REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 255 of 2005

RICHARD MAINA MACHARIA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Judgment in the Senior Resident Magistrate's Court at Karatina in Criminal Case No. 1925 of 2004 dated 15th November 2005 by P. C. Tororey – SRM)

J U D G M E N T

Richard Maina Macharia**,** the appellant, was convicted by the Senior Resident Magistrate, Karatina, on one count of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. Being aggrieved by the conviction and sentence, he preferred the instant appeal through **Messrs Maina Karingithi & Company Advocates**. In the Petition of appeal, the appellant has raised five grounds of appeal to wit;

1. The learned trial magistrate erred in law and fact in finding that the appellant had been positively identified by PW1 and PW2.

2. The learned trial magistrate erred in law and fact in finding and Concluding that the circumstances obtaining at the time of the robbery were favourable to a positive identification and thereby wrongly convicted the appellant on that misconception.

3. The learned trial magistrate erred in law and fact in not finding that the implication of the appellant was a mistaken identity as she did hold in respect of the appellants co-accused.

4. The learned trial magistrate while stating the correct position of law, failed to apply the same and thereby occasioned a miscarriage of justice prejudicial to the appellant.

5. That the conviction was wrong and the sentence excessive.

The evidence as found by the trial court was that on the 6th December 2004 at Kiamaina village in Nyeri District, the complainant (PW1), **Alice Nyokabi Gachagua** had just arrived at home from her saloon business in Karatina town at about 11 p.m. when she was attacked by a gang of robbers numbering about 10 who apparently had been laying in wait in her compound. She raised an alarm and her son **George Kimaru Gachagua** (PW2) who lives in the same compound came along. He had a torch which he directed towards the scene of the incident. However he too was ordered to sit down. He did not. Instead

he scampered for safety whilst raising alarm. It was then that the gang of robbers took off but not before they had robbed PW1 of a mobile phone, Kshs.3000/= and a watch. When members of the public came to the scene, PW1 and PW2 told them that they had identified the appellant as one of the robbers. The villagers proceeded to the house of the appellant, got him out of bed and frogmarched him to a nursery school ½ kilometre away and forced to draw a list of all his accomplices under threat of being lynched. Following the list a total of 13 suspects were arrested among them **Jackson Migwi Wanjera** who was the appellant's co-accused during the trial. Whereas the other suspects were released having been bonded to keep peace, the appellant and the co-accused faced the charge.

The appellant denied the charge. In his sworn statement of defence, the appellant stated that on 7th December 2004 he spent the whole day at his place of work and then went home. At about 9 p.m. he went to bed. At about 11.30 p.m. he heard people outside his house. They called him out. Among them was PW2. He opened the door and the group came in, searched the house but recovered nothing. The group of about 20 people then told him that he had robbed PW1 of cash and mobile phone. They frog matched him to Kiamaina Nursery School and beat him up demanding to know who his accomplices were. They also threatened to lynch him with petrol and a tyre. The group then wrote down names on a paper and asked him whether he knew the names. The police soon thereafter arrived at the scene and he was arrested and later charged together with the co-accused aforesaid. The appellant's defence is that he never saw the complainant on the day of the offence and was therefore not involved.

Having evaluated and analysed the evidence, the learned magistrate was persuaded by the evidence led by the prosecution in so far as the appellant was concerned. Accordingly she found him guilty as charged. The appellant's co-accused was however lucky for he was acquitted of the offence under section 215 of the Criminal procedure Code.

At the hearing of the appeal, the appellant was represented by **Mr. Karingithi**, learned counsel whereas the state was represented by Mr. Orinda, learned Principal state counsel **Mr. Karingithi** submitted that the circumstances obtaining during the incident did not favour positive identification. The robbery was committed at night by a gang of 10 robbers who suddenly accosted PW1 and pinned her down. PW1 claimed to have identified the appellant courtesy of the torchlight from her son (PW2) which he directed at the robbers. However the evidence of PW2 is that he came to the aid of his mother upon hearing her screams. He was armed with a torch and a panga. However he was also ordered to sit down whereupon he ran away. He was at the scene for hardly 30 seconds. To learned counsel it was unconvincing that his torchlight would have enabled him and PW1 to identify the appellant. Counsel went on to submit that the learned magistrate correctly stated the law on identification but failed to apply the same to the circumstances of this case. Furthermore, the only reason appellant's co-accused was acquitted was on the question of possible mistaken identity. Counsel submitted that if the co-accused could have been mistakenly identified, equally then the appellant could also have been mistakenly identified by the two witnesses. After all both PW1 & PW2 were emphatic that they had identified the two at the scene of crime. Finally on the issue of a list allegedly drawn by the appellant of his colleagues in crime, counsel submitted that it was done under extreme intimidation and that in any event the magistrate had held that the list could have been authored by someone else.

Mr. Orinda opposed the appeal. He submitted that the case was one of identification by two witnesses. That the robbers and PW2 had torches which illuminated clear light that enabled PW1 and PW2 to identify the appellant and co-accused. Immediately the house of the appellant was visited and he was arrested. The appellant therefore could not have been a victim of mistaken identity. Counsel pointed out that the learned magistrate had warned herself of the dangers of convicting the appellant on the evidence of identification which is not lessened by the fact that two witnesses identified the appellant. Counsel concluded by submitting that there was no fault in the manner in which the trial court treated the Evidence.

In the case of **Achira v/s Republic (2003) KLR 707** the court of appeal stated thus:-

"**This is a first appeal. This court as the first appellate court is required to reconsider the evidence, re-evaluate the same and draw its own conclusions and in doing so it should make allowance for the**

fact that the trial court has had the advantage of hearing and seeing witnesses.....”

In considering this appeal, we shall bear in mind the above propositions of law.

The whole question in this case turns on whether the appellant was positively identified at the scene of crime. The main attack by **Mr. Karingithi** was directed as it had to be, towards showing that the trial court misdirected itself by omitting to consider if there was light for clear and positive identification. Indeed in his petition of appeal, all the grounds put forth revolve around the question of positive identification and or recognition of the appellant. It was **Karingithi's** contention that given that there was no light at the scene of the crime and that the torch light which PW1 & PW2 insisted helped them identify the appellant was directed at the gang of robbers for a split second, it could not have enabled either PW1 or PW2 to recognise the appellant.

On the issue PW1 testified as follows: “**..... I opened the gate and entered in. As I walked to my house I found people outside my son's house. They had pangas and torches. I was pushed to the ground and passed over my phone, cash and watch. I screamed for help. I lost cash Kshs.30,000/= sic, Motorolla cell phone Kshs.5500/=, watch valued Kshs.300/=. My son heard my screams and came out of his house holding a spotlight. He was ordered to sit down. The light from his spotlight fell on my attackers. I identified Maina (accused 1) and Migwi Wanjera (accused 2). My son rushed back while calling for help. He banged on the iron sheets to draw attention. Members of the public came .....”** As for PW2 he testified as follows on the issue “**..... I do recall on the 6.12.04 at about 11.45 p.m. I was in my house in Kiamaina when I heard someone scream. I identified the voice as that of my mother. I came out of my house with a panga and torch I went in the direction where the screams were coming from. I found my mother lying on the ground. My torch was on. One person was on either side of my mother and another was bent stealing from my mother. They had 2 spotlights. One of them ordered me to sit down. I recognised him as Richard. I identified him physically and also by voice. I screamed and the people attacking my mother ran away.....”**

We have gone into this at some length because of the very crucial issue of identification in this case. The trial court does not seem to have critically analysed, evaluated and considered the evidence of identification and neither was it alive to the matter pertaining to the quality of the light by which the appellant was seen. In the case of **Wangombe v/s Republic (1980) KLR 149** at page 150, Letter 1; the court of appeal stated:

“**..... In this case guilt turned upon visual identification by one or more witnesses ..... a reference to he circumstances usually requires the judge to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged, the position from the accused and the quality of the light.....”**

The same sentiments were reiterated in the case of **Maitanyi v/s Republic (1986) KLR 198**. Indeed in this latter case the court of appeal went on to hold that failure to undertake such an inquiry is an error of law and such evidence cannot safely support a conviction.

The offence herein was committed after 11 p.m. According to the testimony of PW1 & PW2 it had rained and it was dark. There was no other source of light at the scene other than the two torches that the members of the gang allegedly had and that of PW2. Neither PW1 nor PW2 stated that the two torches in the possession of the gangsters were on. Indeed PW1 conceded that it was the light of the torch from his son PW2 that enabled her to see and recognise the appellant. From the evidence on record, the attack on PW1 was sudden and furious. As she walked to her house, she was suddenly confronted by a gang of people who knocked her down and started demanding from her money, cell phone and the watch. She must have been petrified to be suddenly confronted by 10 people in her compound armed with pangas and whilst lying down, she screamed and her son PW2 responded. He came and directing his torchlight to where his mother was he was ordered to sit down whereupon he ran away. In his own words he only directed the torchlight to the culprits for a split second. In the meantime his mother was lying on the ground. For that split second and in that condition she claimed that she was able to recognise the appellant. In our opinion the period PW2 was with the torch at the scene was so short for any meaningful

identification. PW1 and PW2 could only have had a fleeting glance at the gangsters which was not sufficient to enable them identify any of the gangsters. PW1 having been pinned to the ground, we doubt whether she could have been in a position to observe keenly any of the gangsters sufficiently to be able subsequently identify them. In our view the circumstances obtaining at the scene did not favour any positive identification. The learned magistrate did not subject the evidence of identification to exhaustive evaluation by making the inquiries referred to herein above. Accordingly she committed an error of law and should not have used the evidence of the alleged identification to find a conviction.

The appellant was apparently a person well known to both PW1 and PW2 since they are neighbours. From the evidence on record the appellant did not at all disguise himself yet he knew that he could easily be recognised by PW1 and PW2. That is incredible. In the case of **Republic v/s Eria Sebwato (1960) E.A. 174**, the court commenting on a similar case made the following important observations:

"**..... That this accused, well known to the complainant should go with seven other men to commit an organised robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognised, and that, in my view, casts doubt on the evidence of the complaint and his wife .....**"

These sentiments echoed 48 years ago are as true today as when they were first expressed. We adopt the same sentiments in the circumstances of this case.

Apparently, having robbed PW1 the appellant did not bother to run and or escape from the village to avoid immediate arrest. As it is he simply retired to his house and slept. That is where the villagers found him when they went looking for him soon after the alleged robbery. To our mind, the conduct of the appellant was in the circumstances inconsistent with his guilt.

On being smoked out of the house, the appellant was frog matched to a nursery school ½ kilometre away. He was interrogated under threat of being lynched. There was the tyre as well as petrol. He was being asked to name his accomplices in the robbery. Under these circumstances of extreme intimidation, the appellant drew a list of his purported accomplices and in which he incriminated himself. This evidence was inadmissible and the learned magistrate should not have relied on it to nail the appellant. It is not lost to us as well that of all the people the appellant is alleged to have written down as his accomplices, none of them was ever charged alongside the appellant. Instead they were bonded to keep peace. This goes to show that the police found no evidence linking them to the crime. Yet PW1 said that she was robbed by a gang of over 10 people. This further goes to prove that the appellant perhaps spilt the names not because he genuinely believed they had participated with him in the alleged crime but out of fear for his own life and intimidation. Otherwise if the police genuinely believed that 13 names given to them by the appellant were indeed part of the gang which robbed PW1, there is reasonable explanation why they were not charged alongside the appellant.

The appellant's co-accused was acquitted on account of mistaken identity. PW1 and PW2 were emphatic that they had recognised the appellant and his co-accused at the scene of crime. Even if we had held that the circumstances obtaining at the scene of crime were conducive to positive recognition, we cannot however understand how the appellant's co-accused could have been a case of mistaken identity and not the appellant. After all both the appellant and the co-accused were all well known to he two witnesses and came from the same village. The issue of mistaken identity ought therefore to have applied across the board.

In view of the foregoing we are satisfied that the appellant was not convicted on sound evidence. Accordingly the appeal is allowed, the conviction quashed and the sentence of death set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 22nd day of May 2008.

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE