution established its case on the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt.

In the present appeal, it was clear that the Appellant was convicted essentially on the evidence of identification. The identification was purportedly made at 9.30 p.m. Although the identifying witnesses testified that there was security light at the scene of the robbery, they did not give the description of the robbers in the first report that was made to the police. Such description should have included the physical attributes of the robbers and their clothing. The identifying witnesses were also required to explain to the court how they were certain that it was the Appellant who was one of the robbers and not any other person. It will not do for the identifying witnesses to state in the first report made to the police that they would be able to identify the robbers if they had an opportunity to see them again. Neither would it help for the identifying witnesses to state that they had previously seen the robbers within the neighbourhood without explaining the circumstances in which they saw them.

In the present appeal, it was clear that the identifying witnesses were exposed to the Appellant after he was arrested allegedly for behaving in public in a suspicious manner. The ideal situation should have required the police to conduct an identification parade to eliminate the possibility that the identifying witnesses may have been mistaken when they said that they had identified the Appellant as one of the men who robbed them. In the absence of such identification parade, this court cannot, with certainty, reach the determination that the identification of the Appellant as one of the robbers was free from the

real possibility of mistaken identity. This court agrees with the Appellant that when the identifying witnesses purported to identify him on the dock during trial, such identification was worthless in the absence of the safeguards stated above.

In the premises therefore, it is clear from the foregoing that the appeal shall be allowed. The evidence of identification adduced by the prosecution witnesses cannot support the Appellant's conviction on the charge brought against him. The prosecution did not adduce any other evidence to connect the Appellant with the crime. His conviction is therefore quashed. The sentence that was imposed upon him is set aside. He is ordered set at liberty forthwith unless otherwise lawfully held.

DATED AT NAIROBI THIS 31ST DAY OF JANUARY 2017

L. KIMARU

JUDGE