



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Criminal Appeal 99 of 2006**

**MATHEW MUNGAI KIMANI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from original Conviction and Sentence of Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 1248A of 2005 dated 20<sup>th</sup> April 2006 by G. K. Mwaura – P.M.)***

**J U D G M E N T**

The appellant **Mathew Mungai Kimani** was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was sentenced to death as by law prescribed. That sentence was illegal though as at the time of the commission of the offence the appellant was aged 15 or so years. He could thus not be sentenced to death and could only be sentenced to be held at the pleasure of the president. His co-accused **Moses Mugathi Momanyi** and **Joseph Irungu Wambui** were however acquitted.

On 31/3/05 at 8.00 p.m. **Abel Njengu Mutungu** (PW1) the complainant herein was in a bar known as Marina Bar in Murang'a town. At about 8 p.m. he decided to go to his house to light it up. On the way he saw three men ahead. Two of them came to him. When the two men reached him one of them said that he should buy cigarettes for them. All of a sudden one of them held him by the neck and strangled him using a hard object. As he strangled him he was ordering him to give out his mobile phone. They then took out some Kshs.400/= from PW1's pocket. PW1 fought off the attackers and managed to wrestle one to the ground. One of them on realising that his accomplice had been subdued came to his rescue whilst brandishing a knife. He attacked the complainant and injured him on his hand. PW1 was however not done yet. He held one of them rightly while screaming. People responded to his SOS and came to his aid at the scene. They found PW1 still holding on one of the attackers tightly. The members of the public wanted to lynch the attacker but the police arrived shortly thereafter and rescued him.

The person so arrested is the appellant. He was arrested by **P.C. Gathumbi** (PW4). As PW1 was injured PW4 referred him to hospital and issued him with a P3 form. The P3 form was subsequently filed by **Patrick Mwangi** (PW2) the District Clinical Officer based at Murang'a. He classified the injuries sustained by PW1 in the incident as harm. The appellant was then charged.

In his defence, the appellant gave an unsworn statement of defence. He stated that on the material day he was from Mahesh Petrol Station and passed close to Marina bar when he saw some people with beer bottles. These people said that he was one of the thieves and then attacked him and injured him badly. They poured paraffin on him ready to burn him. The police however arrived in the nick of time and saved him from the mob. They took him to the hospital, thence to the police station and was later charged.

The appellant has raised five grounds of appeal in his supplementary petition of appeal filed with his written submission. One, that the learned magistrate failed to comply with the provisions of 207 of the Criminal Procedure Code. Two, over reliance on the evidence of mode of arrest and recovery of the alleged stolen money. Three, that prosecution case was riddled with inconsistencies and contradictions which the learned magistrate failed to resolve in favour of the appellant. Four, over reliance on the evidence of a single identifying witness without warning himself of the dangers of so doing and finally that his defence was given due consideration. In support of these grounds of appeal, the appellant tendered written submissions which we have carefully read and considered.

The appeal was opposed. **Mr. Orinda** for the state submitted that the evidence adduced by the prosecution was sufficient to prove the charge. That the appellant was caught in the Act. He conceded though that the sentence imposed was illegal.

Our statutory duty as a first appellate court is to subject the entire evidence tendered in the trial court to fresh and exhaustive evaluation so as to reach our own conclusion as to the guilt or otherwise of the appellant. **Okeno v/s Republic (1972) E.A. 32.**

The evidence of identification was very clear and without doubt. The appellant was apprehended by the complainant at the scene of crime after the appellant and some of his accomplices had robbed the complainant before fleeing from the scene. The complainant's evidence that he held onto the appellant until other people and police came to the scene was corroborated by PW3, **Macharia Wamwati** and PW4 **P.C. Gathumbi**. PW3 said that he witnessed the incident from about 15 metres away. He saw PW1 struggling with the robbers. He rushed to the scene and found PW1 holding and wrestling with the appellant. Soon thereafter a crowd gathered and PW1 told them that the person he was holding had just robbed him of Kshs.400/=. The crowd wanted to lynch him but police arrived in a land rover and rescued him. As for PW4, he was in the company of police officers who came to the scene. He is the one who took the appellant into custody from the irate crowd. He later searched him and recovered Kshs.400/= which PW1 positively identified as belonging to him.

We find that the evidence against the appellant was overwhelming. We find that the evidence was very clear that the appellant was an accomplice to the robbery in question. The appellant's denial that he was an innocent passerby cannot shake the evidence of the prosecution adduced against him. We also find that his defence cannot be classified as alibi defence because he was at the scene of this incident at the time the offence took place and at the time of his arrest. He admits that much in his statutory statement of defence. It is trite law that identification particularly at night has to be treated with extreme caution and to base any conviction on it, it must be watertight. **Mohamed Mafhabi & 2 others v/s Republic CA No. 15 of 1983 (Nairobi)**. We have considered the evidence of the complainant, PW3 and the arresting officer with great caution and we are satisfied that it was worthy relying on in finding a conviction. As correctly pointed out by **Mr. Orinda**, the appellant was caught in the act. The appellant did not seriously challenge this fact in cross-examination of the witnesses. It is true that the learned magistrate did not warn himself of the dangers of relying on the evidence of a single identifying witness in difficult circumstances to find a conviction. However, from the evidence on record, we do not think that this was a case that turned on the evidence of a single identifying witness. The appellant was caught in the act by PW1. He was held until members of the public as well as police arrived. Taking the evidence of these three witnesses together, it is quite clear that they could not possibly have been referring to a different person. There was no opportunity for the appellant to escape.

We were a little bit disturbed by the lack of any evidence as to the condition of lighting at the scene and the visibility obtaining at the time of this incident. However as we have already stated we are satisfied that the appellant was caught in the act by the appellant and held on until assistance from the public and police arrived. In the meantime his accomplices made good their escape.

The evidence on record is clear that there were not many people at the scene of the incident. There were only the appellant and his two accomplices and PW1. Accordingly the appellant's claim that he could have been a victim of mistaken identity is far fetched and implausible.

On the issue of the learned magistrate not complying with section 207 of the criminal procedure code, we find no merit at all in this complaint. We are satisfied that the plea was properly taken by the learned magistrate. The record shows that the substance of the charge was stated to the appellant by the court and he was called upon to admit or deny the truth of the charge. He returned a plea of not guilty. The appellant's complaint seems to hinge on the fact that the language in which the charge was read out to him is not indicated. This may be true from the typed proceedings. However that is not the position with the original record that we have examined. In any event what prejudice did the appellant suffer. After all he returned a plea of not guilty and his trial ensued in a language of his choice.

Yes there were some inconsistencies and contradictions with regard to the recovery of Kshs.400/= between the testimony of PW1 and PW4. The testimony of PW1 was to the effect that he did not himself recover Kshs.400/= from the appellant whereas PW4 said he recovered Kshs.400/= from the appellant upon search. PW1 also said that the money had been taken by the appellant's second co-accused. However to our mind these contradictions are not major and do not go to the root of the prosecution case. In any case PW1 is not on record as saying he ever conducted a search on the appellant. PW4 however did but it is not clear at what point in time. Was it at the scene or at the police station. If it was at the scene, no doubt PW1 would have known. From his own testimony PW1 found his lost money at the police station the following day. It is therefore possible that the appellant was searched at the police station and not at the scene. That would perhaps explain why the PW1 did not recover Kshs.400/= from the appellant at the scene.

Having considered this appeal at length we find that the conviction entered against the appellant was safe and should not be disturbed. We would dismiss the appeal on conviction accordingly. As regards sentence, we have already stated that the sentence imposed was illegal as the appellant was a minor when he committed the offence. Section 25(2) of the Penal Code forbids the pronouncing or recording of a death sentence against any person convicted of a capital offence if it appears to the court that at the time he committed the offence he was under the age of eighteen years. There is unchallenged evidence that when the appellant committed the offence he was actually fifteen or so years. He should therefore have been sentenced to be detained during the president's pleasure. Pursuant to section 354 of the Criminal Procedure Code, we set aside the sentence of death imposed on the appellant and lieu thereof we direct that the appellant be detained during the president's pleasure.

***Dated and delivered at Nyeri this 21<sup>st</sup> day of October 2008***

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**