

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 130 OF 2005

SAMUEL GITARI RURIGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeals against Conviction and Sentence arising out of the Judgment of J.N. Onyiego Esq. Senior Resident Magistrate dated 24.5.2005 in the Senior Resident Magistrate's Court Criminal Case Number 1498 of 2003 Kerugoya.)

JUDGMENT

The appellant was represented by Counsel in this appeal.

The grounds of appeal are set out in the petition filed by Counsel and dated 2/9/2005. The appellant was tried and convicted on a charge of robbery with violence under section 296 (2) P.C and sentenced to death.

The first ground of appeal is that the evidence of PW1, Gachoki Mukuru Njoroge required corroboration. In other words it was dangerous to convict on the strength of single identification witness. The evidence of identification of Appellant was given by PW1, the complainant. This appellant was Accused No. 3. (Samuel Gitari Ruriga).

The State concedes appeal on the ground that the identification was by a single witness. In the identification form exhibit 4, the complainant did make a remark that the witness (PW1) seemed confused. It is also shown that the witness also identified another person who was not a suspect. It should be noted that the incident occurred on 24/3/2003 while identification parade was arranged on 5/6/2003 more than 2 ½ months later. The complainant was not sure of the man he had seen at the scene of crime at Sagana. This vitiates the evidence on identification.

There is another flaw, the appellant and others were arrested together not because of the robbery but because an informer gave information that a woman had been seen with a gun in a certain premises. It is only when the police searched the house in which the suspects were found that stolen goods identified as of the complainant were found. The trial Magistrate found correctly that the owner of the house is the one who was in their possession and she was convicted on alternative charge. Therefore the conviction of the appellant on the first count was based on the identification of PW1 at the scene and at the identification parade Counsel have cited several authorities. The case of **Kechel –Vs- R [1985] at 513** a High Court decision it was held that the omission to take evidence of the identity of goods the subject matter of the charge against the appellant was fatal and the prosecution can not be said to have proved its case beyond reasonable doubt. In this case the motor vehicle stolen was released to the owner before being produced in court and evidence of its identity taken.

In the case of **Charles O. Maitanyi Vs- Republic Court of Appeal No. 6 of 1986 (1986) 2 KAR** it was held:

(a) although a fact may subject to very well known exceptions, be proved by the testimony of a single witness, it was necessary to test the evidence of a single witness respecting identification with the greatest care..... There ought also to be inquiry whether the complainant was able to give some description or identification of assailants to the police.

In this case the description of dark, slender person with narrow face was said by PW7 not sufficient descriptions to enable the officer to search for suspects.

Lastly there is the authority of Court of Appeal relevant here; Gabriel Kamau Njoroge Vs Republic (1982-88) 1 KAR in which it was held that a dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly identification parade. In this case we find the identification was not positive and the state not supporting the conviction and sentence. We therefore allow the appeal quash conviction and set aside the sentence.

The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered this 8th day of Aug 2006

H. M. OKWENGU

JUDGE

J. N. KHAMINWA

JUDGE