REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 110 OF 2008

MOSES KUBAI M'ITHAI. ....……..……. APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Nanyuki in Criminal Case No. 751 of 2007 dated 6th May 2006 by Ndungu H. N. (miss) – Ag. S.P.M.)

J U D G M E N T

The appellant **Moses Kubai M'Ithai** was charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code in the Senior Principal Magistrate's Court at Nanyuki. It was claimed that "**on the 20th day of November, 2006 at Sportsman Arms Hotel in Laikipia district within rift Valley Province he jointly with another not before court while armed with dangerous or offensive weapons namely swords and a toy pistol robbed Charles Kimani Nduati of cell phone make Motorolla C115, a disco watch, an umbrella and cash Sh.33,000/= all valued at Kshs.35,820 and at immediately before or immediately after the time of such robbery used actual violence to the said Charles Kimani Nduati**." The appellant denied the charge and he was duly tried of the same.

The prosecution case in brief was that on 20th November 2006 at about 10.00 a.m. the complainant **Charles Kimani Nduati** (PW1) was alone walking towards town from sportsman arms hotel Nanyuki. He spotted two men ahead of him about 20 metres from the gate of sportsman arms hotel. One was seated and the other was standing. As he approached them the one standing stopped him and began to ask him if he knew of a certain lady who was educating two disabled boys and whether he knew the town very well. Before he could answer the one seated suddenly stood and held him by the neck. The one who had been making enquiries produced something like a gun which had a silver cigarette paper tied to its tip to make it look like a nozzle. However the cigarette paper fell off. He returned the object in to his pocket and then pushed a knife. He then hit the complainant with it on the hand. The complainant tried to shout. However the man holding his neck placed something that looked like tooth paste in his mouth and his mouth became numb and he could not scream. The man who had a knife then took his cell phone – Motorolla C115, and cash Kshs.33,000/= from his pocket. The same man also robbed him of his wrist watch make Disco. They then escaped. He identified that the appellant as one of those who robbed him. In fact he wass the one who had produced a knife and also something that looked like a pistol from his pocket. He had not known him previously and that the incident took less than 2 minutes. However in that span of time he noted his looks and the clothes he wore. After he had been robbed he went back to

the gate of sportsman arms hotel and tried to point out to the security guards the robbers who were then escaping towards Kahawa area. However the security guards could not understand his gestures as he was unable to speak. He subsequently reported the incident to Nanyuki police station and thereafter went to Ngushishi clinic for treatment. He had been injured on the finger next to the thumb of his right hand. However he never obtained a P3 form.

In the month of April 2007 he was passing through KANU grounds in Nanyuki town when he spotted one of the men who had robbed him as aforesaid. He recognised him by looks. He informed matatu touts around and accosted the man. But on seeing him the man attempted to escape. He pursued him and managed to arrest him outside CMC showroom. Members of the public gathered and escorted the appellant towards the police station. A police officer who was passing by took over the matter, re-arrested the appellant and escorted him to Nanyuki Police Station.

PW2 – **PC Nzau** testified that on 21st April 20007 he found the appellant in the cells having been arrested. He was investigating officer in the case which involved a robbery that had taken place much earlier on 20th November 2006 involving the complainant. None of the robbers had been traced until 21st April 2007 when the complainant met the appellant in town and arrested him with the assistance of members of public and handed him over to **P. C. Ndikwa**. He subsequently charged the appellant.

PW3 – **P. C. Ndikwa** testified that on 21st April 2007 he left Nanyuki police station going to Nanyuki town at around 11.00 a.m. He came to some curio shops and saw a group of people struggling with one man who lay on the ground. He drew near and learnt that the people had arrested the appellant on the allegation that he had robbed the complainant earlier of cash Kshs.33,000/=. The complainant had met the appellant in town and arrested him but he was resisting to go to the police station. Members of the public had intervened and had wanted to lynch him. He re-arrested him and took him to the police station where he was subsequently charged.

Put on his defence, the appellant opted to give an unsworn statement and called no witnesses. The appellant stated that on the date of his arrest he left his workshop at Likii at about 11.00 a.m. going to a hardware shop which is along Sirimon road opposite KANU grounds. On the way he met the complainant who stopped him and asked him where he resided and if he had a brother who lived in Nanyuki. It was then that the complainant told him that he looked like one who had robed him previously. They argued over the matter and members of the public joined in and told them to go to the police station. On the way they met a police officer who heard their arguments and escorted the appellant to the police station where he was booked and subsequently charged with the instant offence. Essentially he was denying his participation in the alleged crime.

The learned magistrate having carefully considered and evaluated the evidence led by the prosecution in support of the case and the defence advanced by the appellant found the case against the appellant proved holding as follows:

"**I have noted that the robbery incident herein took place during broad day light. There has been nothing to suggest that the assailants had concealed their faces in any way at all. The complainant when he made his report to the police did tell them that he could identify the man if he met them. I caution myself that this case is based on the evidence of a single identifying witness i.e. the complainant only, however from the evidence on record I am satisfied beyond any reasonable doubt that the complainant did see the accused who had not concealed himself in anyway. The offence took place during broad daylight. The complainant first saw accused from a distance of 20 metres from the gate of the mentioned hotel, the men even spoke to him first asking him if he knew a certain woman, then if he knew the town well. On the evidence I have no doubt that the complainant saw the accused well during the day light robbery and recognised him 5 months later when he saw him in town and had him arrested. I find him guilty and convict him as by law provided."**

Upon conviction as aforesaid, the appellant was sentenced to the only permissible sentence under the law, death. Aggrieved by the said conviction and sentence, the appellant lodged, the instant appeal. In

his home made amended petition of appeal, the appellant faults the learned Ag. Senior Principal Magistrate for convicting and sentencing him on the evidence of a single identifying witness without warning herself of the dangers of replying on such evidence, which evidence was in any event insufficient and contradictory. That the evidence of visual identification was unreliable as the learned magistrate made no inquiries as to the time taken by the complainant to observe the appellant and was not even supported by a first report to the police. That the learned magistrate was impressed by the appellant's mode of arrest, yet vital witnesses were not called to testify, nor did the learned magistrate take into account the period that elapsed between the time of the alleged offence and the appellant's arrest. Finally the appellant complained that the learned magistrate had rejected his valid defence without giving it due consideration.

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. The appeal was opposed. **Mr. Makura**, learned Senior State Counsel submitted that the conviction of the appellant was on the basis of the evidence of the complainant. The robbery was in broad daylight. The complainant had in his first report indicated that he could identify the robbers. Although identification was by a single witness, the trial court duly warned itself of the dangers of relying on such evidence. The appellant's defence was duly considered and found not to cast any doubts on the evidence adduced by the prosecution.

This being a first appeal it is in the nature of a re-hearing only that we are not taking down evidence and observing the witnesses as they testify. This role was taken up by the trial court. That notwithstanding, it is our duty to re-evaluate the evidence, analyse it and come to our own conclusion but in doing so we must give allowance to the fact that we have neither seen nor heard the witnesses. See **Okeno v/s Republic (1972) E.A. 32**.

It is not in dispute that the appellant was convicted on the evidence of a single identifying witness, the complainant. However there is no rule of law or practice against a fact being proved by the evidence of a single witness. Though the identification herein of the appellant was by a single witness, the court of appeal in the case of **Abdulla Bin Wendo v/s Republic (1953) 20 EACA 166**, confirmed that a fact may be proved by the testimony of a single witness. Again in **Roria v/s Republic (1967) E.A. 583** the court of appeal observed:

"**..... While it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it was not safe to do so ....."** The only qualification however is that if such evidence is with regard to identification, it should be tested with greatest care especially when it is known that, conditions favouring a correct identification were difficult. See instance **Robert Gitau Wanjuku v/s Republic, Cr. Appeal No. 63 of 1990** (UR). A conviction resting entirely on identification invariably causes a degree of uneasiness as stated by **Sir Clement de Lestang V.P. in Roria** (supra) hence the need for scrupulous circumspection when dealing with such evidence.

In he circumstances of this case, we are satisfied that the learned magistrate was alive to the need to deal with the evidence of identification of the appellant with caution. Indeed she went out of her way to warn herself of the dangers inherent on relying on such evidence. The robbery

was committed in broad daylight. It was 10 a.m. in the morning. The complainant spotted the robbers as he approached them from the Sportsman Arms Hotel gate that was 20 metres away. The robbers had not disguised their appearances by wearing huts or even hoods. In other words their faces were in the open for all to see. When he reached them, one of them robbers engaged him a discussion about whether he knew of a woman educating two disabled boys and whether he knew the town very well. This discussion must have been in close proximity and since it was broad day light, it was easy for the complainant to look at the robbers and observe their features. From the evidence, the complainant was very clear as to who between the two robbers did what. That tells us that he was observant. The robbery took 2 minutes or so to accomplish. However much as this was a very short time, the circumstances in which the

robbery was committed were such that the complainant could still have managed to identify the robbers.

It was day time remember. When the complainant subsequently made a report to the police he told them that he could identify the robbers if he met them again. The appellant has raised the issue regarding contradiction as to when the complainant made a report to the police. According to the complainant he made the report on the same day at 1 p.m. However according to the investigating officer, the report was made on 28th November, 2006. In our view nothing much turns on this issue. The fact of the matter is that a robbery was committed on the complainant and report thereof subsequently made to the police. The alleged contradictions are therefore inconsequential. The complainant even noted the clothes the robbers were wearing. For the appellant he noted that he "*wore a grey sweater (wind breaking).*"

Considering all the foregoing circumstances we are satisfied just like the learned magistrate was that the circumstances obtaining at the scene of robbery were favourable for positive identification of the appellant.

We note though that the appellant was arrested 5 months down the line. Much as the period between the commission of the offence and subsequent arrest of the appellant may appear long, there is no suggestion that the complainant may have forgotten the features or appearance of the appellant with the passage of time. Indeed the complainant was categorical that it was the appellant who was among those who robbed him. Before he caused his arrest he had approached the appellant and greeted him. However the appellant on seeing him attempted to escape. This evidence of the complainant was neither challenged nor controverted. If he was innocent as he would like this court to believe, why would he attempt to escape from a person who is simply greeting him? His conduct was thus not consistent with that of an innocent person. We are satisfied that though the appellant was arrested 5 months after the commission of the offence, his features had not escaped from the mind of the complainant with the passage of time considering that the offence was committed during the day. The complainant under cross-examination by the appellant conceded that "***.... It is possible for people to look like each other .....***" However he was forthright "***.... I did not mistake your identity.....***" In our view therefore much as the evidence of identification was of a single witness it cannot be faulted. The learned magistrate was right therefore on acting on it after duly warning herself of the dangers. The issue of mistaken identity does not thus arise.

The appellant has faulted the learned magistrate for convicting him on the basis of his mode of arrest. We do not think that this complaint has any merit. The conviction of the appellant turned on his identification at the scene of crime by the complainant and not his mode of arrest. There is also a complaint that the prosecution failed to call vital witnesses. Such vital witnesses according to the appellant are members of the public who had assisted the complainant subdue the appellant. We do not see what weight such evidence would have added to the prosecution case. The complainant only summoned the members of the public to assist him arrest the appellant after he had positively identified him as one of the two people who had previously robbed him.

On the overall we are satisfied that on the evidence on record, the conviction of the appellant was inevitable.

Accordingly we dismiss the appeal and uphold the conviction and sentence imposed by the learned magistrate.

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

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE