REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 152 of 2004

(From original conviction and sentence in Criminal Case No. 500 of 2003 of the Chief Magistrate's Court at Nyahururu – Hon. Kathoka Ngomo (P.M.)

EUTICOUS MAINA NDUNGU……...…..……APPELLANT

VERSUS

REPUBLIC…….……...RESPONDENT

JUDGMENT OF THE COURT

The appellant Euticous Maina Ndungu was charged with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 26th December, 2002 at Githunguchu area along Shamata/Mailo Inya Road in Nyandarua District, the appellant, jointly with others not before court, while armed with dangerous weapons, namely pistols and an AK 47 rifle, robbed Samuel Nderitu Mureithi of Kshs.9,700/= and Sumsung R200 mobile phone and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Samuel Nderitu Mureithi. The appellant pleaded not guilty to the charge when he was arraigned before the trial Magistrate's Court. After full trial, the appellant was convicted as charged and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and appealed to this Court.

In his petition of appeal, the appellant raised several grounds of appeal challenging the decision of the trial Magistrate in convicting him. He was aggrieved that he had been convicted based on insufficient and incredible evidence of identification. He faulted the trial Magistrate for relying on contradictory and inconsistent evidence of the prosecution to convict him. He was aggrieved that the trial magistrate had failed to consider that the investigating and the arresting officers had not testified in court before the prosecution closed its case and thus rendered his conviction unsustainable. He was finally aggrieved that the trial Magistrate had failed to consider the totality of the evidence adduced which had failed to established his guilt to the required standard of the law.

At the hearing of the appeal, the appellant presented to the court written submissions in support of his case. He further made oral submissions urging this court to allow his appeal and set aside his conviction. The main thrust of the appellant's submissions was that he was not identified by the complainant at the time of the robbery. He took issue with the manner in which the trial magistrate treated the evidence of identification, which in his view, was unsatisfactory and could not sustain a conviction. On its part, the State, through Mr. Mugambi, urged the court to disallow the appeal. Mr. Mugambi submitted that the

prosecution had adduced evidence which established that it was the appellant who robbed the complainant. He submitted that the evidence of identification adduced by the prosecution proved beyond any reasonable doubt that it was the appellant that robbed the complainant.

As the first appellate court, we are mandated in law to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court so as to reach our own independent determination whether or not to uphold the conviction of the appellant. In reaching our determination, we are required to put in mind that we neither saw nor heard the witnesses as they testified and therefore we ought to give allowance in that respect (**See *Njoroge vs Republic [1987] KLR 19*).** The issue for determination by this court is whether the prosecution established to the required standard of proof beyond reasonable doubt that it was the appellant who robbed the complainant. We have considered the submission made by the appellant and that made by Mr. Mugambi for the State. We have also re-evaluated the evidence adduced before the trial magistrate's Court.

The appellant was convicted by the trial Magistrate based on the sole evidence of identification. According to the complainant, who testified as PW1, Samuel Nderitu Muriithi, he was robbed as he was driving on a rough patch along the Gathungucha – Muruai road. He recalled that it was on the 26th December, 2002 that he was robbed. He was accompanied by a friend called Njihia. The said Njihia did not testify before the trial court. The complainant did not tell the court what time the said robbery occurred. According to the complainant, robbers emerged from the bush and pointed guns at them. They ordered the complainant not to look at them. They then told him to surrender all the money that was in his possession. The complainant complied and gave them his wallet. In the said wallet, was the sum of Kshs.9,700/=. The complainant was relieved of his mobile phone, make Sumsung R200 which was valued at Kshs.12,500/=. The complainant testified that he was able to identify the robbers because they wore no masks or disguises. He recalled that the robbery took between 5-10 minutes. The robbers then disappeared in the bushes.

The complainant drove his motor vehicle to Gathungucha where he managed to inform the police of the robbery. He recalled that when he made the first report to the police, he told them that he could recognize the robbers if he had an opportunity of seeing them again. He however did not give the description of the robbers in his first report to the police. He did not describe the appearance of the robbers. On the 22nd January, 2003, the complainant was called to Ndaragwa Police Station. He was requested to attend a police identification parade to see if he could identify the persons who robbed him. The parade was conducted by PW2, Chief inspector of police, Charles Kiilu. He testified that the entire identification exercise took two hours. The complainant testified that he was able to pick the appellant in the identification parade. The complainant conceded that when he was being robbed, and had a gun having been pointed at him, he was surprised.

PW3 P.C. Charles Manda arrested the appellant on the 22nd January, 2003 in a police road block. He testified that on that material day, he was informed that a robbery had occurred at Pesi area. The victim of the robbery gave him the description of the robbers. Based on the description given by the victims of the robbery, he was able to arrest the appellant. None of the alleged victims of the robbery offered their testimony before court. We do not therefore have the benefit of their evidence on how the said victims were able to be certain that it was the appellant who robbed them. PW3 testified that the appellant later led him to the Aberdare forest where he was able to recover an imitation firearm which was produced as *prosecution's exhibit No. 1*. The investigating officer did not testify in this case.

When the appellant was put on his defence, he offered no evidence. He told the court that he did not have faith in the said court.

As stated earlier in this judgment, the appellant was convicted based on the sole evidence of identification. It is now settled that before a court convicts an accused person based on the evidence of identification certain parametres must be established. As was held by the Court of Appeal in **Roria vs Republic [1967] E.A. 583**,

"***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 identification, 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."

It was clear in the present case that the complainant did not know the appellant before the robbery incident. The robbery occurred for about ten minutes. The complainant testified that he was surprised when a gun was pointed at him and ordered to surrender the money that was in his possession. The robbers ordered him not to look at them. After the robbery, the complainant made a report to the police. He did not give the description of his assailants to the police. He only said that he could identify the robbers if he saw them again. He did not give the description of the clothing that the robbers wore. Neither did he say what physical features of the appellant enabled him to be certain that he was among the robbers who robbed him. In the absence of a description given to the police in the first report, it would be impossible to compare the physical description of the accused in the police identification parade held later. In the present case, the complainant took two hours before he was able to identify the appellant in the police identification parade. It was obvious that the complainant was not certain that he had identified the person who had robbed him.

For this court to confirm the conviction of an appellant convicted based on the sole evidence of identification, such evidence must be watertight. This court must be convinced that such evidence of identification was free from any possibility of mistaken identity. In the present appeal, we are not satisfied that the evidence of identification adduced by the complainant was free from the possibility of error.

The identification parade was held nearly a month after the robbery incident. There is a possibility that in the hectic circumstances of the robbery, the complainant could have been mistaken that he had identified the appellant. The circumstances of the arrest of the appellant further raises doubt that he was involved in the robbery of the complainant. The robbery victims who were alleged to have identified him were not called as witnesses during trial. We are left with the hearsay evidence of PW3 who testified that he arrested the appellant based on the description that he had been given by unknown robbery victims. The appellant's conviction on the evidence of identification was therefore unsafe.

His appeal is allowed. His conviction quashed and the death sentence imposed 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 3rd day of December 2007

M. KOOME

JUDGE

L. KIMARU

JUDGE