



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Appeal 50B of 2007**

MARTIN MBEYI SHITUKHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in  
Nyahururu P.M.C.R.C. NO.3335/2006 by Hon. G. A. Mmasi,  
Senior Resident Magistrate, dated 26<sup>th</sup> February, 2007)

**JUDGMENT**

On the night of 25<sup>th</sup> and 26<sup>th</sup> July, 2006, there was an orgy of robbery in Munyeki village of Nyandarua District where armed robbers descended on the residents, robbing them of various personal items and cash. The matter was reported to the police that very night and by morning, the suspects had been arrested.

The appellants, **Simon Gicheru Maina** (in High Court Criminal Appeal No.50A of 2007) and **Martin Mbeyi Shitukhu** (in High Court Criminal Appeal No.50B of 2007) were among the suspects arrested. Four of the suspects including the appellants were charged with **Robbery with Violence** Contrary to **section 296 (2)** of the **Penal Code**. Of the four accused persons, only the appellants were found guilty but of robbery under **section 296 (1)** of the **Penal Code**. Both appealed against the conviction and sentence. Their appeals were consolidated.

Pursuant to **section 354** of the **Criminal Procedure Code**, the State gave notice of enhancement of sentence. The 1<sup>st</sup> appellant subsequently withdrew his appeal leaving only the 2<sup>nd</sup> appellant who we shall refer to from this stage as the appellant.

We must, as expected of us, re-evaluate the evidence presented at the trial in order to come to our own independent conclusion bearing in mind that the trial court was in a better place to observe the demeanour of the witnesses.

As we have stated, the robbery targeted six complainants.

In count 1, the complainant, **P.W.1 Simon Macharia Kiragu (Simon)** testified that he was robbed at 1a.m. by people who introduced themselves as police officers. When they were let in the house, the robbers who were three demanded and indeed stole cash and assorted items from Simon. According to Simon, he was able to identify the appellant. That the appellant was armed with a hammer; that he held Simon as they demanded for money; that Simon was able to see him because Solar generated lights were on; and that Simon was able to pick him out in the police identification parade.

The complainant in the second count, **P.W.2 Samwel Chege Macharia (Samwel)**, the son of Simon was robbed at more or less the same time as his father. He also testified that he was able to recognize the appellant and the 1<sup>st</sup> appellant with the aid of flash lights from

the torch as they were known to him prior to this date.

**P.W.3 Julia Mwendu Macharia**, the wife to Simon, although present during the robbery was not able to identify any of the robbers.

**P.W.4 Haron Wanjama Macharia** the complainant in count three was able to identify appellant and the 3<sup>rd</sup> accused person. He stated that the two did not conceal their identities although they wore hats; that the robbers took ten (10) minutes with him; that at the identification parade, he was able to pick out the appellant.

The complainant in count 4, **P.W.5, Francis Muhia Mburu** was only able to identify the 1<sup>st</sup> appellant. **P.W.6 Mary Wanjiku Mburu** was also robbed, although that robbery is not part of the counts charged. That is probably explained by the fact that she never identified any of the robbers. Similarly the complainant in count 6, **P.W.7. David Kiarie Ngotho** could not identify the robbers. The complainant in the 5<sup>th</sup> count, **Patricia Wanjiku Njoroge**, did not testify.

The appellant denied involvement in the robbery maintaining that he was arrested while playing a pool game. While the people he was arrested with were released after paying a bribe of Kshs.1,000/=, he was charged after failing to bribe the police. In addition, he contends, the complainants in counts 1, 2, 3 and 4 had a grudge against his employer.

The trial court found the evidence presented in counts 1 and 2 only proved robbery under **section 296 (1)** of the **Penal Code**. She also found that the charges under count 3 were not proved and acquitted the appellant and 1<sup>st</sup> appellant. In count 4, the learned trial magistrate found the 1<sup>st</sup> appellant guilty but made no finding in respect of the appellant. She also made no finding in respect of counts 5 and 6. Again she only sentenced the appellant and 1<sup>st</sup> appellant to seven (7) years imprisonment in count 2 and 1<sup>st</sup> appellant to seven (7) years in count 4. There was no mention of count 1.

We have of course observed that no evidence in support of count 5 was called. That notwithstanding, the learned magistrate was required to make a finding on each count charged. The appellant has raised, in this appeal, nine (9) grounds which can be summarized thus:

- i) the evidence against him was contradictory
- ii) the trial court did not analyse the evidence adduced
- iii) there was no evidence in support of the offence of robbery contrary to section 296(1) of the Penal Code**
- iv) the evidence of identification was flawed
- v) the prosecution evidence lacked corroboration
- vi) the identification parade was flawed
- vii) the appellant's defence was irregularly rejected

The appellant also raised in his written submissions two additional grounds which do not form part of those set out in the petition. He did not seek leave and therefore by dint of **section 150(2)** of the **Criminal Procedure Code**, the appellant cannot rely on those two grounds. The two grounds relate to the appellant's rights under **sections 72(3)** and **77** of the **Constitution**.

We can only say in passing that an allegation of violation of the appellant's rights to be brought to court within 14 days must be raised at a time when the prosecution may have an opportunity to provide a justification for delay. That can only be at the trial. At this stage, the prosecution has been ambushed and we cannot decide that point in vacuum.

Regarding the language used during the trial, from the record it is clear to us that the appellant had no difficulty in communicating or understanding the proceedings. He cross-examined the witnesses and at the close of the prosecution case gave a sworn defence. With all this in mind in a protracted trial which lasted one (1) year with nine (9) prosecution witnesses testifying, we cannot see how the learned trial magistrate or even the appellant would have allowed the proceedings to progress when the language was alien to the appellant. But as we have said, these two points were raised too late in the day.

The trial court having found the appellant and the 1<sup>st</sup> appellant guilty in count 2 and convicted them, the broad question for our determination is whether the appellant was identified as being a member of the gang of robbers.

In count 2, the appellant was charged with three others of robbing with violence **Haron Wanjama Macharia**. **Haron Wanjama Macharia** was **P.W.4** and it was his evidence that when the robbers asked him to open his door at about 1a.m., he peeped and he counted seven men outside. The men broke his door and entered the house. The men had torches which they flashed and he was able to see them clearly. He said with regard to the identity of the robbers that:

**“I identified the 2<sup>nd</sup> accused and the 3<sup>rd</sup> accused person (sic). I saw them and their faces. They had placed torch next to their faces so I saw them vividly. I peed through the timber flabs (sic) and saw them vividly. I saw the face. On the head they were wearing kofia (hat)..... They were in my house for above 10 minutes.”**

He went on to state that he was also able to pick the appellant at the police identification parade. The only evidence of police parade was that conducted by **P.W.8 Chief Inspector Charles Kiilu** who confirmed having conducted the identification parade on 31<sup>st</sup> July, 2006 in respect of the appellant. According to him, the only witness he presented to identify the appellant was Francis. The only Francis who testified is **P.W.5, Francis Muhia**. Francis, in his evidence was only able to identify the 1<sup>st</sup> appellant and not the appellant hence the finding by the learned magistrate that count 4 in which **Francis** was the complainant was proved as against the 1<sup>st</sup> appellant.

In other words, there is no evidence, save for **Haron's** words, that the appellant was picked out by **Haron** at the police identification parade.

That leaves us with only the evidence of Haron at the scene of the robbery. It was at night (at about 1a.m.). He peeped outside and saw seven (7) people. The seven (7) broke in and flashed torch lights. He was able to see the appellant because he (the appellant) had placed the torch next to his face. We find this indeed strange and contrary to the normal course of things. Why would one hold a torch next to his face? Again Haron confirmed that the robbers were wearing *kofias* (hats). Being at night, the robbers being strangers to the witness, the only source of light is a torch and the evidence being that of a single witness, were these conditions favourable for identification?

As was held way back in 1953 in **Abdalla bin Wendo and Another Vs. Republic** (1954) 20 EACA that:

**“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions for forming a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the probability of error.”**

Applying these principles to this case, we come to the conclusion that in view of the circumstances obtaining at the time of the robbery, it was not possible to correctly identify the robbers and as a matter of fact the evidence of Haron is not corroborated. We find, on our part that it was not safe to convict on such inadequate evidence.

In the result, we allow the appeal, quash the conviction and set aside the sentence. It is ordered that the appellant shall be set at liberty forthwith unless he is lawfully detained.

**Dated, Signed and Delivered at Nakuru this 24<sup>th</sup> day of June, 2010.**

**D. K. MARAGA**  
JUDGE

**W. OUKO**  
JUDGE