REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 390 of 2007

JOHN KINYUA NDIRANGU………………..……......…………..……..APPELLANT

VERSUS

REPUBLIC………………………………………………………….RESPONDENT

(Appeal from the original conviction and sentence in the Principal Magistrate's Court at Murang'a in Criminal Case No.1245 of 2003 dated 8th September 2004

by G. K. Mwaura, Principal Magistrate)

JUDGMENT

JOHN KINYUA NDIRANGU, the appellant herein, was tried on a charge of four counts of robbery with violence contrary to *Section 296 (2)* of the Penal Code. The particulars of the offence in count I are that on the 10th day of September 2003, along Murang'a Kiriaini road in Muranga District within Central Province, jointly with others not before court, while armed with dangerous weapons namely a pistol, robbed BENARD KINGORI MWANGI of a motor vehicle registration No. 002P make Toyota Hiace matatu, one mobile phone make Motorola and mobile phone make Nokia all valued at Ksh.720,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Benard Kingori Mwangi. In count II the particulars are that on the 10th day of September 2003, along Muranga Kiriaini road in Muranga District within Central Province, jointly with others not before court while armed with dangerous weapons namely pistols, robbed HARUN WACHIURI GICHERU cash Ksh.4,800/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Harun Wachiuri Gicheru. The prosecution withdrew the charge in counts III and IV hence the Appellant was prosecuted on counts I and II. In the end the Appellant was convicted and sentenced to suffer death on each count. The Appellant was dissatisfied hence this appeal.

On appeal the Appellant put forward the following amended grounds:

1. *The learned magistrate erred in law and in facts, with regard to identification evidence, of a stranger, the evidence must be watertight, for a case (sic) safe to convict, circumstances should be conclusive and free of error and since no proper Id/parade,(sic) but shown to witnesses – identification is nullity.*

2. *The learned magistrate erred in law and in facts, in his consideration (sic) that there was any reasonable suggestion, to conclude that, appellant was in deed, or could have been the robber or part of the thugs, who had committed the crime especially that none of the APs and public who assisted, PW3 to identify the thugs, or who communicated, for a proper, arrest, to link the appellant was called and (sic) PW1, to have said appellant had worn the green shirt, when testifying on Pg 11, on 5/5/04 but changed, no evidence when he had seen the accused 1st, and got chance to change when testifying on Pg 14 lines 10-11 as court had no break (sic) and called later.*

3. *The learned magistrate erred in law and in facts, in failing to find identification parade essential, prosecution failed to call essential witnesses and exhibits, and made a passing mention of my unsworn truthful and honest defence without cogent reasons.*

When the appeal came up for hearing before us, we granted the Appellant leave to file and rely on written submissions. Mr. Makura, learned State Counsel, opposed the appeal on the basis that the Appellant was identified and placed at the scene of crime by the evidence of P.W. 1 and P.W. 2. It is the argument of the learned State Counsel that the Appellant was arrested shortly after P.W. 1 and P. W. 2 reported the incident to the Police and that the robbery took place in broad day light.

We wish to set out in brief, the case that was before the trial court before delving into the merits of the appeal. The prosecution's case is buttressed by the evidence of five witnesses. Benard Kingori Mwangi (P. W. 1), a matatu driver plying Nyeri-Nairobi-Murang'a -Othaya road told the trial magistrate that on 10th September 2003 he drove motor vehicle registration number KAP 002P along the same route to ferry fare paying passengers. P. W. 1 said he left Nairobi at 10.30 and when he arrived at Murang'a town some passengers alighted. One of the passengers who sat at the rear seat moved to sit at the front seat left by the alighting passenger. This person informed P. W. 1 that he would alight at a place called Kihinga which he did when the matatu stopped. However, the aforesaid passenger went ahead of the matatu, produced a gun which he pointed at P. W. 1. The passenger who sat in the middle urged P. W. 1 to move out of the driver's seat whereupon he took over the control of the matatu. P. W. 1 said that, he soon realized that the four passengers who had boarded the motor vehicle in Nairobi had carjacked him. The matatu was driven into a feeder road for half a kilometer after which the carjackers abandoned the matatu and walked away after robbing P. W. 1 of two mobile phones and Harun Wachiuri Gichuru (P. W. 2), the matatu conductor of Ksh.4,800/=. P. W. 1 drove the matatu to Mugeka Chief's camp where he reported the incident to the Administration Police officers. Two armed Administration Police officers boarded the same matatu to pursue the robbers. It is alleged the robbers were seen walking but fled when they saw Police officers. The Police gave a chase. There was an exchange of fire between the Police and the robbers. Police officers from the flying squad unit joined the Administration Police officers to pursue the carjackers. The flying squad officers managed to arrest the Appellant while his accomplices escaped.

The Appellant gave an unsworn statement in his defence. He stated that he had alighted from a matatu at Kabuga stage and went to answer a call of nature in the nearby bush. While in the bush he said he was met by people armed with guns who in turn arrested him as a suspect for robbery he did not commit.

We have carefully considered the grounds and the written submissions put forward by the Appellant. In our view the three grounds put forward by the Appellant can be summarized to one. That is to say that there was no cogent evidence presented by the prosecution that could sustain a conviction. Mr. Makura, learned State Counsel is of the view that there was watertight evidence which the trial Court based its conviction. We have carefully re-evaluated the evidence tendered before the trial Court. It is clear from the evidence that P. W. 1 and P. W. 2 were carjacked and abandoned with their matatu in a feeder road about half a kilometer from Kihinga stage. P.W.1 and P.W.2 drove the matatu for 7 Kilometres to Mugeka Chief's camp where they reported the incident to the Administration Police officers based at the Chief's camp. P.W.1, P.W.2 and the Police officers drove back to the scene of crime to pursue the robbers. They were joined by flying squad officers who had been alerted. There is no doubt that the alleged robbers were people not known to P. W. 1 and P. W. 2. We have examined the evidence of Corporal David Kamande (P. W. 3). According to his evidence he was not given the description of the robbers. P. W. 3 was the person who arrested the Appellant. P.W.2 said the description of the robbers had been given to the Police. We are unable to comprehend how P.W.3 could arrest the Appellant yet he had not been described. In any case P.W.1 and P.W 2 had not met with P.W.3. , the Administration Police officers who were with P.W.1 and P.W.3 who did not testify. We have come to the conclusion that the Appellant's arrest could be that of a mistaken identity. We say so because of two reasons: First, is that there was no evidence as to how P.W.3 came to know that the Appellant was the suspect. He did not explain to the trial Court what features helped him to arrest the Appellant yet he had not met P.W.1 and P.W.2. Secondly, there was a break in the chain of causation. According to P.W.1, he drove for 7 Kilometres to Mugeka Chief's camp and back. That is about 14 Kilometres. It is not conceivable to drive for such a distance and come back to find robbers walking leisurely the way it is portrayed in the evidence. It is worst in this appeal because the robbers were people not known to P.W.1

and P. W.2.

In the final analysis, we think there was no cogent evidence which could have sustained a conviction. Consequently the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J. K. SERGON
JUDGE

M. S. A. MAKHANDIA
JUDGE

In open court in the presence of Mr. Makura for the State and the Appellant in person.

J. K. SERGON
JUDGE

M. S. A. MAKHANDIA
JUDGE