REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 40 of 2006

JOSEPH NGIGE MUNGAI …….....…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From the original decision in Criminal Case No. 5301 if 2004 in the Chief Magistrate's Court at Kibera – Mrs. H. Wasilwa PM)

JUDGMENT

JOSEPH NGIGE MUNGAI, the appellant, was charged in the subordinate court jointly with one MICHAEL NJOROGE MUTURI with five counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of count 1 were that on 24th December 2000 along Nyakinyua road Riruta within the Nairobi Area Province while armed with dangerous weapons namely pistols jointly with others not before court robbed EVANNS OWENGA MOSE off his motor vehicle registration No. KXC 775 a Nissan Sunny valued at Kshsh.250,000/= mobile phone make siemens C25, cash Kshs.3400/= and torch all valued at Kshs.261,100/=. The particulars of count 2 were that on 24th December 2000, at Uthiru Shopping Centre within the Nairobi Area Province while armed with dangerous weapons namely pistol, jointly with others not before court robbed JULIUS MACHARIA of his motor vehicle registration No. KAJ 671 E Toyota Corolla Saloon valued at Kshs.350,000/= and at or immediately before or immediately after the time of the robbery threatened to use actual violence to the said JULIUS MACHARIA.

The particulars of count 3, on the other hand, were that on 25th December 2000, at Riruta Satellite within Nairobi Area Province while armed with dangerous weapon namely pistols, jointly with others not before court robbed HENRY NICHOLAS NJUGUNA of his motor vehicle registration No. KXV 332 make Suzuki Sierra valued at Kshs.100,000/= and at or immediately before or immediately after the time of the robbery threatened to use actual violence to the said HENRY NICHOLAS NJUGUNA.

The particulars of count 4 were that on 25th December 2000, at Kirigu village within the Nairobi Area Province, while armed with dangerous weapons namely pistols, jointly with others not before the court robbed HINDRISON MBUGUA KABERA of his motor vehicle registration No. KAJ 375D Nissan Pickup, a mobile phone, wrist watch make Casio all valued at Kshs.530,000/= and at or immediately before immediately after the time of the robbery threatened to use actual violence to the said

The particulars of count 5, on the other hand, were that on 25th December 2000, along Naivasha Road Riruta within the Nairobi Area Province, while armed with dangerous weapon, namely pistols jointly with others not before court robbed JANE MWIHAKI THAIRU of his motor vehicle registration No. KAK 381L Toyota Corolla Saloon valued at Kshs.500,000/= and at or immediately before or immediately after the time of the robbery threatened to use actual violence to the said JANE MWIHAKI THAIRU.

The appellant was the 2nd accused in the subordinate court. After a full trial, the court found the 1st accused not guilty and acquitted him. However, the magistrate found the appellant guilty of counts 1 and 4 and convicted him, but acquitted him on counts 2, 3, and 5. The magistrate sentenced the appellant to death by hanging on each of count 1 and count 4.

Being aggrieved by the decision of the trial court, the appellant appealed to this court challenging both the conviction and sentence. The appellant also filed written submissions, which he relied upon at the hearing of the appeal.

Learned State Counsel, Mrs. Gakobo, supported the conviction on count 1, but conceded to the appeal on count 4. Counsel submitted that with respect to count 1, the prosecution adduced sufficient evidence to sustain the conviction. Counsel contended that PW1 clearly stated that he was carjacked by 4 men at Riruta Satellite, and drive all the way to Kangemi. The carjackers talked to him, and he was able to identify appellant in the process, as the car lights were on. At Kangemi, the vehicle stopped at a petrol station to fuel, and the robber who was driving (the appellant) went out of the vehicle and talked to the petrol attendant. PW1 had another opportunity to observe and identify the appellant through the light at the petrol station. About 3 days later, the same PW1 was able to identify the appellant at an identification parade. Therefore, counsel submitted, there was no possibility of error or mistaken identity. The only discrepancy according to counsel, appears to be on date of arrest, where PW2 stated that the appellant was arrested on 29/12/2000, while PW1 and PW3 stated that parade was conducted on 27/12/2000. Counsel contended that the charge sheet showed clearly that the appellant was arrested on 27/17/2000. Therefore the discrepancy in dates was not fatal.

Counsel further submitted that section 200 of the Criminal Procedure Code (Cap. 75) was complied with, as the record showed that the appellant elected to proceed with the trial from where it had stopped. Counsel contended that, though it was not clear whether the magistrate informed the appellant of his right to recall witnesses, that did not prejudice the appellant. Counsel lastly, submitted that the magistrate considered the appellant's defence and found it to be a mere denial.

With regard to count 4, counsel submitted that PW7 stated that he was carjacked at 8.15 p.m. In cross-examination and re-examination he contradicted himself as to whether the car lights were on. PW3 did not say that she conducted an identification parade in which PW7 identified the appellant, though PW7 claimed to have identified the appellant in a parade. There was also no identification parade form produced in court.

Therefore, counsel submitted, the conviction on count 1 should be upheld, while the conviction count 4 should be set aside.

In response to the submissions of the learned State Counsel, the appellant submitted that the case before subordinate court was a retrial. He contended that witnesses, especially PW1 who was PW3 in the original trial, was not truthful. The appellant submitted that the original proceedings were produced or an exhibit, and it was clearly from those proceedings that the said witness did not identify him at the police station or at the trial in court. The same witness now (in the trial) claimed to have identified the appellant and the magistrate relied on him. Also, PW3 IP BEATRICE OTIENO stated that she did not conduct an identification parade in which PW1 was the witness. The magistrate did not realize that she convicted him on a charge for which he had preciously been acquitted. Secondly, PW2 clearly stated that he was arrested on 29/12/200, and the evidence of an identification parade was that it was conducted before the date of arrest.

On section 200 of the Criminal Procedure Code, the appellant submitted that the succeeding magistrate did not comply with the same.

We observed that case of the appellant herein was initially heard by the subordinate court as Kibera Criminal Case No. 202 of 2001. The Police case was opened in December 2000. Apparently, a retrial was ordered on appeal and Kibera Criminal Case No. 4 of 2006 was conducted. This appeal arises from the retrial.

We have considered the appeal, the evidence on record and the petition of appeal as well as the submissions of the appellant and the State Counsel.

The State Counsel has conceded to the appeal on count 4. Counsel contended that the alleged robbery in count 4 occurred at night (8.15 p.m.). The complainant PW 7 contradicted himself in cross examination as to whether or not the lights of the vehicle were on. In addition, PW3 IP BEATRICE OTIENO testified that she did not conduct an identification parade in which PW 7 HENDERSON MBUGUA KEBERA, was the identifying witness. This was contradicted by PW 7, who was the complainant with regard to the charge, who stated that there was an identification parade where the witness identified the appellant. It was instructive to note that no identification parade forms were produced.

We concur with the learned State Counsel that there were serious contradictions in evidence with regard to count 4. There was no tangible evidence on identification on which the learned magistrate could have convicted the appellant on count 4. We will quash he conviction on count 4.

With regard to count 1, learned State Counsel has urged us to uphold the conviction. In our view, the evidence of identification with regard to count 1 was also not watertight. Firstly, the evidence on record was that the appellant was arrested on 29/12/2000. This was what was indicated in the OB entry No. 47/24/12/2000, as reflected in the charge sheet. That is what PW2 SGT FRANCIS MAINA KARIUKI, the arresting officer stated – that the arrest of the appellant was on 29/12/2000. Certainly an identification parade could not have been conducted for the appellant with regard to the alleged offence on 27/12/2000 before arrest. This is a serious contradiction which raises a doubt as to whether indeed an identification parade was conducted, and when.

Secondly, we have perused the identification parade form which was produced in court as exhibit 3. There are a number of observations that we have to make on the document. The said identification parade form was produced in Criminal Case No. 202 of 2001, rather than the subject case herein before the magistrate. Thirdly, the form has three identifying witnesses that is JULIUS MACHARIA, EVANS DANIEL OWENGA MOSE and MULWA KASINI without stating who of the witnesses identified which suspect. Fourthly, the form is actually not signed by the police officer who conducted the parade. Fifthly, the entries filled on the last page by the parade officer, were carbon copied. All these defects are so clear that, in our view, the alleged identification parade, and the parade form should not have been relied upon. In our view, the learned magistrate erred in relying on the evidence of identification of the appellant by a single witness without testing that evidence with the greatest care – see **GIKONYO – VS - REPUBLIC [1980] KLR 23**. It was not watertight. There was really was evidence of an identification through a parade to be relied upon. The identification evidence was dock identification which does not have much probative value. On the above reasons, we will allow the appeal on that 1st count as well.

Consequently, and for the above reasons, we allow the appeal quash the convictions on both counts and set aside the sentences. We order that the appellant be set at liberty, unless otherwise lawfully held.

Dated and delivered at Nairobi this 30th day of April 2008.

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J.B. OJWANG **G.A. DULU**

JUDGE **JUDGE**

In the presence of –

Appellant in person

Mrs. Gakobo for State

Huka/Mwangi - court clerk