REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 140 of 2004

SAMSON KIMINZA MASILA ……..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Being an appeal from the Judgment of Honourable Mr. J.R. Karanja dated 30th July 2004

in Machakos CM'S CR.C No. 166 of 2004)

JUDGMENT

1. Samson Kiminza Masila was the first accused person in Machakos CM'S Court Criminal Case Number 166 of 2004. He faced the charge of robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged that on 1/1/2004 at Mlolongo Market, Athi-River jointly with others not before court being armed with dangerous weapons namely pistols, rungus and metal bars they robbed Francisca Mukai Mwangi of one T.V. make 'National 14", one player make 'Sony', compact player make 'JVC', iron box make 'Safeway', one 'Mecko', Gas Cooker, a mobile phone and cash Kshs.12,000/= all valued at Kshs.51,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Francisca Mukai Mwangi.

2. At the end of his trial, he was found guilty and in the judgment the learned trial magistrate inter-alia rendered himself thus;

"**The accused contended that he was not involved in the offence. However, the evidence of identification adduced against him by the complainant and her husband is in the opinion of the court reasonably credible and corroborative. It shows that favourable condition and adequate opportunity for positive identification existed at the time of the offence such that the possibility of incorrect or mistaken identification was remote. It would therefore be safe to hold that the accused was positively identified as having been one of those who committed the offence of robbery with violence against the complainant.**

The prosecution thus proved its case as required."

3. The Appellant was thereafter sentenced to death and dissatisfied, he filed this appeal which is conceded by Mr O'Mirera, Principal State Counsel for reasons that the purported identification of the Appellant at the scene by a single witness was not sufficient and there being no other evidence to sustain the charge, the conviction was in error.

4. The advocate for the Appellant has also raised the issue that there was no evidence that the complainant could identify any of her attackers at 2.00 a.m. with suspect lighting. Further that the

purported identification parade was riddled with errors and could not be relied upon, and that in fact the prosecution was based purely on suspicion and not admissible evidence or any credible evidence at all.

5. It is instructive to note that the Appellant was one of four accused persons arraigned before the trial court but the other three were acquitted under Section 210 of the Criminal Procedure Code and the evidence tendered and leading to his conviction and sentence was as follows;-

PW1, Francisca Mukai Mwangi and her husband, PW2 Paul Mwangi Waithaka were entering their house within Mlolongo at 2.30 a.m. on 1/1/2004 when they were confronted by a group of people at the entrance and having relieved of them whatever items they were having, frog-marched them to their house and armed with iron-bars and a pistol robbed them of the items elsewhere listed above.

6. It was the evidence of PW1 that when they entered the house, the robbers switched on the lights and she then stated as follows;-

"**I was able to identify one of the robbers when we entered the house while the rest waited outside. He was the one picking the property from the house and passing them outside to his colleagues. He was the first accused in the dock (identified). On 9th February 2004 I was called to an identification parade and was able to point out the first accused."**

7. During cross-examination, the witness further stated as follows:-

"**The first accused was near me. I could see him clearly. I gave his description to the police. I said he was tall, balded (sic) and strong. I said that he was wearing a blue jeans trouser and a black T-Shirt. He did not have a hat."**

8. PW2 on the other hand stated that he was "**able to identify two of the robbers while inside the house. They included the first accused in the dock (identified)"**. He added as follows during cross-examination;

"**The first accused is the one who was picking up our property and passing them to his colleagues. His colleagues were outside near the house. I was being guarded by the other robber that I identified. He is not in court but was a short person."**

9. PW3, Ag. IP. James Njiru was the one who conducted the identification parade on 10/1/2004 and the number of suspects was four. The Appellant was one of the members of the parade and chose to stand between member No. 4 and No.5. PW1 identified him and the Appellant allegedly expressed dissatisfaction with the parade. He did so apparently because the witness did not know him.

10. PW4, P.C. Geoffrey Mokaya, arrested the Appellant on 9/1/2004 acting on a tip-off. The Appellant was arrested at Ngwata in Mlolongo area and PW4 said that on seeing the officers, the Appellant fled but was chased and apprehended.

11. PW5 P.C. Edward Nyagah received the initial report of robbery on 1/1/2004 at 4.00 a.m. while at Athi-River Police Station. He visited the scene and later the Appellant amongst others was arrested and charged with the offence of robbery with violence.

12. He stated in cross-examination that "**the complainant said that she was able to identify the suspects if she saw them. However, it was not indicated in her statement of 1st January 2004. She did so in a further statement on 10th January 2004 after the identification parade… The complainant did not give the description of the suspects in her first statement. Apart from this case, the accused were arrested in connection with other offences. Nothing connected with the present offence was found with any of the accused."**

13. PW4 also confirmed that PW3 was the one who booked the arrest report in respect of the Appellant.

14. When the Appellant was finally put on his defence, he stated that he was in Syokimau near Mlolongo on the night of 31/12/2004 and that on 6/1/2004, he was at Mlolongo Shopping Centre and while at a café he was arrested and taken to Athi-River Police Station and later an identification parade was conducted near the report office which was easily accessible to the witnesses. He was pointed out by a witness and he was not satisfied with it as he had nothing to do with the robbery.

15. It is our duty to evaluate, examine and analyse the above evidence afresh and reach out own decision on the facts and the law – *see* **Okeno vs R (1972) E.A. 32.**

16. In staying true to that duty, it is clear from the evidence of PW1 and PW2 that on 1/1/2004 at 2.30 a.m. they were returning to their house within Mlolongo area after the New Year celebrations when they were accosted by a gang of five people armed with iron-bars and having relieved them of their personal effects, they were led them into their house and lights were turned on. While one robber guarded PW2, another robber picked household goods and passed them on to the other robbers who were outside the house. The items that were stolen are all listed in the charge sheet and there is no evidence that any of them were recovered in the possession of the suspects who were later arrested, including the Appellant. The question that must be confronted in this; was the Appellant one of the robbers and if so was he properly identified as having been at the scene?

17. We have elsewhere above reproduced segments of the evidence tendered by PW1 and PW2. We agree that the evidence of PW2 on identification would cause any jurist some degree of uneasiness as was stated by Sir Clement de Lestang VP in **Roria vs R (1967) E.A 58**. We say so because he was unable to pick out the Appellant at the Identification Parade and there is no other evidence save dock identification that he actually identified him at the scene. It has been said time and time again that a conviction cannot be based on dock identification because it is unsafe to do so - See **Kiarie vs R (1984) KLR 739.** Further in **Paul Etole & Another vs R Cr. Appeal No. 24/2000 (AK)** it was held that a court in such circumstances should remind itself of "**any specific weaknesses which has appeared in the identification evidence"**. We have done so and we are convinced that the purported identification of the Appellant by PW2 cannot be sustained.

18. Regarding identification by PW1, she remains the only witness who said that she identified the Appellant at the scene and at the Identification Parade conducted by PW3. It has been argued by the advocate for the Appellant that there was no evidence as to the intensity of the light available on the material night and therefore the witness may have been mistaken. In **Etole** (supra) it was held inter-alia as follows:

"**It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis a vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error.**

19. In the present case, we have seen no evidence at all as to what "**lights were turned on"** as was the evidence of PW1 and PW2 and although that issue could have been easily resolved by appreciating that the lights being turned could only have been electric lights, two issues regarding identification are worrisome. The first is that although PW1 in her evidence stated that she informed the police that she could identify one of the robbers, that crucial issue was not recorded in her statement on the material night but was recorded in a statement made immediately after the Identification Parade i.e. on 10/1/2004. Why was such an important matter being addressed only after the parade and not before? Was it possible that PW1 was crafting her evidence along the way and that in fact she could not identify the Appellant?

20. The second issue is with regard to the conduct of PW3 who conducted the Identification Parade. It was he who, according to PW5, upon the arrest of the Appellant booked him in and therefore when he conducted the parade a day later, he was already well versed with the Appellant and his case and therefore his conduct of the parade became suspect. Further, whereas he stated that the parade had people **with "similar or similar physical description with the suspects"**, PW1 said that the parade had "**both brown and darker people, it had short and tall people as well as thin and fat people"**. The obvious

contradiction in the evidence of these two crucial witnesses would cancel any faith one would have in the Identification Parade and whatever doubts exist would favour the Appellant and his defence that the parade was manipulated is thus lent credence.

21. On the whole therefore the evidence of the single witness may not be free from error and we are alive to the holding in **Makokha vs R (1989) KLR 238** where the Court of Appeal held as follows:-

"**While a defendant may be convicted on the identification evidence of a single witness, before a conviction can be based on such evidence the court must warn itself on the danger of doing so and should only convict if satisfied that the circumstances of the identification were favourable and the evidence is reliable and free from possibility of error."**

22. Having warned ourselves appropriately and since the Appeal was predicated on the issue of identification only, we agree with learned Principal State Counsel that the Appellant's conviction and sentence may have been in error.

23. In the event, we shall allow the Appeal, quash the conviction, set aside the sentence and order his release unless he is otherwise lawfully held.

24. Orders accordingly.

Dated and delivered at Machakos this **20th** day of **July** 200**9**.

ISAAC LENAOLA

JUDGE

M. WARSAME

JUDGE