REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 743 of 2001

(From original conviction (s) and Sentence(s) in Criminal case No. 1166 of 2001 of the Chief Magistrate's Court at Thika (H. A. Omondi – SPM)

MURIGI KONGOI ALIAS DOCTOR…….....…..……..APPELLANT

VERSUS

REPUBLIC…….....…….....RESPONDENT

J U D G M E N T

MURIUKI KONGOI alias DOCTOR was found guilty of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death as prescribed in the law. He was dissatisfied by the conviction and therefore lodged this appeal.

The Appellant relied on his amended grounds of appeal in which he raised four grounds. The first ground was on identification that the evidence adduced in that regard was of a single witness and that the trial magistrate in basing the conviction on the said evidence failed to note the duration of time taken to identify the offenders at the scene of attack, the circumstances prevailing at the scene and the distance in relation to the Complainant and his assailants. The second ground is that the identification parade was badly conducted and was full of contradictions. The third ground is that the trial court erred in upholding the evidence of the alleged exhibits without noting that there was no handling charge preferred and finally that his defence was not considered. The facts of the case were that PW1 was driving five tourists to Nyeri from Nairobi. At 10.30 a.m. while driving along Nairobi Thika Road, the motor vehicle PW1 was driving got a puncture. PW1 stopped to change the tyre and that is when a group of 10 people robbed the tourists of various items and took PW1's jacket and cash Kshs.5,000/-. That was on 29th January 2000. On 13th March 2000 one and a half months after the robbery, the Appellant was identified in an identification parade by PW1. The Appellant had been arrested by PW2 on 1st March 2000 after his co-accused in the case before the lower court identified him to the Police officer. PW2 also recovered a novel "beyond recognition" exhibit 3 a camera stand exhibit 5 and clothing exhibit 15, 2, 16 and shoes exhibit 17. The items were identified by PW1 as property belonging to the tourists he was ferrying at the time of the robbery. We shall deal with the issue of identification together with that of the identification parade. PW1 was the only identifying witness and was the Complainant in this case. He said that the incident occurred at 10.00 a.m. He was changing a puncture when 10 men or more surrounded him and his guests. Its only when other people approached them, PW1 and the tourists that the gangsters ran away but not before certain items were stolen from the Complainant and his guests. The Complainant did not disclose the basis of identifying the Appellant except to say that he was in the group which robbed them and that he had entered the vehicle to rob the guy. PW1 identified a book recovered from the Appellant's house, exhibit 3 as belonging to one of his guests which he said he saw the guest reading during the

journey just before the attack. Apart from just saying the book looked like the one he saw a guest reading, the Complainant did not identify any special mark that would differentiate that book to justify a finding that indeed it was the same book that the Complainant's guest was reading prior to the attack. In **KIARIE vs. REPUBLIC 1984 KLR 739** the Court of Appeal held that: -

*"**where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."***

The issue is whether the evidence of identification by the Complainant can be described as watertight. The Complainant was not candid in evidence which reflects on the prosecution. The necessary inquiries needed to be made to establish clearly whether an accused person was properly identified. For example the Complainant did not say exactly what he was doing when the robbers struck. Questions like how far were the robbers when he first saw them and what he was doing at the time remained unanswered. Since the Complainant was changing the tyre, it was important to know whether he was bent over when he noted them in which case the view he could possible have had of them is different from if he was standing. That view would determine how many people he could have been able to see as the nearer they were when he noticed them, the less the numbers of them he could see and the shorter the time of observation. These are critical issues which the learned trial magistrate ought to have inquired into at the time of trial.

We note that **Mrs. Omondi** who wrote the judgment was not the one who heard the Complainant's evidence. Her finding that the Appellant "was near" to the Complainant to enable the Complainant see him sufficiently to be able to identify him later had no support from the record of the proceedings. We find that insufficient details were given by the Complainant in his evidence to form any basis of finding that he was in a position to identify the Appellant subsequently in an identification parade. The Complainant's evidence of identification was not watertight and therefore would not justify a conviction. In fact he gave no descriptions of the Appellant before the identification parade was conducted and in the circumstances none ought to have been held since it was not clear whether the Complainant could identify any one of those who attacked him before the parade was conducted.

The Appellant's third ground is misconceived. Exhibits recovered during investigations can form part of the evidence in support of a charge of theft or robbery and there need not be an alternative charge of Handling. That ground of appeal lacks in basis and is dismissed.

As to the Appellant's last ground that his defence was not given due consideration we have noted that in his defence he dwelt at length on the day of his arrest and denied involvement in the robbery and secondly he also denied that any exhibits were recovered from his house. The learned trial magistrate at page J5 observed: -

*"**Then there is the fact that one of the items stolen during the robbery was recovered from accused 2. He does not explain how he got to have the book with same title as the one….nor does he say where he was on 29/1/00 preferring to talk about the date of his arrest."***

The learned trial magistrate appears to have fallen into two very serious errors. One, he learned trial magistrate ignored the Appellant's defence in which he specifically denied involvement in the crime and also denied being found with any exhibits. The learned trial magistrate concluded rather that a book was recovered from him which belonged to one of the Complainant's passengers and that the Appellant gave no explanations of how he came to posses the book. We do not wish to repeat what we said about the book except to say there was no cogent proof that the book was the self same one that the Complainant saw one of his passengers reading.

The second error the learned trial magistrate fell into was to shift the burden of proof to the defence and thereby causing the Appellant to suffer prejudice.

Having carefully considered this appeal we find that the conviction entered against the Appellant was unsafe and should not be allowed to stand. We quash the conviction and set aside the sentence. The

Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 18th day of July 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA M.S.A.

JUDGE

Read, signed and delivered in the presence of;

Appellant(s) present

Mrs. Obuo for the State

Tabitha/Erick – Court clerks

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LESIIT, J.

JUDGE

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MAKHANDIA, M.S.A.

JUDGE