



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 64 of 2005

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 684 of 2003 – T.Wekulo [S.R.M.] )

DAVID MUHORO GITHAIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant, David Muhoro Githae, was charged with two counts of Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that on the 22<sup>nd</sup> February 2003 at Lanet location of Nakuru District, the appellant jointly with others not before court, while armed with dangerous weapons namely a pistol and pangas, robbed J O and his wife H M O of their motor vehicle registration number *particulars withheld* and other personal belongings including identification documents all valued at Ksh.328,200/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said JO and HM O.

The appellant was further charged with the offence of **Attempted rape contrary to Section 141** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the appellant attempted to have unlawful carnal knowledge of H M O without her consent. He was alternatively charged with **Indecent assault on a female contrary to Section 144 (1)** of the **Penal Code**. The particulars of the offence were that on the same day, and in the same place, the appellant unlawfully and indecently assaulted H M O by touching her private parts by removing her inner pants. The appellant pleaded not guilty to the charge when he was arraigned before the trial magistrate's court. After a full trial, the appellant was found guilty of the two counts of **Robbery with violence** and the main count of **attempted rape** and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

The appellant raised several grounds of appeal challenging the decision of the trial magistrate in convicting. The main thrust of his appeal was that he was aggrieved that the trial magistrate had convicted him based on the evidence of identification made in circumstances that were not conducive for positive identification. He was aggrieved that the trial magistrate had considered the said evidence of identification whereas the complainants had not given the description of the persons who robbed them when they made the first report to the police. He faulted the trial magistrate for failing to consider that upon his arrest by the police, he was found with nothing that was robbed from the complainants. He was finally aggrieved that the trial magistrate had not considered his defence before arriving at the said

decision convicting him for the offences charged.

At the hearing of the appeal, the appellant, with the leave of the court, presented to this court written submissions in support of his appeal. He further made oral submissions urging the court to find that the prosecution had adduced insufficient evidence of identification to enable the trial court find him guilty. He urged the court to allow the appeal. Mr. Mugambi for the State submitted that the prosecution had adduced sufficient evidence of identification to sustain the conviction. He reiterated that the appellant had been identified by the victim of the robbery at the scene of crime because the robbery took a considerable period of time. He submitted that the identification of the appellant by the complainant was confirmed when the complainant pointed out the appellant in an identification parade mounted by the police. He urged the court to dismiss the appeal and confirm the conviction and the sentence of the appellant.

Before giving reasons for the determination of this appeal, it is imperative that the facts of this case be set out. On the 22<sup>nd</sup> February 2003, at about 10.30 p.m., PW3 JO and PW2 H M O were in their saloon motor vehicle registration number *particulars withheld*. They had just dropped the sister to PW2 at Modern Farm in Nakuru. PW3 drove back to his house within the Lanet area. At Lanet telephone exchange, PW3 testified that a Nissan motor vehicle made as if to collide with his motor vehicle. In a bid to avoid the collision, PW3 stopped the motor vehicle. Immediately he stopped the vehicle, four men emerged from the Nissan and accosted him. Three of the men were armed with pangas while one of them was armed with a pistol. They ordered PW2 and PW3 to get out of the motor vehicle. They robbed them of their personal belongings after threatening injury to inflict to them. PW3 recalled that he was robbed of his national identity card, his visa credit card, his KAFOCA membership card, among other documents.

PW2 had her handbag ransacked and was robbed of two mobile phones and Ksh.200/= . PW2 testified that one of the robbers, whom she identified as the appellant, attempted to rape her. She recalled that she was able to survive being raped because she pleaded with the robber to leave her alone as she was in her monthly periods. PW2 and PW3 were then ordered to board the Nissan matatu. At that moment, they recalled, another motor vehicle arrived at the scene and the robbers attempted to rob its occupants. The driver of the said motor vehicle managed to reverse the motor vehicle at a high speed. The robbers followed the motor vehicle on foot. PW2 and PW3 took the opportunity to escape from the Nissan matatu and went to the houses within the neighbourhood where they sought help.

PW2 and PW3 were assisted by officers from the Armed Forces Training College, Lanet. They made a report to the police. PW2 and PW3 told the police that they would identify their assailants if they saw them again. However, the two did not give the police the description of the robbers in the first report made to the police. The motor vehicle which was robbed from PW2 was recovered on the following day at a place near Stem Hotel. The battery, the music system and the speakers were missing from the motor vehicle. On the 18<sup>th</sup> March 2003, PW4 PC Fredrick Wambua, accompanied by other police officers went to Kiratina area near Lanet and arrested the appellant on suspicion of having been involved in a spate of robberies. Nothing was recovered from the appellant that connected him with the robbery of the complainants during his arrest. His house was searched. Nothing incriminating was found.

PW3 was called at Bondeni Police Station on the 23<sup>rd</sup> March 2003 where he was asked to attend an identification parade. The identification parade was conducted by PW5 IP Cheruiyot Cheseret. According to PW3, he was able to identify the appellant in a parade of about nine men of similar height and complexion. PW3 testified that he was able to identify the appellant because the robbery took place for more than ten minutes. He reiterated that he was able to identify the appellant by his voice. He however testified that he had seen the appellant for the first time during the robbery. PW3 conceded that during the robbery he was in shock and was scared. He was able to identify the appellant by his voice. Although PW2 testified that she identified the appellant as the person who had attempted to rape her, she conceded that when she made the first report to the police, she told the police that she was not able to identify her assailants.

When the appellant was put on his defence, he denied that he had robbed the complainants. He gave an

alibi defence. He testified that he was else where when the incident took place. He recalled that he was at his place of work, selling at a retail shop when it was alleged that he had robbed the complainants. He pleaded innocence of the charge.

This being a first appeal, this court is mandated to re-evaluate and to re-consider the evidence adduced in the trial before the magistrate's court so as to reach its own independent determination whether or not to uphold the conviction. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore could not make any finding as regard the demeanour of witnesses (See ***Okeno –vs- Republic [1972] E.A. 32***). The issue for determination by this court is whether the prosecution proved its case on the charge of robbery with violence against the appellant to the required standard of proof beyond reasonable doubt. We have carefully re-evaluated the evidence that was adduced before the trial magistrate and also considered the submissions made by the appellant and by Mr. Mugambi on behalf of the State.

It was evident that the prosecution relied on the sole evidence of identification to convict the appellant. It is trite law that before an accused person can be convicted based on the sole evidence of identification, particularly made in difficult circumstances, the court must be certain that the said identification was free from any error. In ***Maitanyi vs Republic [1986] KLR 198*** at page 200, the Court of Appeal had this to say on such evidence:

***“Although the lower courts did not refer to the well known authorities Abdulla Bin Wendo & another vs Reg[1953] 20EACA 166 followed in Roria vs Rep [1967] EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:***

*‘Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identifications, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error’.*”

In the present appeal, it was the evidence of PW3 that he was able to identify the appellant as being among the gang of four robbers, who robbed him on the night of the 22<sup>nd</sup> February 2003. He testified that he was able to identify the appellant in the course of the robbery. He recalled that the robbery took a period of more than ten minutes. He was able to identify the appellant by the headlights of two motor vehicles which had been stopped at the scene of the robbery. He however conceded that he was in shock and in fear during the entire robbery incident. He reported the robbery immediately after he was assisted by his fellow officers from the Armed Forces Training College, Lanet.

In his first report, PW3 did not give the description of the persons who robbed him. In our view, his subsequent identification of the appellant in an identification parade was rendered doubtful in the absence of the description of the robbers made in a first report. PW3 identified the appellant in a police identification parade which was held on the 23<sup>rd</sup> March 2003. This was more than a month after the robbery incident. There was a possibility that PW3 could have been mistaken that he had identified the appellant. We acknowledge that the circumstances under which PW3 identified the appellant were difficult. PW3 conceded that he was in fear and shock during the robbery ordeal. It was possible that during the hectic circumstance of the robbery, especially taking into account that a pistol had been pointed at PW3 and the fact that one of the robbers had attempted to rape his wife, that PW3 could be mistaken that he had identified the appellant.

We find the evidence of identification by PW3 to be unsatisfactory. PW2's evidence on identification of the appellant was dock identification and therefore cannot be relied on. PW2 conceded that when she made the report to the police during the first report, she told the police that she was not able to identify the robbers. In the circumstances therefore, her evidence of identification is incredible. There was no

other evidence which corroborated the evidence of identification adduced by PW3. No item robbed from the complainants was recovered in the possession of the appellant. The police officers who arrested the appellant including PW5, arrested him on the basis of suspicion that he had been being involved in a spate of robberies within the area. There is no concrete evidence which was been placed before the trial court to enable us uphold the conviction of the appellant on the charge of robbery with violence.

The upshot of the above reasons, is that the appeal filed by the appellant has merit. It is hereby allowed. The conviction of the appellant is quashed. The sentence imposed is set aside. The appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

It is so ordered.

**DATED at NAKURU this 29<sup>th</sup> day of November 2007**

**M. KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**