REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 353 of 2007

ELIJAH MUTUGI MUCHINA ……….……………………. APPELLANT

VERSUS

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

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Karatina

in Criminal Case No. 630 of 2006 dated 30th October 2007 by P. C. Tororey – Ag. P.M.)

J U D G M E N T

The appellant was among the 4 persons who faced two counts of Robbery with violence contrary to section 296(2) of the Penal Code in the Senior Resident Magistrate's Court at Karatina. They pleaded not guilty to the charges and were tried. The brief facts of the case were that on the night of 29th June 2006 a gang of robbers descended upon Mbogoini trading centre in Kirinyaga District and broke into various shops and houses. The robbers who were armed with pangas and axes robbed their victims of cash, mobile phones and electronics and assorted farm chemicals. After the complainants made their reports to the police the 4 accused were arrested. PW4 **Winfred Wanjiru** told the court that she identified one of the robbers, the appellant during the robbery. Later the police invited her to an identification parade and she managed to pick the appellant from the parade. She stated that she identified the appellant with the assistance of some light from the robbers spotlight. He was however not known to her before but he watched over her for a while as the other robbers ransacked the house. She further stated that there was sufficient light from spotlights used by the appellant's accomplices which at times would be directed at his face. She stated that she spent a lot of time with him. After the appellant was picked on the identification parade as aforesaid he led the police to the arrest of this co-accused. PW6, the arresting officer testified that they recovered farm chemicals from the house of appellant's co-accused number 2. No recovery was however made from the house of the appellant.

Put on his defence, the appellant elected to make a sworn statement of defence in these terms; that he came from Kiania in Kirinyaga and was a farmer. He did not know Nguguini area though he lived with his sister **Jane Wathoko**. They were orphans. On the 29th June 2006 he was at the Karatina District Hospital visiting his sick uncle. He left the hospital at about 6.00 p.m. and returned home. Thereafter he went to bed. He slept under the same roof with his sister but the house is L shaped and he had his own entrance. He never left the house that night. The following morning he woke up at 8.20 a.m. and returned to Karatina hospital. He was arrested on the 5th July 2006 from his home in Kiania. He was arrested by one, **Mr. Kariuki** of flying squad and other officers. There was no recovery made from his house in relation to this case. He never knew **Winfred Wanjiru Kinyua** (PW4) before. He heard her make allegations that she identified him from his voice. An identification parade was carried out at the

police station. The witness was **Winfred Wanjiru**. They were told to say the words '**toa pesa'** and she picked him out. But he was innocent. He never participated in any robbery on the material night. He then called his sister **Jane Wathoko** as a witness. She corroborated his evidence that he never left the house on 29th June 2006.

The learned magistrate having carefully considered the evidence tendered by the prosecution and the defence advanced by the appellant and the co-accused, she found the charges against the appellant's co-accused unproved and acquitted all of them. However, as for the appellant, she was convinced that the prosecution had proved the case against him beyond reasonable doubts. Accordingly, she convicted him and sentenced him to the mandatory death sentence. This is how the learned magistrate delivered herself when convicting the appellant:

"**She (meaning PW4) told the court she spent a considerable time with him and he was talking to her. She also stated that he carried a spotlight whose light was sufficient for her to see him. She further stated his accomplices also had spotlights and their light was sufficient for her to see the 4 accused. Thus when she appeared for the identification parade, she readily picked him for his physical appearance and for avoidance of doubt, his voice. I am satisfied that this witness was truthful and honest. The identification parade was conducted professionally in compliance with the Judges Rules by PW7 Inspector Ruto. Having conducted (sic) the foregoing I do find the prosecution has proved their case beyond all reasonable doubt as against accused 1 on Count III of being in possession of police stores contrary to section 324(3) and accused 4 on the offence of Robbery with violence contrary to section 296(2) of the Penal Code."**

It is against the aforesaid conviction and sentence that the appellant has lodged the instant appeal. He faults his conviction aforesaid on the grounds that the evidence of identification was flimsy and insufficient as the circumstances prevailing during the robbery were not conducive for positive identification, identification was by a single witness but the learned magistrate did not warn herself of the dangers of relying on such evidence and finally that the learned magistrate rejected the appellant's defence without assigning any reasons.

When the appeal came up for hearing, the appellant with the permission of the court tendered written submissions which we have carefully read and considered.

For the state, **Mr. Orinda**, learned Senior Principal State Counsel opposed the appeal. He submitted that the conviction was based on recent possession. The items recovered were chemicals that were positively identified by the victim. The court had no alternative but to rely on the presumption that the appellant was the thief. Appellant did not give explanation for his possession of the chemicals.

This is a first appeal and that being so, it is our duty to reconsider the evidence re-evaluate it and come to our conclusion, but always remembering that we have neither seen nor heard the witnesses – see **Okeno v/s Republic (1972) E.A. 32**.

We must from the onset correct the wrong impression created by **Mr. Orinda** that the conviction of the appellant rested on the doctrine of recent possession. Nothing can be further from the truth. The conviction of the appellant was on the strength of the evidence of visual and voice identification of the appellant at the scene of crime by PW4. Nothing was recovered from the appellant's house when he was arrested and his house searched. The alleged Chemicals were actually recovered from the house of the appellants co-accused 3 who was nonetheless acquitted of the charges. Mr. Orinda thus supported the conviction and sentence of the appellant on the mistaken belief that the appellant was convicted on the application of the doctrine of recent possession which was besides the point. It was erroneous. Apart from the foregoing, Mr. Orinda made no other submissions in support of the appeal.

As already stated, the appellant was allegedly identified at the scene of crime by a single witness, PW4. The court of appeal has dealt with the matter of identification in many cases, for instance, the case of **Francis Kariuki Njiru & Others v/s Republic, Criminal appeal No. 6 of 2001** (UR) in which it stated:

“**....... The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.......”**

In the present case, only one witness is alleged to have identified the appellant out of the many robbers whose total number she could not tell. Though the learned magistrate relied on her evidence to convict the appellant having found her a truthful and honest witness she did not however bother to warn herself of the dangers inherent in relying on the evidence of identification of a single witness in difficult circumstances to find a conviction as required. Her failure to do so amounted to gross misdirection in law on the part of the learned magistrate as correctly submitted by the appellant.

The offence was allegedly committed at night: It was at 3.30 a.m. to be precise. This is in the dead of night. However there was no light in the house. Indeed the star witness (PW4) categorically stated “***we had no lights on the house.”*** Thus there was completely no light in the house. The only source of light PW4 alleged was from the torches that that the robbers had. However the learned magistrate failed to carry out the necessary inquiries such as the source of the light, intensity of the light, the source of light in relation to the appellant and for how long the said light was focussed on the appellant as would have enabled PW4 to see the appellant sufficiently as to be able to positively identify him. It has been held in **Maitanyi v/s Republic (1986) KLR 198** that “**..... Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction........”** Inquiry of careful testing referred to is what we have already stated above. Accordingly the learned magistrate having failed to undertake the inquiry of carefully testing the evidence of identification of PW4, she should not have relied on that evidence of PW4 to convict the appellant much as she had found the witness truthful and honest. Clearly the conditions obtaining at the scene of robbery were not favourable for positive identification of the appellant. A group of robbers descended on the house of PW4 who was asleep with her husband. When they refused to open some of the robbers climbedon the roof and started to cut it open. Scared of her safety she relented and opened the door. The robbers’ actions aforesaid must have chilling. Upon entry they beat up her husband and ordered her around. Apart from the light from the torches carried by the robbers, there was no other light. We doubt that the robbers knowing that they could easily be identified if they turned the torch lights on themselves would recklessly do so as PW4 would want this court to believe.

PW4 is alleged also to have identified the appellant on a police identification parade. In the absence of a description of the appellant to the police by PW4 who indeed conceded that he was a stranger, the identification parade was worthless. In any event from the evidence of PW7 who conducted the police identification parade in respect of the appellant, the witness who participated in the parade was one **Danson Mugo Ndegwa** and not PW4. It was therefore erroneous for the learned magistrate to attribute the evidence of the police parade to PW4 when in fact it was another witness **Danson Mugo Ndegwa** who allegedly picked the appellant in the identification parade. PW4’s name is **Winfred Wanjiru Kinyua** and not **Danson Mugo Ndegwa**. Further even the said **Danson Mugo Ndegwa** was not called as a witness. From the foregoing it is apparent that the evidence of identification parade is similarly worthless.

PW4 also claimed to have identified the appellant by his voice. Of course evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence however, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See **Choge v/s Republic (1985) KLR 1**. In the circumstances of this case, there is no evidence that PW4 was familiar with the appellant’s voice. In her own testimony she conceded that she had not known the appellant before. In any event we have already held that this particular witness would appear did not participate in the parade. Even if she had, it is also our considered finding that the conditions obtaining at the scene of crime could not have provided PW4 with an opportunity to positively identify the appellant.

In the result, we allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant. He should be released forthwith unless lawfully held for another offence.

Dated and delivered at Nyeri this 11th day of May 2009

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE