**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 233 OF 2007**

PAUL KARIUKI KIGOCHI .......................................................APPELLANT

VERSUS

REPUBLIC ..........................................................................RESPONDENT

*(From original conviction and sentence in criminal case Number 1868 of 2006 in the Chief Magistrate's Court at Kibera – C. Maundu (SRM) on 17/04/2007)*

**JUDGMENT**

1. The Appellant, **Paul Kariuki Kigochi** was convicted of the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**, in **Nairobi CM Cr. Case no. 1868 of 2006**, by Mr. Maundu Senior Resident Magistrate (as he then was). He was sentenced to death in accordance with the law.

2. It had been alleged that on 30th day of March 2006 at Mlango Soko along Naivasha road in Riruta within Nairobi province, jointly with another not before court, while being armed with dangerous weapons namely pistols they robbed Alice Nyambura Ng'ang'a of cash Kshs.21,000/= and a mobile phone make Nokia 3310 valued at Kshs.5,000/=, all valued at Kshs.26,000/=. He had been similarly charged with robbing one Margaret Waithera Karanja of property valued at Kshs. 6,390/- and at, or immediately before, or immediately after the time of such robbery they threatened to use actual violence against the said Alice Nyambura Ng'ang'a in **count I** while they used actual violence against Margaret Waithera Karanja in **count II**. He was acquitted in count II.

3. The appellant subsequently filed an appeal against both conviction and sentence, advancing five grounds of appeal in which he stated that

circumstances described in the evidence did not favour positive identification, and that the trial court relied on incredible, inconsistent and contradictory evidence to convict him. He also contended that the prosecution case was not proved beyond reasonable doubt, and that his defence was not considered adequately.

4. The learned state counsel Mr. Kabaka, opposing the appeal on behalf of the state, submitted that there was sufficient evidence on record to support both conviction and sentence. He submitted that **PW1** was able to positively identify the appellant since there was adequate light from the street lights at the scene of the robbery, and that the evidence of **PW2** corroborated that of **PW1** that there was a big light at the scene although **PW2** did not identify the appellant. He further argued that the appellant was arrested immediately after the robbery and was still wearing the same jacket that **PW1** had seen him in, and still carrying the toy pistol he used in the robbery. In Mr Kabaka's opinion the identification by **PW1** was proper and not mistaken.

5. We have subjected the evidence adduced before the trial court to fresh analysis and re-evaluation bearing in mind that we neither saw nor heard any of the witnesses as they testified, and giving

due consideration thereto in line with the decision in **GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982-88) 1KAR 1134.**

6. We have exercised great caution in weighing the evidence of identification bearing in mind the warning of the Court of Appeal in **KARANJA AND ANOR. VS. REPUBLI [2004] 2 KLR pg 140.** We note that the case against appellant before us depends wholly or to a great extent on the correctness of the identification of the appellant, which he alleges to be mistaken. We have therefore, warned ourselves of the special need for caution before convicting the appellant in reliance on the correctness of the identification. More so in this case where the case depends on a single identifying witness.

7. According to **PW1** the offence occurred at 10.p.m. and it was raining. Those who attacked them were people she did not know prior to that moment. The evidence does not state that she described the robbers to the two men to whom she reported and who went to look for them. It was not clear how the two men identified the appellant when they found him, but they did return 30 minutes later in a police vehicle with one suspect, whom **PW1** identified as one of her attackers, because of the jacket he wore. **PW2** who was with her did not identify the attacker. We note that no evidence was led as to how much time **PW1** had the attackers under observation.

8. After a careful analysis of the evidence we are constrained to agree with the appellant that the circumstances of identification did not commend themselves to positive identification. No doubt the appellant had some dark motive and was not an innocent hawker returning home from a busy day as he would have the court believe, because the presence of a toy pistol in his inner-wear belies that fact. We find however, that the prosecution evidence did not meet the threshold of proving his guilt beyond reasonable doubt.

9. For the foregoing reasons we find that the conviction of the appellant was not founded on sound evidence and cannot be left to stand. We therefore quash the conviction and set aside the sentence following therefrom, and order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED** and **DELIVERED** in open court this **25th** day of **July 2013**.

A. **MBOGHOLI MSAGHA** | **L. A. ACHODE**

**JUDGE** | **JUDGE**