REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 260 of 2005
STEPHEN MAINA WANJIRU …….. APPELLANT
VERSUS
REPUBLIC …….……..…….. RESPONDENT

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JUDGEMENT

The Appellant herein **STEPHEN MAINA WANJIRU** has filed this appeal against the conviction and sentence imposed upon him by **HON. H.N. NDUNG'U**, the learned Principal Magistrate, Mombasa Law Courts. On 16th June 2005 the appellant was arraigned before the subordinate court and charged with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the offence were that

"On the 1st day of June 2005 at Kengeleni Lights in Kisauni Division within Mombasa District of the Coast Province, jointly with another not before court robbed BEATRICE ONDUSO MORAA of one Golden chain and one Diamond bracket both valued at Kshs.6,000/-and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said BEATRICE ONDUSO MORAA"

The prosecution called a total of three (3) witnesses in support of their case. The complainant in her evidence told the court that on 1st June 2005 at about 7.30 A.M. she was walking to work. As she alighted from a matatu two men came up behind her and greeted her. They passed her and then stopped infront of her. As the complainant made to walk past them one man held her by the neck and threatened to kill her. The other man took her gold and diamond chains. They attempted to take her hand-bag but failed because she held onto it tightly. After robbing her the two men jumped over the wall and disappeared. The complainant proceeded to work. She later saw one of the men who had robbed her sitting on a wall basking in the sun. She telephoned the flying squad who came and arrested him. That man [the appellant herein] was taken to the police station and upon completion of police investigations he was taken to court and charged.

At the close of the prosecution case the appellant was ruled by the learned trial magistrate to have a case to answer and was placed on his defence. The appellant elected to keep silent in defence. On 28th November 2005 the learned trial magistrate delivered her judgement in which she convicted the appellant of the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. After hearing mitigation from the appellant the trial magistrate sentenced him to death in accordance with the law. The appellant was not satisfied with this conviction and sentence and so filed this present appeal.

The appellant who was unrepresented at the hearing of this appeal chose to rely entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO**, the learned State Counsel who appeared for the Respondent State gave oral submissions and conceded the appeal.

Having carefully examined the record of the trial before the lower court, we have been able to identify certain material inconsistencies and anomalies which lead us to agree with the learned State Counsel's concession of this appeal.

The learned trial magistrate relied heavily upon the identification of the appellant by the complainant as a factor in rendering her conviction in this case. This is evident by her statement on page 15 line 26 of her judgement that

"The offence was committed during broad daylight 7.30 A.M. There is the real possibility that the complainant saw the accused well."

There is no doubt that the incident occurred in day light. It was 7.30 A.M. However even where circumstances were ideal for a clear

identification, we note that the only witness who purported to positively identify the appellant as one of the robbers was the complainant herself. There was no other eye witness to provide corroboration for this evidence. The learned trial magistrate failed to adequately warn herself of the dangers of relying on the evidence of a single identifying witness. In the case of **MAITANYI –VS- REPUBLIC [1986] KLR 198**, the Court of Appeal held that:-

"The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made."

We have anxiously examined the judgement of the learned trial magistrate. At no point did the trial magistrate issue such a warning before proceeding to convict the appellant.

In her evidence at page 4 line 3 the complainant states

"I was able to identify the man because when he greeted me I had looked up to see who it was and also when they went ahead of me I saw them well and noted the clothes he was wearing and they were the same ones he wore when I saw him basking"

Despite her firm assertion that she was able to identify and recognize the clothes which the appellant was wearing at the time of the incident **PW1** does not bother to describe what type of clothes these were. She does not describe this attire to the court, and neither did she appear to have given any such description to the police. **PW2 PC JOSEPH MUSYOKA** at page 5 line 20 merely states

"I believed the complainant identified you by physical appearance and clothing"

PW2 does not describe this clothing neither does he describe the physical appearance of the appellant, which he claims was given to him by the complainant. **PW3 PC DAVID CHUMA** is the officer to whom the complainant pointed out the appellant and who arrested him. It is odd that **PW3** also fails to give a description of the appellant's clothing and physical appearance, yet these are the factors which **PW1** claimed to have relied upon and to have given to the police to help in identifying the appellant. The chain of evidence in this respect does not flow as certain relevant pieces of information are left out of the evidence.

Lastly and of no less importance is the fact that the complainant did not bother to report this alleged robbery to police until **after** the arrest of the appellant. She told the court that after she was attacked and robbed she proceeded to work. It is only after she saw the appellant sitting on a wall that she called the police. Therefore the description of the appellant which the complainant claims to have given to the police can only have been given after the arrest of the appellant. In such circumstances the description would not have served much of a purpose since the appellant was already in custody.

Our own re-evaluation of the prosecution case shows it to have been weak and not sufficient to support a conviction on so serious a charge. The identification evidence does not in our view pass muster. On the whole we find this conviction to have been unsound. As such we do allow this present appeal and we quash the conviction of the appellant. The subsequent sentence is also set aside. The appellant to be set at liberty forthwith unless he is otherwise lawfully detained.

Dated and delivered at Mombasa this 27th day of May 2010.

……..……. **…….**

F. AZANGALALA **M. ODERO**

JUDGE **JUDGE**