REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 56 OF 2007

MARK MUTEMBEI KHAYEGA…….....……..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

The appellant, Mark Mutembei Khayega, was jointly charged with 4 others on two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charges were as follows:-

Count I

On the night of 28th and 29th December 2004 at Gichobo Area in Nakuru District within the Rift Valley Province, jointly with others not before court while armed with pangas and an axe robbed Mrs Lucy Wamuyu Nyamu of 6 bed covers, 2 blankets, 15 seat cushions, 12 seat resters, one Greatwall Televion, one Trident Radio Casette, 2 hot pots, one tray, 2 gas cylinders, assorted food stuffs, one mattock, one dress, one handbag, one Nokia mobile phone 3310, cash Kshs.21,000/- and one motor vehicle registration number KZV 858 Datsun 1200 Pick-up amounting to Kshs.490,000/- and at or immediately before or immediately after such robbery threatened to use actual violence to the said Mrs Lucy Wamuyu Nyamu.

Count II

On the night of 28th and 29th December 2004 at Gichobo area in Nakuru District within the Rift Valley Province, jointly with others before court while armed with pangas and an axe robbed Anne Wangare Muringe Kshs.200/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Anne Wangare Muringe.

The prosecution called a total of eight witnesses while the accused persons gave sworn statements in their defence. The court convicted the appellant on the first count above while the others were acquitted of both counts. Being aggrieved by the said decision, the appellant filed this appeal based on the following summarized grounds:-

1. That the trial court erred in relying on circumstantial evidence;

2. That the trial court erred by relying on medical evidence that was not produced by an expert;

3. That the court erred by not calling the informer as a witness;

4. That there was no evidence of the identification of the appellant;

5. That the trial court failed to consider the appellant's defence.

Mr. Nyakundi, learned counsel for the State conceded to the appeal for the following reasons; that the appellant was convicted based on information given by an informer 10 days after the commission of the offence; that the appellant was not seen at the scene nor was he found in possession of the stolen property; that the appellant was arrested because he had an injury allegedly inflicted by police on one of the robbers (gun shot) but no doctor was called to verify that evidence; that before production of the P3, the prosecution did not demonstrate that the maker of the report could not be found. Counsel also submitted that where the evidence relied upon is that of an informer, the informer should be called to testify. For that proposition counsel relied the case of **Peter Wambundi Wepukhulu V Rep. CRA 1068.** Counsel urged that only the doctor's evidence would have corroborated the evidence on injuries, but that was lacking. It is counsel's view that the conviction is unsafe and should be quashed.

The brief facts of this case are that Lucy Wamuyu Nyamu (PW1), a resident of Lare in Njoro was asleep in her house on the night of 28th December and 29th December 2004 at about 1.00 a.m. when she was suddenly woken up by breaking glass. Robbers had entered in her house and they demanded money. She asked for some time to look for the money and in the process pushed the security alarm button. She gave them Kshs.21,000/- and they carried away most of her household goods on her pick up, motor vehicle KZV 858. The robbery took about one hour and the complainant was not able to identify any of the robbers. After she had opened the gate for the robbers, and they were leaving, she heard gun shots and it is then the Assistant Chief, Keraho (PW3) with armed police officers who informed her that her vehicle was intercepted and that some robbers had been killed.

PW2, Duncan Mureithi Maina, an employee of PW1, was in his cubicle, heard a commotion and the robbers demand for money from PW1. He heard the vehicle drive away and soon thereafter he heard gun shots and the Assistant Chief and police arrived. He did not witness the robbery. PW3, Lewis Kerao Mwangi, Assistant Chief of Sindendet Sublocation, Kichobo Location, Lari Division, Nakuru District was on patrol with APC David Leyator (PW6) and Tanui when they were informed of an alarm from PW1's house. On their way there, they met PW1's vehicle being driven away. They flagged down the vehicle. His flash light was on and the people on the pick up shot at the torch, it went off. It is then the police officers shot back and the vehicle lost control and rolled. Four men ran from the pick up. PW3 went to the pick up and found it was full of goods. They found two people shot dead, one on the stearing and one outside the vehicle. On 11/1/05, following information, they went to Nakuru Ponda Mali Estate, with help of Officer Commanding Station Nakuru, where they arrested the appellant and two others. They found that the appellant had a fresh wound on the arm though he had not sought treatment. PW3 said that he had told police that some suspects escaped with injuries because he heard one scream in a lot of pain as the robbers fled. PW4, IP Sambu Wafula visited the scene of the robbery and took photographs of the scene and also of the appellant with the wound on the hand. According to PW4, the appellant had sustained a bullet wound because its area of entrance was smaller then the exit, characteristic of bullet wounds.

PW5, PC Solomon Mbaisi, was on duty on 29/12/04 when he received a report of robbery through police control and found that PW3 and the AP police were already at the scene. He saw the two bodies of those robbers who were shot dead. He is one of those officers who went to Ponda Mali where an informer led them. He also escorted the appellant to the police Doctor for examination. PW5 did not disclose the identity of the information.

PW7, Inspector Rotich Sengol, and PC Harrison Machaira were part of the squad that went to Ponda Mali Estate on 11/1/05 and acting on a tip off, arrested the appellant. The information that the witnesses had was that the appellant had a wound on the hand.

The appellant in his sworn defence recalled that on 11/1/05, he went to work at about 2.00 p.m. but did

not get his employer and went back home. He met three police officers who inspected his wound sustained in a lorry mishap. They disagreed with the police officers and he was taken to the police station, then for examination at Nakuru Provincial General Hospital and later he was charged with other people he did not know.

We have considered the evidence of the prosecution and the appellant's defence. PW1 was not able to identify any of the robbers neither did PW2 because he never came into contact with the robbers. Apart from the robbers who were shot dead outside PW1's gate the others escaped into the darkness. According to PW3, he knew that some of the robbers who escaped had been injured because of the cries made by them. He never saw those robbers neither did PW6, the police officer who was with him. He told the court that they relied on the evidence of an informer in order to trace and arrest the appellant. The prosecution witnesses did not know whether the informer was present at the scene of the robbery or not.

As regards evidence of an informer, the Court of Appeal in the case of **Patrick Kabui Maina & Another v Rep. (1986)KCA 889**, said:-

"…if any accused is arrested on the strength of an information given by an informer and he is not put in the witness box to testify in chief and be cross-examined, such evidence should be disregarded."

We are of the view that basing a conviction on an informer's evidence is dangerous because it is hearsay unless supported by other independent evidence. An informer's evidence is evidence that can be easily abused and the court has to take great care in relying on such evidence.

The appellant was found with a wound which all the witnesses believed was caused by a bullet. However, the prosecution did not call any expert evidence i.e. a Doctor to confirm that it was indeed a bullet wound. But even if it was established that it was a bullet wound the appellant would have remained a mere suspect because it was not established who may have shot the appellant. The appellant was not arrested after the robbery or within the vicinity of the robbery. The appellant was arrested about 11 days after the robbery. There needed to be other evidence direct or circumstantial to link him to the robbery.

We agree with the learned counsel's submissions that the P3 form in respect of the appellant was irregularly produced in evidence by PW5, the Investigating Officer. Under **Section 77** of the **Evidence Act,** the P3 could have been produced by the Investigating Officer only if it was established that the Doctor could not be traced or that there would have been a delay in procuring the attendance of the said Doctor. It was evident that the appellant had an issue with the said P3. He had not conceded to the P3 report being produced by consent.

In the trial court's judgment, the magistrate appreciated that the evidence against the appellant was circumstantial and invoked the finding in **Sawe v Rep. [2003] KLR 364.** In that case the court said:-

"(1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt;

(2) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on;

(3) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

We find that the magistrate erred in finding that the evidence adduced pointed to the fact that the appellant was wounded in the robbery that took place at PW1's house because the wound on the appellant only raised suspicion against him, that he may have been one of the robbers. The existing circumstances totally weakened the prosecution's case because the appellant was neither seen at the scene of the robbery

nor was it established where he was injured. The burden of proof in criminal cases always remains on the prosecution to prove their case beyond any reasonable doubt. The burden never shifts upon the appellant to prove his innocence.

As the first appellate court, we have carefully analyzing the evidence before us, and come to the conclusion that the prosecution did not meet the required threshold, to prove its case beyond any doubt. There was not sufficient evidence to convict the appellant. The conviction is unsafe, it is hereby quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 22nd day of June, 2012.

R.P.V. WENDOH
JUDGE

ANYARA EMUKULE
JUDGE

PRESENT:
In person - the Appellant.
Ms Idagwa for the State.
Kennedy – Court Clerk.