



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.194 OF 2015**

***(An Appeal arising out of the conviction and sentence of Hannah Ndungu (Ms.) - CM delivered on 26<sup>th</sup> March 2015 in Nairobi CM. CR. Case No.42 of 2011)***

**SALOME DAVID MAORE.....**

**.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Salome David Maore was charged with 3 others (who were however acquitted) 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 1<sup>st</sup> January 2011 at Pangani area in Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons namely pistols robbed PC Gabriel Tonkei of a pistol Serial No.F4563 loaded with 15 rounds of 9mm caliber ammunition, a Nokia mobile phone and Kshs.6,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said PC. Gabriel Tonkei. When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charge. After full trial, she was convicted as charged. She was sentenced to death. She was aggrieved by her conviction and sentence. She has appealed to this court against both conviction and sentence.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. She was aggrieved that she had been convicted on the basis of insufficient, contradictory and incredible evidence. She took issue with the fact that the trial magistrate had not properly analyzed the evidence which would have led her to the finding that the ingredients to prove the charge had not been established. She faulted the trial magistrate for failing to accord her a fair hearing by giving undue weight to the evidence adduced by the prosecution witnesses and ignoring the evidence she had adduced in her defence. The Appellant was of the view that the trial magistrate had failed to appreciate that vital and crucial witnesses had not been called by the prosecution to testify in the case. She stated that the prosecution's case was based on circumstantial evidence which was not conclusive. She was of the opinion that the prosecution had not discharged the burden placed upon it to establish its case to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on her.

During the hearing of the appeal, the court heard oral submission made by Mr. Swaka for the Appellant and by Ms. Aluda for the State. Mr. Swaka submitted that the prosecution had not established its case to

the required standard of proof. The investigating officer did not testify in the case. He complained that while the Appellant's co-accused in the trial court were acquitted on account of the fact the investigating officer had not testified in the case, the Appellant was convicted yet the same reasoning apply to her. The Appellant submitted that the complainant's testimony was not corroborated. He took issue with the fact that the trial court had relied on extraneous issues including a statement made under inquiry which was not produced in court. Learned counsel submitted that although the complainant testified that he had met the Appellant on the material night for the first time, he did not give her description as that of the robber in the first report that was made to the police. No identification parade was mounted by the police when the Appellant was arrested. In his evidence, the complainant admitted that the Appellant was a complete stranger to him. He submitted that the trial court did not take into account the Appellant's alibi defence before reaching her determination to convict the Appellant. He explained that the ingredients supporting the charge of robbery with violence were not established. He urged the court to allow the appeal.

Ms. Aluda for the State conceded to the appeal. She submitted that the robbery took place at night. The robbery took a short span of time. The Appellant was a stranger to the complainant. There was no clear description of the source of light that would have enabled the complainant to identify the Appellant. No identification parade was conducted. The Appellant was arrested a week after the commission of the offence. It was not clear how the Appellant was arrested. The Appellant's co-accused in the trial court were acquitted. The gun that was robbed from the complainant, although recovered, was not produced into evidence during trial. Two crucial witnesses, namely the investigating officer and the arresting officer, did not testify in the case. In her considered view, the prosecution's case did not establish the charge brought against the Appellant to the required standard of proof. She urged the court to allow the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.***

In the present appeal, the issue for determination by the Court is whether the prosecution adduced sufficient evidence to establish the charge brought against the Appellant of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

The facts of this case are rather straight forward. The complainant in this case PW1 PC Gabriel Tonkei was robbed of a pistol, a Nokia mobile phone and Kshs.6,000/- cash. According to the complainant he got out of his house at about 10.30 p.m. with a view to sending money through Mpesa. The day was 1<sup>st</sup> January 2011. The distance from his house to the Mpesa shop was about 100 metres. While at the Mpesa shop, he met with a woman who requested to be shown direction to Bilton Hotel within Park Road area. He offered to escort her to the hotel. While on the road, a gang of three men in a motor vehicle stopped and ordered him inside the motor vehicle. The woman accompanied the men. He was threatened with an AK 47 rifle. He complied with the directions he was given and entered the motor vehicle. He was blindfolded. He was taken around for some time before he was dumped at Forest Road. He was robbed of his regulation pistol, his mobile phone and Kshs.6,000/-. In his testimony before court, he testified that he was able to identify the Appellant as the woman who was with the men that robbed him. This was a week after the incident when the Appellant was arrested. It was evident from his evidence that he did not give the description of the woman who was an accomplice to the men who robbed him in the first report that he made to the police. No identification parade was held. The complainant admitted in his evidence that

he was a stranger to the woman that had sought directions from him.

In her judgment, the trial court held as follows in evaluating the complainant's evidence of identification:

***“The complaint (sic) explained that he saw her during the robbery. They walked together as he was shown her the way to Bilton Hotel. He clarified that during cross-examination. He had met her standing next to door of the Mpesa shop and they walked together. He said that from the time he met the lady to the time of the attach (sic) it was about 20 minutes. I believed that was sufficient time for him to see and register her in (t)his mind in any case the meeting was friendly and relaxed because he was showing her the way.”***

This court finds fault with this analysis of the evidence of identification. The trial magistrate did not explain how the complainant was able to identify the Appellant as the woman whom he met at the Mpesa shop when it is a fact that he did not give a description of the woman in the first report that he made to the police. He did not give the source of light that enabled him to register the description of the woman in the 20 minutes that he interacted with her. *Was there light between the Mpesa shop and Bilton Hotel? Was this light sufficient to enable the complainant be certain that the woman was the Appellant?* The complainant admitted that it was the first time he met the woman. He had also taken a few tots of whisky prior to meeting with the woman. This court is not persuaded that in such short interaction, the complainant registered the physical and facial appearance of the Appellant that enabled him to be certain that the woman was the Appellant when she was arrested a week after the incident.

This court holds that the trial court did not properly evaluate the evidence of identification before arriving at the decision to convict the Appellant. The trial court did not take into account the fact that the evidence adduced by the complainant was that of a single identifying witness made in difficult circumstances which should have been corroborated by other evidence (See **Maitanyi –vs- Republic [1986] KLR 198**). The trial court did not warn itself of the danger of convicting the Appellant based on the evidence of a single witness. In the absence of any other corroborating evidence, this court agrees with the Appellant that the prosecution did not adduce any evidence to sufficiently connect her with the crime. The evidence was woefully insufficient. The prosecution, correctly in the view of this court, conceded to the appeal.

The upshot of the above reasons is that the appeal lodged by the Appellant has merit and is hereby allowed. The conviction of the Appellant is quashed. The sentence is set aside. She is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF APRIL 2016.**

**L. KIMARU**

**JUDGE**