REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 812 Of 2001

ISAIAH MUTUMA *Alias* DUNCAN MURIITHI NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 13 of 2001 delivered by Hon. R.A Mutoka (Mrs.),P.M on 11th July, 2001).

JUDGMENT

BACKGROUND

The Appellant, Isaiah Mutuma alias Duncan Muriithi Nyaga, was charged, in the first count, with committing the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars were that on the 14th day of December, 2000 at Githurai 44 in Nairobi within Nairobi area jointly with others not before court while armed with dangerous weapons namely a pistol serial number 37431 robbed James Githundu Gathemba of cash Kshs. 700/-, one bicycle valued at Kshs. 4000/- and cigarettes at Kshs 25,000/- and all valued at Kshs 29,700/- and at or immediately before or immediately after the time of such robbery used actual violence to the said James Githundu Gathemba.

In count 2 the Appellant was charged with the offence of being unlawfully in possession of a firearm contrary to Section 4(2)(a) of the Firearm Act, Cap 114 of the Laws of Kenya. The particulars were that on the 14th day of December, 2000 at Githurai 44 in Nairobi within Nairobi area jointly with others not before the court, was unlawfully found in possession of Beretta pistol serial number 37431 without a firearm certificate in force at the time.

In count 3, the Appellant was charged with the offence of being unlawfully in possession of ammunition without a firearm certificate contrary to Section 4(2)(a) of the Firearm Act, Cap 114, Laws of Kenya. The particulars of the offence were that on the 14th day of December, 2000 at Githurai 44 in Nairobi within Nairobi area, the jointly with others not before the court was unlawfully found in possession of one round of .9 mm ammunition without a firearm certificate in force at that time.

The Appellant was arraigned before the magistrate's court and a trial held at the end of which he was found guilty on all counts. He was only sentenced in count II to death. It must be noted that this is a rehearing of the Appellant's appeal as directed by the Court of Appeal. In this hearing, he set out the same grounds of appeal filed in the year 2001 as follows;

1. That the learned trial magistrate erred in relying on the evidence of PW1 and PW2 as truthful witnesses.

2. That the trial magistrate erred by admitting the extra judicial statement in evidence as it was improperly obtained especially as the prosecution failed to avail the mentioned officers who were involved in torturing him.

3. That the learned magistrate erred by failing to consider the fact that the case was not investigated to show he was the assailant.

4. That the learned magistrate erred by failing to consider the defence case and this constituted a breach of the rules governing natural justice.

5. That the prosecution case was not proved at all as no medical evidence was tendered supporting the violent robbery.

He supplemented the same with written submissions that set out that the he was convicted on the evidence of identification that was not sufficient, and as set out in **Kiarie v Republic[1984] KLR 739** such evidence should be watertight. He submitted that the fact that an offence occurred in broad daylight did not mean that mistakes of recognition could not occur. He relied on **Naftali Njeru Irungu v republic, Criminal Appeal No. 1334 of 2002.** He also submitted that the learned magistrate erred in rejecting his defence of mistaken identity as far-fetched without weighing her previous finding in her judgment that PW3 was categorical that the person who committed the robbery was stoned to death. He contended that this misdirection by the learned trial magistrate occasioned a grave miscarriage of justice and that the finding of guilt was wrong and not based on sound evidence but on inconsistent, contradictory and inconclusive evidence.

He further submitted that the failure to state the distance that was covered when the assailant was pursued, how long the chase took and how many times the chain of the chase broke down was fatal to the identification of the Appellant. He further averred that the fact that the complainant did not participate in the arrest of one of the robbers who was later lynched by a mob means that he (Appellant) could not have been the robber. Further, that all the witnesses confirmed that the robber who had been chased by the mob was stoned to death. Furthermore, even in court the complainant did not identify him in the dock. He relied on **Robert Gitau v Republic(UR) Criminal Appeal no. 63 of 1990(Nakuru)** where it was stated that, *"**...the evidence of identification should be tested with the greatest care especially when it is known that the conditions favoring a correct identification were difficult..."***

The Appellant further took issue with the prosecution's reliance on retracted confession evidence which he termed as subversion of justice. He therefore prayed that the appeal to be allowed.

Learned State Counsel, Miss Sigei opposed the appeal. She submitted that all the ingredients of the offence of robbery with violence were proven beyond reasonable doubt. She further submitted that PW1 had given the description of the robbers to PW3 who realized he had met them and they gave chase. She submitted that the prosecution relied on the confession that was corroborated by the evidence of PW1, PW2, PW3 and PW4 plus the sequence of events at the scene. She submitted that PW1 was able to recognize the Appellant from previous sightings and from the clothes he wore and that the prevailing conditions, daylight, enabled a positive identification. She therefore prayed for the court upholds the conviction and sentence.

EVIDENCE

This being the first appellate court its duty is to reevaluate the evidence and come up with its own findings and conclusions. See **Okeno v Republic(1972) EA, 32.**

The prosecution's case was that the complainant was making deliveries on the day in question when he was accosted by three men. The first man had a gun and threatened him with it. One of the men took his

bicycle and rode off while the others robbed him. They then instructed him to walk off and not look back which he did. After a while, he turned and saw the men were leaving. He decided to go to the Chief's camp for help and on his way there he ran into his friend who had come across the thieves and they decided to pursue the thieves. They chased after them and the thief who had a gun shot in the air. A multitude of people formed and chased after the man and he finally ran into a dead end and they were able to subdue him. He was arrested and taken to the police station and finally charged in court. The prosecution's case was that the man who arrested was the Appellant and he later gave a confession of guilty and involvement in the matter.

PW1, James Githundi Gathemba was the complainant**.** He was a trader with a shop in Githurai 44. He was a cigarette sales man. He recalled that on 14th December 2000 he bought a carton of cigarettes worth 2,500/- and started distributing them to shops. At about 7:15am he was near the Githurai 45 shopping centre on his bicycle when he heard someone call him. He stopped and he saw three men approaching him and the one in front was holding a pistol. The man with the pistol threatened him with it and ordered him to give him all his money. He proceeded to search the witness and found Kshs. 700/- that was in his pocket.

One of the other men told the witness to release the bicycle and he rode off on it. The man with the pistol pointed it at the witness and told him if he made any noise he would be shot. The men then asked him to accompany them and they walked down an earthen road where he was asked to walk ahead of them and not look back. He walked a distance before turning back and noticed that the men were not there. He walked back to the main road and he saw the two men walking along the main road. He crossed the road and ran to the Chief's camp where he found some young men he knew and he informed them what had transpired. He showed them the robbers walking down the main road. Together with the young they ran after the robbers. One of the pursuers jumped on one of the robbers who then produced a pistol and shot in the air. They all ran away. They got to a field and resolved to go back and search for them. They went across the railway line where they found the man holding the pistol who then on seeing them started running. He shot in the air and ran ahead of them. After a while they noted that he had no bullets and this emboldened them to chase after him. The man ran into Soweto village and they raised an alarm. Members of the public emerged and they started searching for him. They found him being beaten by other members of the public. He was bleeding from the head and the pistol was next to him.

They decided to take him to the chief's camp but administration police officers arrived and rescued the man. PW1 further testified that the man was stoned to death. He was later called to Kasarani Police Station where he recorded a statement. It is there that he found the suspect dead.

PW2, John Waihenya Bango a casual labourer in Soweto village within Githurai 45 corroborated the evidence of PW1. He joined the mob that was chasing the suspect who had a gun. His evidence was that the suspect was stoned to death by the mob.

PW3, Samuel Kariuki Karanja, he testified that he stayed at Githurai 45 where he ran a hotel. He too corroborated the evidence of PW1 and 2 in its entirety.

He recalled that on 14th December 2000 at around 7:45am he was walking towards the Chief's camp when he met the complainant in this case, PW1. PW1 informed him that he had been robbed. They walked together towards the direction the robbers went and PW1 showed him the people who robbed him. He realized that he had passed them before he met PW1. They raised alarm and chased after the men with the help of members of the public. One of the men pulled out a firearm and shot in the air making the chasers scatter. The other man disappeared. They however could see the man with the firearm who ran and they gave chase. They finally cornered him at Soweto village where he was stoned to death.

PW4, APC Shadrack Charo was attached to Kahawa west Chief's camp. He recalled that on 14th December, 2000 he was at the Chief's camp when three members of the public came and reported that there was a suspect who was in the process of being arrested by members of the public at Soweto Village and that the suspect had a firearm.

They rushed there and found that the suspect was still being beaten and was bleeding from the head. They stopped the public and one of the mob members gave them the firearm. They found a magazine in the gun with two rounds of ammunition and one round of ammunition stuck in the chamber. The suspect was already dead and they took the body to the mortuary.

PW 5, No. 215586 IP James Mutindwa, he testified that he was attached to CID Kasarani. He recalled that on 18th December 2000 at around 3:30pm he was in the CID office when the Appellant was brought to his office by PC Kariuki so he could record his statement under inquiry. He testified the Appellant admitted to having been involved in the robbery. He also reiterated that the statement was not obtained under any duress.

PW6 , Mbogo Donald Mugo, he testified that he was a firearm examiner at CID headquarters Nairobi. He recalled that on 18th December 2000 he received exhibits from PC James Kiprotich of CID Kasarani. They were; a baretta pistol serial number 370431 and 9mm calibre round of ammunition. He observed that the pistol was in good general and mechanical condition and was capable of firing. He also tested the ammunition which he found to be live ammunition. He prepared a report after concluding his examination which he produced in court.

PW7, No. 52939 PC James Kiprotich, he testified that he was attached to CID Kasarani/ he recalled that on 14th December 2000 he was in the office when the Appellant was brought by Administration police officers from Kahawa Chief's camp. They reported that the Appellant had robbed the complainant of a bicycle, cash and cigarettes. He arrested him and also received a pistol and one round of ammunition.

The accused had injuries and he took him to Kenyatta National Hospital where he was admitted for two days.

Prosecution then closed their case and the court ruled that a prima facie case had been established by the evidence on record. The Appellant was put on his defence. He gave a sworn statement in his defence. He testified that he lived in Githurai where he sold used shoes. He recalled that on 14th December, 2000 he left his house in the morning and headed to his work station at Soweto Githurai. On his way he heard gunshots and he started to run away. He met members of the public who stoned him before he was rescued by Administration Police officers who took him to Kasarani Police station where he was charged with the present charges which he denied.

DETERMINATION

Having considered the evidence and the respective submissions, I have narrowed down the issues for determination to be**;** whether the identification of the Appellant full-proof, whether the alleged confession recorded by the police implicated him and whether the offence was proved beyond a reasonable doubt**.**

On the issue of identification, the Appellant contended that he was mistakenly identified and that none of the witnesses identified him positively, both at the scene and in the dock. He submitted that his identification was premised on the statement that he gave and that this statement was written after he was tortured and was therefore obtained under duress. He further stated that PW1, PW2, PW3 and PW4 all gave evidence that the man who was chased, the perpetrator of the offence, was stoned to death. As such, he could not have been on e of the robbers.

The evidence indicates that PW1,who was the complainant, PW2, PW3 and PW4 all testified that the man who was chased by the mob and was one of the robbers was stoned to death. PW4 even testified that they took his body to the mortuary. The evidence further reveals that PW2 and other members of the public chased two of the robbers. One had taken off with the complainant's bicycle, past the railway line where the man armed with a gun shot in the air and they dispersed. According to PW1 when they got to the field their resolve got stronger and they resumed the chase. PW3 was in this crowd. In the process one of the men disappeared. It therefore appears that from this point going forward they were pursuing only one of the robbers; the armed one. The man then ran into Soweto village. This is where PW2 comes in. He was in his house when he heard alarm that had been raised by the pursuing mob. He also joined the mob and

they chased the man into a dead end where the man continued threatening them with the firearm. There was a stand-off during which time the man tried to cock the gun. They realized the gun had jammed and they moved in. He testified that one Kariuki was influential in subduing the man by holding him as PW2 took away the gun. Thereafter the man was stoned to death.

From the above chronology of events at the scene, it is clear that the robber who arrested by the members of the public was killed. He could not have been the Appellant. As such, the Appellant could only have been charged solely on the basis of the alleged confession he recorded with the police. His case is that the trial court relied on a repudiated and retracted confession as he denied having recorded the same. An interrogation of the confession is therefore prudent.

The learned magistrate carried out a trial within a trial when the Appellant objected to the production of the statement. The prosecution's evidence was given by PW1, No. 21586 IP James Mutindwa who was attached to CID Kasarani. He recalled that on 18th December, 2001 he received the Appellant at his office. He had been brought for the purpose of recording a statement under inquiry. He read the Appellant the charges and cautioned him that he was not obliged to say anything but if he did so it would be used in court against him. The Appellant informed him, in Swahili, that he was ready to sign the statement. He then proceeded to narrate a statement, in Kiswahili, which he recorded in English. He invited the Appellant to read it and make any corrections. The Appellant made no corrections and the witness made a certificate. He stated that the Appellant had been subjected to mob justice and had been recently discharged from hospital.

The Appellant gave an unsworn statement that on 18th December, 2000 he was removed from the cells by an officer who took him into an office where he found PW1 alone. He was given a paper that had writings on it and asked to sign it. He signed it since PW1 told him that it would gain him a release. He had initially refused but he was beaten leading to his capitulation and subsequent signing.

The trial court in its ruling found that the allegations by the Appellant that he had signed the statement because he was going to be released or due to a beating he received without merit and unsubstantiated. The magistrate went ahead to state that the Appellant did not substantiate his allegation by offering specifics of injuries sustained or what steps he took to remedy the same. She did not see any reason why the police having taken the Appellant to hospital to receive care for injuries sustained in the attempted lynching would subsequently beat him to extract information. She therefore dismissed his claim and ruled that the statement was voluntarily made and should be admitted.

Principles governing the admissibility of a confession were set out in the case of **R. v Smith [1959] 2 All ER 193; [1959] 2 Q.B. 35** where Lord Parker C.J said:

> *"**It has always been a fundamental principle of the courts … that a prisoner's confession outside the court is only admissible if it is voluntary. In deciding whether an admission is voluntary the court has been at pains to hold that even the most gentle, if I may put it that way, threat or slight inducement will taint a confession."***

Again in **DPP v Ping Lin[1975] 3 All ER 175** it was said:

> ***"...this in turn depends on the application of the well-known rule, peculiar to English law and its derivative systems, that to be admissible, confessions, however convincing, must be voluntary in the sense that the prosecution must prove, and prove beyond reasonable doubt, in the classic words of Lord Sumner in Ibrahim v R: 'that it has been obtained from him either by fear of prejudice or hope of advantage exercised[sic] or held out by a person in authority'."***

The question then is whether by the nature of the confession recorded by the Appellant, the test of admissibility was satisfied. This court has looked at the statement in question and found an anomaly that does not equate with the evidence at hand. The statement is written down by obviously two distinctly unique writers. This is evidenced by the respective handwriting. The initial writer goes all the way to page 3 and then a second writer takes over. It must be noted that the evidence at hand was that it was only the

Appellant and PW5 were in the office when the statement was recorded. PW5 stated that he wrote the statement as the Appellant narrated and then gave it to him to read and correct but no corrections were made. With discrepancy in the handwriting of the writer of the statement I am doubtful that the Appellant recorded, if he did, the same voluntarily. My strong view is that since his identification was mistaken, he was arrested on mere suspicion and thereafter forced to write a confession. This is vindicated by the fact that he was taken to hospital for treatment for some injuries. These injuries could not have been as a result of mob justice as was alleged by the police because the person who was stoned died and the body was taken to the mortuary. I am inclined then to infer that the statement was obtained under duress and written with a view to securing a conviction. The prosecution, in the trial within a trial failed to prove beyond a reasonable doubt that the confession was not obtained under duress. It was a misdirection on the part of the learned trial magistrate to hold otherwise. I therefore conclude that the same was inadmissible and went against the tenets of a fair trial.

Although the prosecution proved the elements of the offence of robbery with violence, for the reasons afore stated, I find that they did not prove that he robbery was perpetrated by the Appellant. In effect, the prosecution did not prove their case beyond a reasonable doubt. I quash the conviction, set aside the death sentence and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and **DELIVERED** in Nairobi this **18th** day of **August, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person

2. M/s Atina for the Respondent