REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 44 of 2004

PETER MWENGI MAKUMI……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant, Peter Mwengi Makumi, was charged in Voi Senior Resident Magistrate's Court, Criminal Case No. 755 of 2005 (K. Muneeni) with two counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence in the first count were that the appellant on the night of 26th and 27th June 2005 at Kariokor ya Juu village, Voi municipality, within Taita Taveta District of Coast Province, jointly with others not before the court, while armed with dangerous weapons to wit pangas and iron bars, robbed Silinkai Lesani of cash Kshs. 12,000/= and a Seiko watch all valued at Kshs. 12,500/= and at or immediately after the time of such robbery threatened to use personal violence on the said Silinkai Lesani.

The second count carried the following particulars: that, the appellant on the night of 26th and 27th June 2005 at Kariokor ya Juu village in Voi municipality within Taita Taveta District of Coast Province, jointly with others not before the court while armed with dangerous weapons to wit pangas and iron bars, robbed Edward Ndolo Wambua of cash Kshs. 85/=, a jacket and a pocket radio make Nakira all valued at Kshs. 1,100/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Edward Ndolo Wambua.

The appellant pleaded not guilty. After a full trial he was convicted on both counts and sentenced to death. Being dissatisfied with the conviction and sentence, the appellant has appealed to this court on various grounds which challenge the Learned Senior Resident Magistrate's findings with regard to his identification and the failure to consider his defence. Through his counsel Mr. Gikandi, the appellant contended that the evidence on identification was not water tight. Counsel specifically challenged the Identification Parade conducted by the police and the dock identification of the appellant by the complainant in the second count.

Mr. Onserio, Learned counsel for the Republic conceded the appeal on the ground that on the evidence adduced before the Learned Senior Resident Magistrate, it was unsafe to found a conviction.

This is a first appeal. That being the case, this court is mandated to reconsider and re-evaluate the evidence which was adduced before the Learned Senior Resident Magistrate and arrive at its own decision on whether to uphold the conviction bearing in mind that the court did not see or hear the witness testify (see **Njoroge – v – Republic [1987] 1 KLR 19).**

In a nutshell, the facts of the case were that on the night of 26th and 27th June 2005 at about 2.00 a.m., Silinkai Lesani (PW 1), was in his one roomed house with his wife Joyce (PW 2), when he heard a knock on the window. He put on lights and heard people talking outside asking for the owner of his car which was parked outside. On enquiry, the people told PW 1 that they were police officers. They wore jackets. One had a panga, another, timber, and another a big torch. Two of the people went to the door of the house and one was left with PW 1 at the window. He asked him to identify himself whereupon the person produced a purse in purported identification of himself. The person then broke an electric bulb outside the house and all the three people entered the house. They wore no masks and asked for his purse. At that juncture the appellant knew that the people were not police officers. PW 1 was ordered to sit down and his wife told to produce his identity card. The appellant inspected PW 1's garments and took 14,000/= from his blazer. He also took his Seiko watch. He returned to the appellant Kshs. 2,000/= and gemstones which he had taken from a table in the house. A

neighbour was attracted by the commotion and came to investigate whereupon the thugs fled. The appellant testified that he identified the appellant's black complexion, big eyes and his voice. He had however not seen the thugs before.

PW 1's wife Joyce testified as PW 2. She gave similar evidence as PW 1. She however added that the appellant took her earrings but was not the one who took PW 1's Seiko watch.

PW 3, Christopher Mutie Kisondu, testified that on the material night at 2.00 a.m., he was attracted by a commotion from PW 1's house. The attackers were asking for money. It was dark outside and he called his neighbours including Mulwa but the thugs fled.

PW 4, Edward Ndolo Wambua, was the complainant in count two. He testified that on the material night, as he kept watch over Father Musui's house he saw three people who said they were police officers chasing a thief who had escaped into the Father's compound. The people were infact thugs and included the appellant who hit him with an iron bar on the head. PW 4, lost Shs. 85/= and a pocket radio. In his evidence in chief, PW 4 testified that he recognized the appellant's voice and identified his face.

PW 6, PC Reuben Lwamba testified that he arrested the appellant on information he received through his mobile phone from an informer. PW 9, IP Joan Kwasa mounted an Identification Parade in which PW 1 and PW 2 picked the appellant.

In his unsworn testimony, the appellant narrated how he was arrested at a market for offences he did not commit.

The above is an outline of the evidence upon which the Learned Senior Resident Magistrate based his conviction of the appellant. The Learned Senior Resident Magistrate found that the offences of robbery with violence had been committed and that the commission was by the appellant who was in the company of others. He was satisfied that PW 1 and PW 2 identified the appellant and further picked him at an Identification Parade mounted by the police. With regard to count two, the Learned Resident Magistrate also found that the same had been established as the complainant had had time with the appellant during the robbery.

Having independently re-considered and re-evaluated the evidence which was adduced before the Learned Senior Resident Magistrate, we do not share the view that the appellant was positively identified. The attack took place at night and the entire episode took no more than seven minutes. None of the witnesses had known the appellant before the robbery. The Identification Parade would have provided the best means to verify PW 1's and PW 2's identification of the appellant. However, we are far from persuaded that the Identification Parade was properly conducted. There was no evidence that before the parade was mounted, PW 1 and PW 2 had supplied the police officer who mounted the same with sufficient description of the people who attacked them. (See **Fredrick Ajode Ajode – v – Republic: CR APPEAL No. 87 of 2004 (UR)).** Further, whereas it was the testimony of Joan Kwasa, PW 9, the police officer who mounted the parade, that he selected parade members of the same height as the appellant. PW 2, Joyce Yasi Silinkai gave conflicting evidence that the parade comprised short and tall people. Further, in our view, the parade would not have served any purpose for the complainant in count one, PW 1, Silinkai Lesani. He testified that he saw the appellant at a market and alerted the police who then arrested him before the purported Identification Parade. In those premises, for what purpose would an Identification Parade be held? Yet the police still mounted a parade and asked PW 1 to participate. The police by their action doubted the identification of the appellant at the scene of robbery and when he called them to arrest the appellant.

With regard to the complainant in count two, PW 4, Edward Ndolo Wambua, did not also know the appellant before the robbery. He did not participate in the Identification Parade. His, was therefore dock identification which is worthless without an earlier Identification Parade. (See **Kiarie – v – Republic [1984] KLR 740).** It is now settled that the court has a duty to ensure that the evidence of identification is water tight before basing a conviction on it (see **David Kieti Mulei – v – Republic CR APPEAL NO. 108 of 2005) (UR).**

In the light of what has been discussed above, we were not surprised that Mr. Onserio who represented the Republic did not support the conviction of the appellant. The conviction is quashed, the sentences set aside and the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Before leaving this matter, we note that the Learned Senior Resident Magistrate convicted the appellant on both counts and handed down two death sentences. It is now settled that only one sentence of death should be imposed because it is not possible to hang a person twice over. That is however now academic as the appellant's entire appeal has been allowed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 12 .DAY OF MAY 2009.

J. K. SERGON

JUDGE

F. AZANGALALA

JUDGE