



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL CASE NO. 198 OF 2007**

**PATRICK GICHOHI MAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence by S. K. Ndungu Principal Magistrate in the Senior Principal Magistrate's Criminal Case No.2479 of 2006 dated 28<sup>th</sup> June 2007 at Murang'a)*

**JUDGMENT**

**Patrick Gichohi Maina**, the appellant herein, together with John Kamau Irungu were tried on a charge of robbery with violence contrary to *Section 296 (2)* of the Penal Code. At the end of the trial, the Appellant was convicted while his co-accused was acquitted. The Appellant was sentenced to suffer death. Being aggrieved, the Appellant preferred this appeal.

On appeal, the Appellant put forward in his petition, the following grounds:

- (1) That my constitutional right was violated by being detained in the police custody for more than 24 hours contrary to Article 49(1) f (i) of the Constitution of Kenya.**
- (2) That the learned trial magistrate erred in law and facts by failing to hold no description about me was given by the complainant to the Police in his first report as required by the law.**
- (3) That the learned trial magistrate erred in law and facts by failing to observe no claimed stolen item was found in my possession.**
- (4) That the learned trial magistrate erred in law and facts by failing to hold there was no bright light that could enable the complainant see his assailants.**

When the appeal came up for hearing, Miss Ngalyuka, learned Senior State Counsel, informed us that she was conceding the appeal on the ground that the Appellant's identification was not free from error hence he should have been given the benefit of doubt. We have on our part re-evaluated the evidence as required of by the first appellate court. It is appropriate at this stage to set out in brief the case that was before the trial court. **Joseph Mwangi** (P.W.1) told the trial court that in the night of 23<sup>rd</sup> August 2006, he was attacked by three people who robbed him of his gas cooker, electric iron box, a mobile phone, a computer key board, torch and Ksh.600/= in cash. All the items allegedly stolen were valued at Ksh.19,300/=. P.W.1 claimed that his assailants took away the aforesaid items after threatening to harm

him if he resisted. P.W.1 said he was able to recognize the Appellant with the assistance of a reflective light emanating from a torch flashed on papers placed on a table in P.W.1's house. The Complainant claimed that the Appellant was the one who threatened to harm him if he failed to give them money. The Appellant was picked out by P.W.1 in an identification parade mounted by **I.P. Benjamin Kiprono** (P.W.3) a week after the incident. The Complainant stated that he was able to identify the Appellant due to his stature and voice. In his defence, the Appellant claimed that he was arrested on the orders of the then O.C.S, Murang'a whom he had a grudge with over his refusal to work in his hardware shop at Lunga Lunga Nairobi. He claimed the person who picked him out at the identification parade was previously in company of the Police Officers who had come to arrest him.

We have critically re-evaluated the evidence which were presented before the trial court. There is one serious question which has been left to this court to grapple with that is whether the Appellant's identification was free from error. It is not in dispute that the alleged robbery took place at 2.30 a.m. on 23<sup>rd</sup> August 2006 while the Complainant was asleep. The Complainant (P.W.1) was alone in the house. He said he flashed a torch on a reflective material on his table. The reflective light is what P.W.1 used to recognize the Appellant. Upon being cross-examined by John Kamau Irungu, the Appellant's co-accused, P.W.1 admitted that the light emanating from his torch at the time of the robbery was dim. The only physical description the Complainant gave about the Appellant is his body stature and by his voice. The Appellant was not a person the complainant knew before the incident. P.W.1 admitted during cross-examination that the Appellant's body physic was unique in that there are others who had a similar physic. After a careful reconsideration of the evidence, we have come to the conclusion that the evidence of identification tendered against the Appellant was not free from error. The strength of the light used was not strong enough to enable a person to meaningfully identify a person whom he did not know previously at night. Furthermore the features given about the suspects to the Police were not unique. We must commend Miss Ngalyuka for conceding to this appeal. We allow the appeal. We order the conviction quashed and the sentence set aside. The Appellant be set free forthwith unless lawfully held.

*Dated and delivered at Nyeri this 27<sup>th</sup> January 2012.*

**J. K. SERGON**  
**JUDGE**

**J. WAKIAGA**  
**JUDGE**