REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 633 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 719 of 2004 of the Chief Magistrate's Court at Kibera (Mrs. Juma – SPM)

STEPHEN MUNGAI GITHINJI..……..……..APPELLANT

VERSUS

REPUBLIC…… ……..…….....RESPONDENT

J U D G M E N T

STEPHEN MUNGAI GITHINJI was charged with one count of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. He was found guilty for the offence and sentenced to death as by law prescribed. He lodged his appeal after being aggrieved with the conviction and the sentence. The Appellant has raised four grounds of appeal in his amended grounds.

One that part of the times the case was heard, the court Coram was not indicated;

Two the evidence against the Appellant was that of a single identifying witness which was not tested with great care as required;

Three that the learned trial magistrate erred in law and fact in relying on visual identification made under difficult circumstances and;

Four, the learned trial magistrate erred in law and facts when she rejected the Appellant's alibi defence.

The facts of the case were that the Complainant was going home at 7.00 p.m. when at a dark corner, he came face to face with three men and a lady. He was held by the neck as he passed them, then one who had a knife came to his front. The man with the knife drove his knife towards the Complainant's stomach but stabbed the cabbage he was carrying instead. The woman then hit the Complainant with an iron bar on the shoulders. The knife man then stabbed him on the left eye and he lost consciousness. He was then robbed of Kshs.150/-. Out of the injuries the Complainant lost his left eye. The Complainant reported to the police one month and nine days later and also gave the name of his assailant as 'mathu'. The Complainant then led police to the Appellant's home where he was found sleeping and arrested.

The Appellant gave alibi defence saying first of all that his name is not 'MATHU". Secondly he gave an alibi defence and called one witness to confirm that on the day of the alleged offence, he carried household goods of his witness from one house to their plot while he also helped her set up her bed. That same evening the Appellant did not leave the home and his witness stayed with him and his wife and had supper until 9.00 p.m. when they retired for bed.

We have analyzed and evaluated afresh the evidence adduced before the lower court as required of a first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32**.

The first ground raised lacked in merit since the learned trial magistrate indicated the full Coram of the court during each of the days that the case was heard.

The Appellant's conviction hinges on the evidence of visual identification by a single witness made under difficult circumstances. In **RORIA vs. REPUBLIC 1967 EA 583** at page 584 **Sir Clement De Lestand V,P.** said;

"***A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a Untied Kingdom which is designed to widen the power of the court to interfere with verdicts:***

There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten- it is in a question of identity."

We do not hesitate to state that the evidence adduced in this case causes us a degree of uneasiness and the need to consider it with great caution cannot be emphasized enough. In **ODHIAMBO VS. REPUBLIC [2002] 1 KLR 241** **Chunga CJ, Lakha** and **Ole Keiwua JJA** held: -

"***1. Courts should receive evidence on identification with the great circumspection particularly where circumstances are difficult and to not favour accurate identification.***

2. Where evidence of identification rests on a single witness and circumstances of identification are known to be difficult, what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which, the court may reasonably conclude that identification is accurate and free from the possibility of error."

In the instant case we do not only have the evidence of identification by a single witness but in addition that evidence was made in circumstances that are known to be difficult.

Even though the Complainant stated that he knew the Appellant before and therefore recognized him, the need to consider the evidence with great care still exists even though the evidence of identification was that of recognition.

The Complainant gave graphic evidence of the conditions existing at the scene. It was a corner and the attack was sudden and unexpected. It was also dark and in his evidence, the Complainant stated that he only recognized the Appellant because he went to the front near him. There is no evidence at all of any form of lighting at the scene. There was no description whether there was moonlight at the time and if so how bright. The evidence before court then clearly shows that the scene of incident was dark and therefore the circumstances of identification were difficult.

We considered that at the time the Complainant claimed that he identified the Appellant he was being held by the neck backwards. If he saw the man who came to his front, it was a clear view. It was a view from the corner of his eyes. That therefore means that the Complainant saw his assailant from the corner of his eyes in difficult circumstances. That waters down the quality of visual identification by the Complainant even further.

We noted that the Complainant did not say he identified any of his assailants until one month and nine

days later. That is material. The Complainant claims that he did not give the name in order to avoid the Appellant escaping. We may be prepared to accept that in regard to the neighbour who assisted to call the Complainant's wife to the scene where the Appellant was left after this attack. We however do not accept it of his wife. He should have told his wife that he recognized one of his attackers the moment he had the opportunity to do so especially after fully regaining his consciousness. We find that it is possible the reason that the Complainant did not mention he recognized anyone when he first had the opportunity to do so was because he did not recognized anyone after all. The recognition is a by the way.

We have noted also that the name he attributes to the Appellant is not his and has not been established to be the Appellant's alias name. That also does create doubt as to the person the Complainant believes he saw and recognized at the scene of the crime.

The Appellant gave an alibi defence. That defence was not rebutted by the prosecution case. Not only did the Appellant raise an alibi defence, he also called a witness to corroborate his defence and establish the alibi much further.

The Appellant's duty in raising the alibi defence was merely to create doubt as to his involvement in the said offence. We think that the Appellant succeeded in creating this doubt. Not only was the name attributed to the Appellant by the Complainant not proved to be his, the Appellant's presence at the scene of crime has also not been proved. Given the very poor and therefore dangerous circumstances under which the Complainant identified his assailant, we find that the evidence of recognition was not safe and was not free from the possibility of error or mistake. The conviction was unsafe and should not be allowed to stand.

In the circumstances, we find that the appeal has merit and should be allowed. We sympathize very deeply with the Complainant's loss as a result of this attack. However we are satisfied that the Appellant was not one of those who caused it. The appeal is allowed, conviction quashed and sentence set aside. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 3rd day of May 2007.

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LESIIT, J.

JUDGE

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DULU

JUDGE

Read, signed and delivered in the presence of;

Appellant present

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

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DULU

JUDGE