REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

Criminal Appeal 4 of 2005

STEPHEN GITHINJI MAINA…….APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Coram : LESIIT, DULU JJ)

(From Original Conviction and Sentence in Criminal Case No. 1573 of 2003 of the Chief Magistrate's Court at Nairobi Kavedza (Mrs.) SRM)

JUDGMENT

STEPHEN GITHINJI MAINA the appellant was charged before the subordinate court with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that –

"**On the night of 16th June 2003, at DRC Bar at Ngara area in Nairobi Area jointly with others not before court while being armed with dangerous weapons namely pistols robbed AGNES ITUMBI KASANGI of cash Kshs.8,000/= and at or immediately before or immediately after the time of such robbery shot and killed MOSES NZIVO".**

After a full trial the appellant was convicted of the offence and sentenced to suffer death as provided for by law. Being dissatisfied with the decision of the learned trial magistrate, he has filed this appeal challenging both the conviction and sentence. His grounds of appeal can be reduced to three grounds. Firstly, that his identification was not positive. Secondly, that the learned trial magistrate rejected his defence without giving cogent reasons. Thirdly, that the sentence imposed on him was harsh and excessive.

At the hearing of the appeal, the appellant made submissions in support of his grounds of appeal. He submitted that PW1 did not explain the colour of the jacket that he was said to have worn nor did she describe the nature and intensity of the light. He submitted that though PW2 was together with PW1, he said that he merely saw the attackers going away. He contended that PW3, who was at the scenes did not say anything tangible that could connect him to the offence. Further, he submitted that the learned trial magistrate did not consider his defence properly. He also contended that the sentence is harsh.

Learned State Counsel, Mrs. Gakobo, opposed the appeal and supported both the conviction and sentence. She submitted that, though the offence took place at 11.00 p.m., PW1 stated that the lights were on in the bar. The appellant and his colleagues talked to her and asked for cigarettes and a match box. She contended that it was actually the appellant who asked for a matchbox. In addition, the appellant was arrested and brought back to the bar merely 3 to 4 minutes after the incident. Also PW2,

who was a police office, testified that it was the appellant who searched him and took his wallet. She submitted further that PW2 was one of the people who chased and arrested the appellant without losing sight of him. In her view, the evidence of PW3 corroborated that of PW1 and PW2. PW3 stated that it was the appellant who ordered people to lie down. PW3 also testified that the bar had lights which were alight.

On the defence, the learned State Counsel submitted that the learned trial magistrate considered the defence and found that it had no merits. The court found that there was no evidence of framing of the appellant, as PW1 and PW2 did not know the appellant before. They also had no reason to frame him. She further submitted that the sentence was the only lawful sentence provided by law.

This being a first appeal, we are duty bound to re-evaluate the evidence and come to our own conclusions and inferences – see **OKENO –vs- REPUBLIC [1972] EA 32.**

The prosecution evidence was that on 16th June 2003, PW2 APC Kiprotich Mango, PW3 APC Samuel Ngoroi and APC Nzibo were in DRC Bar Ngara Nairobi, having gone there to take dinner. They were on beat duties that night. PW1 Agnes Kasangi was a worker in the bar at the counter. At about 11.00 p.m., APC Nzibo went to pay the bill when some four people came into the bar. Two of those people went to the counter and engaged PW1 in discussions. They asked for cigarettes and a matchbox. Then suddenly, one of those tow people, produced a pistol and ordered all the people to lie down. They searched the patrons, and took money and other items. They also demanded that PW1 gives them all the money that she had, and she gave them Kshs.17,000/=. When they searched APC Nzibo, they found that he had a pistol and that he was a police officer. They shot him dead and took the pistol.

The robbers then ran out of the bar. At that point, PW2 and PW3 gave chase, and the appellant was arrested and brought back to the bar. He was later charged with the offence of robbery with violence.

In his defence, the appellant stated that he was a driver along Eastleigh route. On the material day, he reported on duty and, at 11.00 p.m., he finished duty. He boarded a vehicle, alighted at Ngara and started walking to his home at Pangani. He met police officers who briefly interrogated him, arrested him and took him to Pangani police station. He was later charged with the offence of robbery with violence.

The first ground of appeal of the appellant is on identification. It is trite that, where the evidence relied upon to implicate an person is entirely evidence of identification, that evidence must be waterlight to justify a conviction – see **REPUBLIC – vs – ERIA SEBWATO [1960] EA 174 and KIARIE – vs – REPUBLIC [1984] KLR 739**. In our present case, the learned trial magistrate had this to say, on page 4 of the judgment, regarding the identification of the appellant –

"PW2 had identified him as the one they gave chase and arrested. PW1 had identified him as one of the two people who went to the counter and ordered drinks and later committed the robbery, and as the one who was brought back by the police officers. The circumstances under which she was able to identify the accused person were not difficult at all. The lights were on in the pub and the accused person took time with PW1…… From the time of robbery to the time the accused was arrested, PW2 never lost sight of him".

We have evaluated the evidence on record. Though PW1 and PW2 testified that there was light in the bar, none of the witnesses testified as to what type of light it was, how bright it was, and where the source of light was in relation to the appellant. We are not able to speculate as to the adequacy of that light. We are therefore of the humble view that the circumstances for identification were not favourable. In addition, PW1 did not describe the appearance of the appellant nor did she give a detailed description of the appellant. PW2 and PW3, on the other hand, did not give any description of the appellant. There was, in our view, a real possibility of mistaken identity of the appellant.

What would have saved the day would have been the arrest of the appellant, if he was tracked down and arrested without being lost sight of. PW2 is the witness who testified that he arrested the appellant. It was his evidence that when they stood up they saw people running towards their camp and a Masai

watchman shouting for help. Then they chased and arrested the appellant. There is no evidence that PW2 followed the appellant from the bar without losing sight of him until arrest. There is no evidence that there was light outside the bar to enable anyone chase another without losing sight of him. More importantly, the Masai watchman who was outside the bar, and who assisted in the arrest of the appellant, did not testify in court. In our view, the learned trial magistrate did not direct her mind to the circumstances of the arrest of the appellant. Her finding that PW2 did not lose sight of the appellant is not supported by the evidence of PW2 on record. We are of the view that the evidence on record did not establish that the appellant was chased from the bar and arrested without being lost sight of by any of the witnesses. It is therefore quite possible that the defence of the appellant, that he was arrested while going to his home at Pangani, might as well be true.

The second complaint of the appellant is that the learned trial magistrate did not consider his defence. That the magistrate dismissed his defence without giving reasons. We have perused the judgment. In our view, the learned trial magistrate considered the appellant's defence. She dismissed the defence on the basis that she was not convinced that the police had any reason to frame the appellant. The fact that the learned trial magistrate might have rejected the defence on the wrong reason did not mean that the magistrate did not consider the defence. In our humble view, the learned trial magistrate considered the appellants defence. Therefore, the ground of appeal that the learned trial magistrate did not consider the defence of the appellant has no merits, and we dismiss the same.

The appellant has also challenged the sentence, which he considers excessive. The mandatory legal sentence for an offence of robbery with violence is death. Therefore, the sentence of death imposed by the learned trial magistrate, following the conviction for the offence of robbery with violence, cannot be said to be excessive. However, as we have found that the identification of the appellant was not positive, we will have to quash the conviction and set aside the sentence.

Consequently, and for the above reasons, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 8th day of May 2007.

LESIIT

JUDGE

DULU

JUDGE

Read and Delivered in the presence of –

Appellant

Mrs. Gakobo for state

Tabitha/Eric – Court Clerks

LESIIT

JUDGE

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DULU

JUDGE