REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 146 of 2005

DAVID GITAU KIMANI……..…..……..……. APPELLANT

-AND-

REPUBLIC……...RESPONDENT

(An appeal from the Judgement of Principal Magistrate Mrs. M.W. Murage dated

9th March, 2005 in Criminal Case No. 24 of 2004 at the Kikuyu Law Courts)

JUDGEMENT OF THE COURT

The appellant was one of three persons charged before the trial Court, with the offence of robbery contrary to section 296(2) of the Penal Code (Cap.63). The particulars of the charge were that the three persons, on 23rd September, 2004 at Gikuni Village in Kiambu District, within Central Province, being armed with offensive weapons namely knives and clubs *(rungus*), jointly robbed ***George Wainaina Kamau*** of cash in the sum of Kshs.6,000/= and at, immediately before, or immediately after the time of such robbery, wounded the said ***George Wainaina Kamau***.

After taking the evidence, the learned Magistrate acquitted the 2nd and 3rd accused, but found the appellant herein guilty, convicted him, and sentenced him to death as provided in s.296(2) of the Penal Code.

The appellant who was dissatisfied with the Judgement, appealed on the following grounds:

(i) that, the learned Magistrate erred in law and fact, by relying on weak and meagre identification evidence by a single witness who had been in difficult circumstances of identification;

(ii) that, the trial Magistrate erred in law and fact, in not noticing that the allegation of the presence of torch-light, at the material time, had not been stated in the complainant's first report;

(iii) that, the trial Magistrate had erred in law by not according to the appellant the benefit of the doubt in the evidence adduced;

(iv) that, the trial Court's rejection of the appellant's defence amounted to a miscarriage of justice, and a shifting of the burden of proof to the appellant.

At the hearing of this appeal, learned State Counsel ***Mr. Makura*** stated he would concede to the appeal, on the factor of the single identifying witness, as the primary consideration. ***Mr. Makura*** submitted that

the learned Magistrate had not warned herself of the risks attendant upon conviction on such evidence of identification.

Mr. Makura also submitted that the record showed a discrepancy in dates – the date of commission of the offence. As already noted, the charge sheet shows the material date as ***23rd September, 2004***; but PW1, the complainant, says the offence was committed on 17th September, 2004 at 8.00 pm.; PW2 states that the date of the offence was 17th September, not of ***2004***, but, by the trial Court's record, of ***2005;*** PW3, ***Dr. G.K. Mwaura*** of Kinoo clinic says he examined ***George Wainaina Kamau,*** who had a history of assault, on 29th September, ***2004.*** It is obvious that the date recorded, in relation to PW2's testimony, namely ***17th September, 2005*** is erroneous: because the date of hearing that witness was 15th December, ***2004.*** I would, therefore, rectify the date of commission of the offence, in the evidence of PW2, to read ***17th September, 2004.***

The date 17th September, 2004 is confirmed by PW4, No. 95048344 A.P.C. ***Francis Ngugi Gikuni*** as the date of the offence charged. And there is further confirmation of the same from PW5, No. 69559 ***P.C. John Kanyi,*** who started investigations into the offence in question on ***24th September, 2004*** though the year referred to on the record is ***2005;*** this could not be right, and the year ***2004*** must have been intended, because hearing itself was taking place on 19th January, 2005. I will, therefore correct the record to show that PW5 was conducting investigations as from 24th September, ***2004.***

The date 17th September, 2004 is consistent also with the averments in the unsworn statements of the appellant. The appellant was arrested at Ongata Rongai on ***23rd September, 2004*** and charged together with two others who were, however, acquitted by the trial Court; and one of those others (2nd accused, ***James Kinuthia***) stated in his unsworn statement that he was arrested on 23rd September, 2004 in connection with an offence committed on ***17th September, 2004***. The Police officers who arrested the 2nd accused, also on the same date, 23rd September, 2004 arrested the 3rd accused, ***John Ngui Kinyua*** in connection with an offence that was committed on 17th September, 2004.

So perhaps, in the minds of the Police officers who were called as witnesses, the offence was committed on 17th September, 2004 – which we take to be true position, in the light of the testimonies of the complainants. The written charge on the charge sheet, however, indicates ***23rd September, 2004*** as the date when the offence was committed.

These discrepancies of dates, which would render the charge sheet defective, were apparently not noticed by the trial Court, as is apparent from the following passage in the Judgement:

"***The three accused persons…are jointly charged with robbery contrary to section 296(2) of the Penal Code. The offence was committed on 23rd September, 2004 at Gikuni where [the three accused] robbed George Wainaina Kamau [of] Kshs.6,000/= plus other items. [The] prosecution case is that on 17th September, 2004 at around 8.00 p.m. [the] complainant was on his way home in [the] company of PW2. Two people approached them and ordered them to stop and sit. PW2 managed to escape. The two people held [the] complainant as he tried to run away; they hit him with a stone. They then robbed him. He fell into a ditch when he was hit. [The] accused had a torch. At one point it shone on him and PW1 saw his face."***

The judgement not only does not examine methodically the issue of identification, but also does not take note of the discrepancies in *dates,* which are so apparent on the face of the proceedings and indeed, of the judgement itself.

Mr. Makura noted that the appellant herein had been arrested after his name had been mentioned by his co-accused; but no witness had been called to testify on the justification for the arrest of the appellant.

Learned counsel submitted that there was no reliable evidence on the state of lighting at the place

where and the time when the appellant had been arrested. According to PW1, the appellant and his accomplices had a torch, the light of which fell on the appellant's face, and so PW1 was able to identify him. But according to PW5 identification of the appellant had taken place only thanks to the moonlight – and this witness was not an eye-witness.

Learned counsel urged that, due to the defects in the proceedings, and the unreliability of the identification of the appellant as the culprit, this case should have been resolved in favour of the accused. He urged that the appellant's case had merit, which this Court may take into account.

It is clear that the particulars stated in the charge sheet are at variance with the specifics recorded to have been actually proved. We have no doubts in our minds that the appellant had believed all the time that he was being tried for an offence committed on ***17th September, 2004,*** even though this is not what is shown on the charge sheet. If this is taken together with the point raised by counsel, that no witness testified on the reason why the appellant was arrested in the first place, then the date of commission of the offence charged, namely ***17th September, 2004*** becomes highly material. The failure, in these circumstances, to state 17th September, 2004 in the charge sheet, as the date of arrest, is in our opinion a fundamental error which goes to the root of the charge itself. The discrepancy between the actual date of the offence, and the date specified in the charge sheet, we believe, had the effect of raising a trial that rested on a misconception. Misconception it was, as is evidenced by the judgement which specifies the date of the offence as carried in the charge sheet, and then makes findings based on an offence committed on a *different* date. This means, in our view, that the *charge sheet had not served as the basis of trial;* and so for the purpose of the trial, it was a void charge sheet. From this foundation it follows that the trial itself was a nullity.

An appeal founded on such a defect in the trial process is in most cases, likely to succeed. Such a situation may be likened to a case in which conviction is entered, even when sections of the recorded evidence are lost and cannot be found; in such a case, it has been held, "*it is impossible for an appellate Court…to be certain that an appellant has not been prejudiced in the prosecution of his appeal*": ***Rex v. Abdi Moge and Others*** (1948) 15 EACA 86.

We have also been concerned about the standard of identification achieved by the prosecution, given the fact that the incident took place in the dark of night, and only unreliable evidence has been brought forth on the claim that the complainant did, indeed, see the appellant as the offender. So crucial is proper i*dentification* as a basis for conviction for any offence, its integrity may be stated to be a matter of *law*. In ***Oscar Waweru Mwangi v. Republic***, Crim Appeal No. 2 of 1999 (unreported) it was thus held:

"***It is trite law where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from any possibility of error before it can safely make a basis for conviction***."

It has not been shown, in our view, that the greatest care was taken in respect of the reliability of identification of the appellant as the offender.

We consider that the right decision in all the circumstances, is to quash the conviction and sentence. We have also addressed our minds to the question whether this would be a fit and proper case for a *retria*l, and our persuasion is in the negative. We have already noted our reservations with regard to the identification of the appellant as the culprit; and the purpose of a retrial is not to create *locus poenitentiae* for the prosecution to go and carry out their proof in a better way than they had done before. We thus allow this appeal, quash the conviction of the appellant, and order that he shall be forthwith released, unless lawfully held in a different cause.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 12th day of July, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Tabitha Wanjiku and Erick

For the Respondent: Mr. Makura

Appellant in person