REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 289 OF 2002

SAMUEL MAINA KAIRU …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from original Judgment and Conviction in Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 1748 of 2001 dated 13th June 2001 by Mr. Abdul El Kindiy – P.M. – Murang'a)

J U D G M E N T

Samuel Maina Kairu (hereinafter referred to as the Appellant) was tried before the Principal Magistrate Murang'a for the offence of Robbery with violence contrary to section 296(2) of the Penal Code. He was convicted of simple Robbery Contrary to section 296(1) of the Penal Code and sentenced to five years imprisonment and 5 strokes of the cane. Being aggrieved, the appellant has brought this appeal. In his grounds of appeal the appellant has contended that the magistrate erred in convicting him on the evidence of a single witness, he further maintained that the prosecution evidence was contradictory and that the evidence of identification was poor and not sufficient to sustain the conviction.

The particulars of the charge alleged against the appellant were as follows:

> "***On the 13th day of November 2001 at Murang'a township in*** *Murang'a District of the Central Province jointly with others not before the court robbed Peter Kahino Hunya of cash Kshs.9,000/= and one camera make Olympus all valued at Kshs.12,000/= and at or immediately before the time of such robbery used personal violence to the said Peter Kahino Hunya."*

Only two witnesses testified before the trial magistrate. These were the complainant Peter Kahino Hunya and Cpl. James who was the arresting cum investigation officer.

The complainant's evidence was that on 13th November at about 9.30 p.m. he went to Tetu Bar in Murang'a Town. He was taking a soda when a person he did not know before approached him and asked him for 10/=. He gave the person the money and the person bought a soda and sat a few feet away from him. After a while the complainant decided to leave the Bar. About two shops away from the Bar he was accosted by three people. He recognized one of them as the same person who had earlier asked him for 10/=. The men robbed him of Kshs.9,000/= and an Olympus Camera valued at Kshs.6,350/=.

The following day the complainant was at Rwathia Bar when he saw the person he had given 10/= the previous day. The person entered Tetu Bar. The complainant went and reported to Murang'a police station. He was accompanied by Cpl. James who arrested the appellant whom the complainant identified as the man to whom he had given 10/= and who was also among the group of 3 men who robbed him.

In his defence the Appellant explained how he was arrested from his garage. He however denied having been involved in any robbery.

In his judgment the trial magistrate found that there were electricity lights where the complainant was robbed and that he saw and positively identified the appellant as the person he had earlier given 10/=. The trial magistrate found that the appellant participated in the robbery, he however found that the ingredients of the offence of Robbery with violence under Section 296 (2) Penal Code were not established as there was no threat to the person of the complainant nor did his assailants carry any lethal weapons. He therefore convicted the appellant of simple robbery under Section 296 (1) of Penal Code.

It is evident that the appellant's conviction was based solely on the evidence of identification by a single witness. In the case of **Abdalla Bin Wendo v/s Republic [1953] 20 EACA 166** the court of appeal stated as follows;

> ***"Subject to certain 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 evidence of a single witness respecting identification especially where it is known that 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 this case the complainant met the appellant for the first time at Tetu Bar on the night of the robbery. Although in his judgment the trial magistrate found that "At Tetu Bar there were plenty of electricity lights." This was not born out by the complainant's evidence. The Complainant never mentioned anything about the lights at Tetu Bar. There is therefore no evidence regarding what sort of lights that were in the Bar or the intensity of that light. There is also no evidence as to whether the complainant was seated inside the Bar or outside on the veranda. Although the complainant states that the appellant sat just a few feet away from him, he has not explained whether he was seated in front, behind him or at his side. This was important to show whether the Complainant had a good opportunity to observe the appellant so as to recognize him later. It is noteworthy that the appellant did not give any description of the man who asked him for 10/= whom he claimed to be the same person who attacked him later.

Further although the complainant claimed that there were lights outside which enabled him to identify the appellants, the complainant did not explain what type of light nor did he explain the exact location of the light vis a vis where he was attacked.

We find that in the circumstances of this case a mistaken identification cannot be ruled out. The conviction of the appellant was therefore not safe. We accordingly allow the appeal, quash appellant's conviction and set aside the sentence imposed on him.

The appellant shall forthwith be set free unless otherwise lawfully held.

Dated signed and delivered this 13th day of April 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE