REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 81 OF 2003

JAMES

MUTHION…….....…….....APPELLA

NT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGMENT OF THE COURT

The appellant, James Muthion was charged with four counts of **robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that on the 18th of November 2002, at Nyoro Farm Nakuru District, the appellant jointly with others not before court while armed with dangerous weapons namely pangas, rungus, arrows and bows robbed Emmanuel Koech, Stephen Waweru, Daniel Gitau and Ekiru Tumbo of cash and various personal items and at or immediately before or immediately after the time of such robbery threatened or used actual violence on the said Emmanuel Koech, Stephen Waweru, Daniel Gitau and Ekiru Tumbo. The appellant denied the charges against him when he was arraigned before the trial magistrate's court. After a full trial, he was found guilty as charged on all the counts. He was sentenced to death as is mandatorily provided by the law. Being aggrieved by his conviction and sentence the appellant appealed to this court.

In his memorandum of appeal, the appellant raised several grounds faulting the trial magistrate for convicting him. He was aggrieved that he had been convicted whereas the prosecution had not discharged the burden of proof placed on it of proving the case beyond any reasonable doubt. He faulted the trial magistrate for convicting him against the weight of evidence which was in his favour. He was aggrieved that the trial magistrate had not considered his defence before reaching the said decision convicting him. At the hearing of the appeal, the appellant presented to this court written submissions in support of his appeal. He also made oral submissions urging this court to allow his appeal. Mr Gumo, Learned Counsel for the State made submissions supporting the conviction and the sentence imposed on the appellant. We shall consider all the issues raised in the said appeal after briefly setting out the facts of this case.

PW1 Emmanuel Koech and PW2 Ekiru Tumbo were employed as watchmen to guard the premises of a flower company called Chandaria at Rongai. The two testified that on the 18th of November 2002 at about midnight while they were guarding the said premises, they saw a group of people who were armed with pangas and metal bars break into the said premises. According to PW1, among the group of robbers was the appellant. He testified that he was able to recognize the appellant because previous to being employed at the flower company, they used to be workmates in another company. PW1 testified that the

robbers held him by the neck and beat him up. They robbed him of his torch, arrows, club, a small axe, and a two-way radio set. PW1 testified that he was able to identify the appellant because at the place where he was beaten there was sufficient light. He testified that upon the appellant recognizing him he ordered his fellow robbers to kill him. He narrated how he was thoroughly beaten until he lost consciousness.

PW1 was taken to hospital and underwent treatment for two weeks. He later reported the incident to the police and informed them that he was able to recognize one of the robbers. He reiterated that he was able to see the appellant because there was a powerful electric light at the place where he was accosted and beaten by the robbers. He testified that he even directed the police to the house of the appellant but the police could not find him there because he had moved elsewhere. PW2 did not recognize any of the robbers. Neither did PW3 nor PW4 who were also robbed from their houses which were within the flower farm. PW5 PC Ronald Karani of Rongai Police Station was assigned to investigate the case. He told the trial court that PW1 had told him that he had recognized one of the robbers. He was directed to the house of the appellant where he was able to arrest him. He searched the appellant's house but was unable to recover anything incriminating.

When he was put on his defence, the appellant testified that PW1 had framed him because of a grudge that existed between them over a woman who later became the appellant's wife. He testified that he had earlier quarreled with PW1 over the said woman to the extent that he was forced to leave employment in August 2002 and move altogether from the area. He denied that he had participated in the robberies that he was charged with.

The duty of this court as the first appellate court is to re-evaluate and reassess the evidence adduced before the trial magistrate by the witnesses so as to reach its independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is mandated to put in mind that neither saw nor heard the witnesses as they testified and therefore cannot make any determination as to 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 against the appellant on the charge of robbery with violence to the required standard of proof beyond reasonable doubt.

We have considered the submissions made to us by the appellant and Mr Gumo on behalf of the State. We have also carefully reevaluated the evidence adduced by the prosecution witnesses. The evidence that the prosecution relied on to secure the conviction of the appellant is that of PW1 who claimed to have identified the appellant as one of the robbers on the night of the robbery. PW1's evidence is the evidence of a single identifying witness. As was held in the case of **Maitanyi –vs- Republic [1986] KLR 198** at page 200 by the Court of Appeal,

"***Although the lower courts did not refer to the well known authorities Abdulla bin Wendo & Another –vs- Rep (1953) 20 EACA 166 followed in Roria –vs- Rep [1967]E.A. 583, it may be that the trial court atleast did have them in mind. It is important to reflect upon the words so often repeated yet bear repetition:-***

"***subject to the well known exceptions it is trite law that a fact may be proved by a 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 be it 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 this appeal PW1 testified that although it was at night, he was able to identify the appellant as being among the robbers who robbed him because he identified him from the powerful electric lights which were on at the gate where he was guarding at the time the robbers accosted him. He testified that he first saw people enter through the gate and go to where he was. As he was readying himself to shoot the intruders with a bow and arrows, he was held by the neck by someone from behind and ordered to put

down his weapons. He testified that he came face to face with the appellant who ordered him to put down his weapons. According to PW1 he complied. It was at that moment that he recognized the appellant who was his former workmate. He told the court that when the appellant realized that he had been recognized, he ordered his accomplices to beat him up. He testified that he was beaten to the extent that he lost unconscious. He testified that he was robbed of his torch, arrows, a club and a small axe. He was also robbed of a two way radio set. The other witnesses PW2, PW3 and PW4, although they were similarly, robbed were unable to identify the robbers.

We have carefully re-evaluated this evidence. We have noted that there were more than nine robbers who attacked PW1. Before PW1 made the identification, he said that one of the robbers had held him by his neck from behind. PW1 must have been frightened. From the evidence adduced, the robbery at the flower company was thwarted when a company vehicle came to where the robbery was taking place. According to witnesses who testified, it is when the robbers saw the headlights of the vehicle that they scattered. Although PW1 stated that there was sufficient light at the gate to have enabled him to positively identify the appellant. The testimony of the other witnesses does not support this evidence. It would be improbable that the robbers would launch a frontal assault of the gate where there was a possibility that they could be recognized.

PW1 testified that although he saw some robbers jumping over the gate, as he was preparing to shoot them with arrows, another robber held him by the neck and told him to drop his weapons. It is obvious that some robbers had gained access to the compound through another entrance or over the fence. This evidence cast doubts to the allegation by PW1 that there was sufficient light at the gate. From the evidence adduced, it is clear that the robbery took place for a short while. There is a possibility that PW1 mistakenly thought that he had identified the appellant as being someone whom he was familiar with. In the hectic circumstances of the robbery this court cannot be certain that PW1 made a positive identification of the appellant. No evidence of the first report made to the police of the robbery was adduced by the prosecution. From the evidence adduced it is apparent that PW1 made the report to the police that he had recognized the appellant two weeks after the said robbery incident.

The appellant in his testimony testified that there existed a grudge between him and PW1. This could have given PW1 motive to settle scores with the appellant. It is instructive that

PW1 never told PW2, PW3 and PW4 that he had recognized one of the robbers immediately after the robbery incident. His claim that he had identified the appellant could therefore be an afterthought. This court could have accepted this evidence of identification if there was other evidence which could have connected the appellant to the robbery. However nothing was found in the house of the appellant that could connect him with the robbery. No other evidence was adduced either direct or circumstantial to connect the appellant with the robbery.

In the circumstances of this case we are not prepared to find that the alleged identification of the appellant by PW1 was free of any error. PW1's identification of the appellant could be case of mistaken identity. Reasonable doubt has been raised as to the identification of the appellant by a single witness especially in circumstances which were obviously difficult and not conducive to positive identification. This doubt will of necessity be resolved in favor of the appellant.

For the reasons stated hereinabove it is obvious that the appeal shall be allowed. The appellant's conviction is quashed. He is acquitted of the charge of robbery with violence. The sentence which was imposed upon him is set aside. He is set at liberty and ordered released from prison unless otherwise lawfully held.

DATED at NAKURU this 24th day of February 2006.

MUGA APONDI

JUDGE

L. KIMARU

JUDGE