REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1012 of 2003

(From Original Conviction and Sentence in Criminal Case No.15925 of 2002 of the Chief Magistrate's Court at Makadara – Mrs. P.N. Kimingi).

MARTIN MUDAKI EMBUE…….....…..……..APPELLANT

VERSUS

REPUBLIC…….....……..……..…RESPONDENT

JUDGMENT

The genesis of this appeal is a charge sheet dated 10th July, 2002 in which the appellant ***MARTIN MUDAKI EMBUE*** 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 8th day of July, 2002 At Utalii Bridge along Thika Road in Nairobi within Nairobi area jointly with another not before court while armed with offensive weapon namely pistol robbed Fides Waruguru Ndungu of Kshs.4,000/= and at or immediately before or immediately after the time of such robbery threatened to use violence to the said Fides Waruguru Ndungu.

It was the prosecution case before the subordinate court that Fides Waruguru Ndungu, the complainant was seated in her car on the material day at about 10.00 a.m. The car had broken down and she had dispatched her driver to look for a mechanic to fix it. As she waited in the co-driver's seat, a man came by and she signaled to him that she did not require his assistance. However the man continued walking towards the vehicle with a screw like metal in his hard. The person came to where the complainant was seated and opened his coat, retrieved an axe and smashed open the window of the vehicle. The person then took the complainant handbag which was on her laps, removed Kshs.4000/= and ran off limping as the complainant screamed. Members of the public who were attracted by the complainant's screams gave chase to the person but he disappeared into the slums nearby. The complainant then proceeded to make a report of the incident at Muthaiga Police Station and gave the description of the person. The following day the complainant was called to the police station and participated in an identification parade and was able to identify the person. That person is the appellant herein. According to the complainant she was able to identify the appellant as he was next to her when he picked her money and she noticed him from about seven metres away as he walked towards her.

PW2, a police officer received the complainant's report. From the complainant's description of the

person who robbed her PW2 suspected a person he had been seeing initially roasting maize at the scene otherwise known as the drift. The next day he and his colleague went to the drift in a civilian vehicle and saw the person whose description fitted the one given by the complainant off the road in a bush. They arrested the person who is the appellant herein. He was then handed over to the investigating officer.

In his statement of defence the appellant stated that he was a mechanic in his father's garage. That on 9th July 2002 at around 10 a.m., he left the garage to repair a customer's vehicle at Muthaiga depot. He finished the repairs by 11 a.m. As he was going back walking down hill at Utalii he saw a vehicle stop in front of him. People alighted from the vehicle holding guns and ordered him to surrender. He was handcuffed and taken to the police station and was later charged for an offence he knew nothing about.

The appellant was however convicted and sentenced to death as required by the law. He was dissatisfied with the conviction and sentence and hence lodged the instant appeal. In his petition of appeal, the appellant has faulted the trial magistrate for convicting him on insufficient evidence, faulty identification evidence and failure to consider his defence adequately. In support of his appeal, the appellant tendered written submission that we have carefully considered.

The appeal was opposed by the state. Mr. Makura, the learned state counsel submitted that the appellant was convicted on evidence of identification particularly by PW1, the complainant. According to PW1 the offence was committed at 10.00 a.m. and she clearly saw the appellant. In her first report to the police, PW1 described the appellant. Counsel further submitted that an identification parade was conducted by PW3 in which the complainant positively identified the appellant. Counsel also referred us to the evidence of PW2 who arrested the appellant following description given to him by the complainant. Counsel finally submitted that the evidence of PW1, PW2 and PW3 was sufficient to convict the appellant of the offence. Regarding the appellant's defence, counsel submitted that the appellant gave an unsworn statement in which he denied committing the offence. The trial magistrate considered the same and rejected it.

This is a first appeal. Pursuant to the holding in ***OKENO VS. REPUBLIC (1972) E.A 32,*** we are required to subject the evidence tendered in the trial court to fresh evaluation but giving due allowance to the fact that we neither saw and or heard the witnesses as they testified.

From the particulars of the charge set out at the beginning of this judgment, It would appear that for the prosecution to bring the case within the armpit of Section 296(2) of the Penal Code they had to prove that either the appellant in committing the offence was in the company of another person or persons, was armed with offensive weapons namely pistols and finally that immediately before or immediately after the time of such robbery threatened to use violence to the complainant. Did the prosecution discharge this obligation? We do not think so. First and foremost there is no evidence at all that the appellant in committing the alleged crime was in the company of any other person. PW1 testified as follows on the issue

"…….. ***The vehicle had a mechanical problem near a petrol station at Utalii. The driver left me there. A man came by. I waved at him as a sign that I did not need him but he walked towards the vehicle. He had a screw like metal in his hand. He came where I was seated, in the co-drivers seat. He opened his coat and produced an axe. He cut the window and broken glass fell on me. My handbag was on me so he removed Kshs.4000/= from the bag and ran off……..*** *"*

From the foregoing extract of the evidence tendered it is quite clear that the appellant was not in the company of any other person when he allegedly committed the crime. He was alone contrary to the particulars given in the charge sheet. The particulars also allege that the appellant was armed with offensive weapons to wit pistol. But again from the aforesaid extract, it is clear that the appellant was not at all armed with a pistol. Rather he was armed with a screw like metal and or an axe.

Despite this variance in evidence, the prosecution did not deem it necessary to amend the charge sheet. An axe or screw like metal is not generally an offensive weapon. It depends much to what use it is put to and the circumstances in which it is being used. The prosecution should have led evidence to show

that the axe and or screw like metal were an offensive weapon in the circumstances. An accused person is entitled to know the case he is meeting so as to mount a proper defence if any. If the particulars of the charge sheet are at variance with the evidence tendered and the prosecution takes no trouble to amend the charge sheet so as to tally with the evidence tendered then obviously, doubts are created regarding the credibility of such evidence, which doubt must of necessity be resolved in favour of an accused person. Did the appellant threaten to visit violence on the complainant in the course of and after the alleged robbery? We do not think so as well. The appellant never said anything to the complainant that would remotely suggest that he intended to use violence on her. Even after gaining access to the car, the appellant without uttering anything to the complainant merely took her handbag, removed Kshs.4000/= and ran off. At no point did the appellant give any indication either verbally or by any action that he intended to harm the complainant.

In our view the evidence adduced and accepted by the trial court did not meet any of the three ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code as succinctly stated in the celebrated case of ***JOHANA NDUNGU VS. REPUBLIC – CRIMINAL APPEAL NO.116 OF 1995 (UNREPORTED).*** However on the evidence we are satisfied that a lesser offence was committed. We shall revert to this issue later in the course of this judgment.

The appellant claims that his identification could not have been positive in the light of the prevailing circumstances during the commission of the offence. According to PW1, the offence was committed within two minutes. It was during the day. Before the appellant committed the offence, the complainant had seen him from seven metres as he approached the motor vehicle. She even waved him away as she did not require his services and or assistance. The offence was committed during the day, 10.00 a.m. to be precise. Before smashing the window of the motor vehicle, the appellant had stood by the co-drivers seat unbuttoned his jacket and showed the complainant an axe. The complainant also noted that the appellant had a limping gait. Immediately after the commission of the offence, the complainant reported the incident to Muthaiga Police Station and gave a description of the appellant. Using the description given the police were able to arrest the appellant. The appellant has a limping gait. Immediately upon his arrest, the appellant was subjected to an identification parade in which the complainant participated. This was a day after the robbery. In our view the events of the previous day were still fresh in the mind of the complainant and the possibility that she could have wrongly picked on the appellant is really very remote. We also note that before picking out the appellant on the identification parade, PW1 demanded that the parade consist of people who were lame which request was complied with. In our view and as was properly submitted by the learned state counsel, the parade was properly conducted and in accordance with the standing orders. We have perused the parade forms and noted that the appellant indicated thereon that he was satisfied with the manner in which it was conducted. For him now to turn around and claim that the parade was conducted in violation of the Force Standing Orders is clearly an afterthought and self serving. Taking into account the totality of the foregoing, we are satisfied contrary to the submissions of the appellant that circumstances obtaining during the commission of the offence were such that the complainant was in a position to positively identify the appellant.

We are aware that the

*"**Evidence of a single identifying witness in difficult circumstances must be tested with the greatest caution and can only be* **a** *basis for a conviction, if it is absolutely watertight**".***

See generally ***JACKSON MUIA KIMAKU & OTHER VS. REPUBLIC, CRIMINAL APPEAL NO. 152 OF 2005 (UNREPORTED) AND RONA VS. REPUBLIC (1967) E.A. 583 AND ANJONONI & OTHERS VS. REPUBLIC (1980) KLR 59.***

In the later case it was emphatically stated that:

*"…….**.. The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being at night the conditions for identification of the* **robbers in this case** *were not favourable…….".***

It is unfortunate that the trial magistrate did not caution herself of the dangers of convicting the appellant on the evidence of a single identifying witness. We have however on our part duly cautioned ourselves. Having done so, we are persuaded that the evidence on record regarding the identification of the appellant was watertight and sufficient to sustain a conviction.

The appellant's claim that his defence did not receive sufficient attention from the trial magistrate is in our view without merit.

Although the trial Magistrate should have done a better job of it, we are however satisfied that the trial magistrate duly considered the defence advanced by the appellant before rejecting it as lacking in merit. We are satisfied after analyzing that defence in the light of prosecution's case and the trial magistrate findings, that the rejection of the Appellant's defence was justified.

As we had already stated earlier on, although the evidence on record does not disclose the offence with which the appellant was initially charged with, we are nonetheless satisfied that the evidence discloses a lesser and cognate offence to robbery with violence.

In our view the Appellant committed the offence of robbery contrary to Section 296 (1) of the Penal Code in the process. Accordingly we find him guilty of the offence, and convict him and sentence him to serve 5 years imprisonment. The sentence shall run from 11th November 2003 when the appellant was convicted for the initial count of robbery with violence. Otherwise we allow the appeal, quash the conviction entered against the appellant and set aside the sentence of death imposed on the appellant in respect of initial the offence. In substitution thereof the appellant shall serve the aforesaid sentence.

Dated and delivered at Nairobi this 6th June 2006.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE