REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 207 of 2004

DAVID ERAGAE KERIO…….....……APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code.** The particulars of the offence were that on the 5th day of January, 2003 at African location in Laikipia District of the Rift Valley Province, jointly with another not before court and while armed with a dangerous weapon namely an AK 47 rifle robbed Dorcas Wanjiku Macharia cash Kshs.13,000/= and at or immediately after the time of such robbery threatened to use actual violence to the said Dorcas Wanjiku Macharia.

After a full trial, he was convicted of robbery contrary to section 296(1) of the Penal Code and sentenced to three years imprisonment. He was aggrieved by the said conviction and sentence and preferred an appeal to this court. In his memorandum of appeal he faulted the trial magistrate for relying on conflicting evidence of prosecution witnesses to convict him. He further faulted the trial magistrate for convicting him on improper identification evidence saying that no proper identification parade was conducted. I will revert to the grounds of appeal after a brief consideration of the evidence that was tendered before the trial court.

On 5/1/2003 at about midnight **Wanjiku Macharia (P.W.1)** and her husband **Robert Macharia** (P.W.3) were in their house when some people knocked on the main door of their house. When P.W.1 enquired who was knocking, she was told it was the police and ordered to open the door. Before she could do so, the door was broken and some people entered into the house and pointed a gun at her. PW1 and PW3 were ordered to produce all the money that they had and they gave out a total of Kshs.13,000/=. There was a lantern lamp that was lit and P.W.1 and P.W.3 said that they were able to identify the appellant as the person who was armed with the gun. P.W.1 and P.W.3 reported the robbery to Rumuruti police station on the following day.

On 31/3/2003 Administration police **Sergeant William Lelpolkara (P.W.2)** was told by security officers from Muge Ranch that there were two people who had gone towards a place known as Tingamana and they had a gun. P.W.2 and the security officers boarded a vehicle and followed the two people. The said security officers spotted two people who were walking and told P.W.2 that they were the ones who had a gun. P.W.2 said that as soon as he alighted from the vehicle one of the two people threw down a handbag and a rifle and raised his hands and pleaded with P.W.2 not to shoot him but the other person grabbed the gun and shot at P.W.2 and the two exchanged fire and P.W.2 killed him. The other person was arrested and P.W.2 said that it was the appellant. Police officers from Rumuruti went to the scene and P.W.2 handed over the appellant, the gun and the bag to them.

On 1/4/2003 P.W.1 and P.W.3 were called by the police to see if they could identify the appellant. P.W.1 said that twenty people were lined up in an identification parade and she picked out the appellant as the person who had robbed her and P.W.3. When she first reported the matter to the police immediately after the robbery, she did not describe the person who had robbed her. However, on 1/4/2003 she purported to identify the appellant by his appearance.

P.W.3 also did not describe their assailant to the police when he first reported the robbery and on 1/4/2003 when he went to Rumuruti police station, six people were lined up for an identification parade. P.W.3 said that he identified the appellant from his appearance.

In his defence, the appellant told the trial court that on 1/4/2003 he was coming from Nakuru heading to his home. He had alighted from a matatu and was walking towards his home. He was joined by another person along the way and they continued walking together. As they approached his home, the appellant saw a police vehicle and the other man started running away and a police officer alighted from the vehicle and chased the other man and shot him dead. The appellant was then ordered to lie down and he complied. The appellant further stated that he did not know the person who had been shot dead and he was shocked to realise that there was a gun in the bag that he had carried with him. The appellant was then arrested and taken to Rumuruti police station.

The trial court held that the appellant had been properly identified by the prosecution witnesses as well as the gun that he allegedly had during the night of the robbery. Because P.W.1 and P.W.3 had not been injured during the time of the robbery, the trial court found the appellant guilty of simple robbery.

The first appellate court is under an obligation to submit the evidence tendered before the trial court to a fresh and exhaustive examination so as to reach its own conclusion as was held in ***OKENO VS REPUBLIC [1972] E. A. 32.***

From the evidence of P.W.1 and P.W.3, the robbery was committed at around mid-night. The only source of light was a lantern lamp. It was not stated how bright it was. It is trite law that before a court can base a conviction on evidence of identification at night, such evidence should be water tight. Visual identification of an accused person must be treated with greatest care and ordinary dock identification alone should not be accepted unless the witness had in advance given a description of the assailant and identified the accused at a properly conducted parade. It was so held by the Court of Appeal in ***PETER KIMARU MAINA VS REPUBLIC*** Criminal Appeal No.111 of 2003 at Nyeri (unreported). When P.W.1 and P.W.3 reported the robbery to the police, they did not give any description of their assailants. Nearly three months after the robbery P.W.1 and P.W.3 purported to identify the appellant in identification parades which were not properly conducted. In the first parade there were twenty people who were lined up and in the second one six. Under Police Force (Standing) Orders, while conducting identification parades, an accused persons should be lined up against at least eight other non-accused persons. It is also not right to line up an accused with twenty people. If the identification parade is not property conducted, the whole exercise becomes unreliable, see **JOSEPH KARIUKI VS REPUBLIC [1985] KLR 507**

In ***FREDRICK AJODE VS REPUBLIC*** Criminal Appeal No.87 of 2004 at Kisumu it was held that before an identification parade is conducted, a witness should be asked to give the description of the accused and the police should arrange for a fair parade. This was not the case in the matter under consideration.

With regard to the gun that was allegedly found in possession of the appellant, the circumstances under which it was allegedly recovered are not satisfactory. The security officers who were with P.W.2 at the time were not called as witnesses. No ballistic expert was called to testify. There was no conclusive evidence that it did not belong to the person who was shot dead.

The trial court did not carefully weigh and analyse the appellant's defence. In my view, the appellant's conviction was unsafe, considering that there was insufficient evidence of his identification by P.W.1 and P.W.3. In the circumstances, I allow the appeal, quash the conviction and set aside the sentence that was meted out by the trial court. The appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at NAKURU this 12th day of May, 2006.

D. K. MUSINGA

JUDGE

12/5/2006

Judgment delivered in open court in the presence of the appellant in person and N/A for the state.

D. K. MUSINGA

JUDGE

12/5/2006