REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 3 OF 2008

MICHAEL LITALI KHAEMBA…….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

The appellant Michael Litali Khaemba was charged with another with the offence of **robbery with violence** contrary to **section 296(2) of the Penal Code**. The particulars of the offence state that during the night of 23rd January 2006 at Kaptembwa Estate in Nakuru District within Rift Valley Province jointly with others not before court, being armed with dangerous offensive weapons namely pangas, they robbed Isaac Muiruri of cash Kshs 2,500/= and two speakers valued at Kshs 2,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said Isaac Muiruri.

The appellant was also charged with a second count of being in possession of suspected stolen property contrary to section 323 of the Penal Code. The particulars of offence state that on the 14th day of February 2006 at Kaptembwa Estate in Nakuru District within Rift Valley Province having been detained by No. 63184 PC Francis Makari and No. 83367 PC Paul Awajo as a result of the exercise of powers conferred by section 26 of the Criminal Procedure Code had in his possession one TV 14 inches coloured, two speakers, one Altech radio, one Panasonic radio cassette, one table clock, three torches, seven mobile phone chargers, one electronic connector, one hacksaw, two remote controls, VCD Deck, 3 bunches of keys, 2 motor vehicle keys, one sonny radio cassette, 13 sim cards, 8 shirts, 2 skirts, female full dress, 2 tops, 3 bed sheets, three bags and two pairs of shoes reasonably suspected to be stolen.

The appellant's co-accused was discharged after he was found to have no case to answer. The appellant was found guilty and upon conviction, he was sentenced to the mandatory death sentence. Being aggrieved by the conviction and sentence, the appellant has challenged the judgment by the trial magistrate, which was principally founded on the evidence of identification when circumstances for a correct identification were difficult. The offence took place at night and the complainants giving the description of the assailants made no first report. Moreover no identification parade was conducted thus the dock identification was worthless.

The judgment by the trial court was also challenged on the grounds that the stolen item namely the speaker had no identification on it. The appellant filed written submissions, which he relied on during the hearing of this appeal. We have taken into account the grounds that are raised in the said further grounds and submissions which raises further grounds such as the language used by the court and the fact that the appellant was not given a chance to cross-examine one of the complainants. Lastly the judgment was also

faulted for failure to consider that there was no independent evidence to corroborate the evidence given by the prosecution witnesses especially PW1.

On the part of the State, **Mr. Njogu** did not offer any arguments in this appeal on the grounds that he had not read the record of appeal. As required of this court by law, we have re-evaluated and re-assessed the evidence before the trial court. In order to analyse the evidence we re-state it herein albeit in summary. On the night of 23rd January 2006 after midnight at Kaptembwa Estate, a gang of robbers attacked **Isaac Muiruri [PW1]**. They broke into his house while armed with pangas and rungus. They demanded to be given money. They stole Kshs 2,500/= from PW1 and also a mobile phone and two Panasonic speakers. PW1 was not able to identify the robbers. The robbery took between 5 and 10 minutes and the robbers moved into the neighbour's house, where they continued the orgies of terrorising and robbing. **Ayub Abiya Omfuoko [PW2],** also a neighbour testified that he looked through his window and saw two people entering the neighbour's house. They broke the electric bulb on the corridor and then broke into another house. PW2 testified that he was able to identify the appellants, the following day he spotted the appellant in a video shop. He alerted the neighbours and the Police and the appellant was apprehended and taken to the police station. When the appellant was interrogated by the police, he led them to his house at Mwariki estate where several items listed in the charge sheet were recovered including a speaker that was identified by PW1 as the one, which had been stolen from him. PW2 testified that he did not give the description of the appellant to the Police when they gave the first report. On cross-examination he said he was able to identify the appellant by noting his fat cheeks.

After robbing PW1, the robbers moved to the house of **Phyllis Wanjiru [PW3]**. They also demanded money, and PW3 told them where she had kept the money, they took away Kshs 350/= from the table. After they left that is when PW3 discovered that they had stolen Kshs 2,100/= belonging to her husband and another Kshs 50/= from the sitting room. PW3 testified that she was able to see one of the assailants while hiding behind the curtains. She had indicated to the Police that she would be able to identify one of the assailants. She went to the Police station after some suspects were arrested. She found two suspects who were taking tea at the police station and she identified the appellant as one of the assailants. During cross-examination PW3 was categorical that she identified the appellant by noting his smile. Further she said he was short and black however these features were not noted in her statements, nor were they recorded before the appellants were arrested.

Samuel Kigo Nganga [PW4], the landlord of the plot, which was attacked by robbers, adduced further evidence. The tenants reported to him about the robbery. He established that four houses had been broken into. While accompanied by the tenants they reported the matter at Kaptembwa Police Post on 24th January 2007. On 14th February 2007 while PW4 was in his house he was informed by PW2 that a suspect had been spotted at the video shop. He promptly called the Police, and PW2 identified the appellant who was arrested by the Police. The appellant later led the Police to his house where many items suspected to have been stolen were found in his possession. The appellant also led to the arrest of 2nd accused person.

This matter was reported to **PC Paul Awanjo [PW5]** on 14th February 2006, at Kaptembwa Police Station. It was reported that a suspect who had been involved in a robbery incident was spotted at a video shop. PW5 with other police officers arrested the appellant. After interrogating him he led the police to a house where several items suspected to have been stolen were recovered. They included a speaker, which was identified by PW1 as the one that was stolen from him. However the police did not get people complaining about the other items.

After considering the above evidence the 2nd accused person was acquitted after he was found to have no case to answer. The appellant was put on his defence, he denied having had anything to do with the offence. He claimed that on the 14th February 2006, he had entered the video shop to get change that is when three people who introduced themselves as police accosted him. Soon other people who purported to identify him as a robber joined them. The police requested him to show them where he lived and since he had nothing to fear he took them to his house. They searched the house. People were called to identify whether they could see their property but said they could not. The Police seized his properties

and asked him for receipts but he had no receipts so the police took his properties. He was also locked in the Police cells for two days and later charged with the offence of robbery with violence with another person whom he said he did not know.

At that point the learned trial magistrate discovered that due to an oversight PW1 was not cross-examined after he gave his evidence in chief. The trial court ordered that PW1 be recalled for purposes of cross-examination and the record shows that on 11th December 2007, PW1 was recalled and cross-examined by the appellants. Under the provisions of Section 150 the court is given powers at any stage of the trial to recall and re-examine a witness if his evidence appears essential for the just decision of the case.

In this particular case since the appellant had already given his defence when PW1 who was the complainant had already given his evidence in chief, the appellant was not given a further chance to adduce further evidence in his defence after what transpired in the cross-examination. There is likelihood that the appellant was prejudiced. Besides this point, on the overall evaluation of the evidence we find the investigations in this case were poorly conducted. The robbery took place in the night of 23rd January 2006. There is no indication by the investigating officer that when the first report was made the description of the appellant was given. The appellant was arrested three weeks later. PW3 who was among the complainants said that she saw the appellant at the police station drinking tea and that is how she identified him.

No identification parade was carried out so that PW3 could identify the person whom she said she saw through the curtains at night for a period of 1-5 minutes. PW1 was not able to identify the assailants. However he was able to identify a speaker that was found in the house of the appellant. The only thing he used to identify the speaker was the wire and make. There was no other mark or distinguishing feature on the speaker. This taken with the defence by the appellant that the items that he had, had no receipts creates doubt in our minds as to whether there was positive identification of the speaker found in the house of the appellant to show that it belonged to PW1. PW1 also did not have the receipt for the same speaker.

This now leaves the evidence by PW2 who was not a victim of robbery but said that he was able to identify the appellant from the window as the robbers moved from the houses of PW1and PW3. In his evidence, he testified that he was able to identify the appellant by his fat cheeks. Three weeks later he saw the appellant at a video shop and alerted his neighbours and the landlord. They reported the matter to the Police and arrested the appellant. While considering this evidence the court should have been cautious while dealing with evidence of identification especially when the conditions favouring a correct identification can be said to have been difficult. As with other witnesses PW2 did not give the description of the assailant to the Police. Indeed he stated in his evidence that he did not make a first report to the Police.

Upon analysis of the evidence before the trial court we find the conviction of the appellant not safe for reasons that there could have been a mistaken identity of the appellant. The circumstances of the case and evidence before the trial court does not establish beyond reasonable doubt that it is the appellant and no other committed the offence he was convicted of.

In the upshot the conviction is quashed and the death sentence imposed upon the appellant is hereby set aside. Unless the appellant is otherwise lawfully held he is to be set at liberty forthwith.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE

M. MUGO

JUDGE