



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

**Criminal Appeal 121 of 2004**

*(From original conviction and sentence in criminal case No.2073 of 2003 of the Senior Principal Magistrate’s Court at Kiambu (Wachira -SPM))*

**CHARLES MOHE MBURU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

**CHARLES MOHE MBURU**, hereinafter referred to as the Appellant, was charged with three counts of different offences. In Count 1 he faced a charge of **STEALING** contrary to **Section 275** of the **Penal Code**. In count 2 he faced a charge of **ESCAPE FROM LAWFUL CUSTODY** contrary to **Section 123** of the **Penal Code** and in count 3 **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code**. The first two offences were alleged to have been committed in February, 1999 while the capital offence was alleged to have been committed on 28<sup>th</sup> September, 2003. After a full trial, the learned trial magistrate found the Appellant guilty in counts 2 and 3 and sentenced him to death for the capital offence, as prescribed in law. It is against the conviction and the sentence that the Appellant now appeals to this court.

The facts of the prosecution case were very simple. The Complainant for the capital robbery charge was approaching the gate to his home at 10.00 p.m. on the material day when four youths accosted him. One of them hit him on the left side of his head injuring him near the eye. The Complainant immediately grabbed one of the young men and held on to him until he called out his brothers. The other three youths tore his shirt and stole his mobile phone before escaping. The fourth one was the Appellant and he was eventually handed over to the police.

In support of the second charge of escape from lawful custody, P.W.4, **P.C. Wanyama** told the Court that on the night of 16<sup>th</sup> February, 1999, he took over the report office duties and 36 prisoners at Kiambu police station. In the course of that night, the Appellant and another prisoner escaped from the cells through the exhibit store. In his defence the Appellant denied committing the robbery charge. The Appellant alleged that he was well known to the Complainant and that the Complainant arrested him because he, the Appellant declined to get him a girl he wanted.

The Appellant has challenged the conviction on four main grounds which are quite similar in nature and which are:

One that the P.W.1 was an incredible and unreliable witness

Two that the evidence of the prosecution witnesses was inconsistent

Three that essential witnesses were not called to testify and that the Appellant's age needed to be assessed.

Four that the Complainant's evidence as to the cause of injury on his eye was at variance with that adduced by the clinical officer P.W.6.

The State opposed this appeal. The Appellant was in person while the State was represented by **Mr. Makura**, State Counsel.

We propose to start by considering the first and second grounds of appeal together.

The Appellant in his written submission contented that the Complainant was unreliable and an incredible witness on the basis that the iron bar he alleged to have recovered from the Appellant at the time of arrest was not seen by his brothers P.W.2 and P.W.3 and was not adduced in evidence as an exhibit. He relied on the case of **NDUNGU KIMANI –V- REPUBLIC (1979) KLR 282** which held as follows:-

***“The witness upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straight forward person or raised a suspicion about his trustworthiness or say or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence”.***

The cited case has no relevance or application to the instant case. The failure to produce an exhibit occasioned by the prosecution's negligence cannot be blamed on the witness and neither can it be a valid ground to find such a witness unreliable or incredible. The Complainant did not say or do anything that could have created a doubt as to his integrity and credibility. The learned trial magistrate found as follows concerning the Complainant at page J3 of Judgment:-

***“In the present case I find that the witness P.W.1 was honest and unmistakable that the person charged is the same person he arrested while committing the offence of robbery against him on that material night”.***

The learned trial magistrate had the opportunity to see and hear the witnesses and was better placed to assess their demeanour. The learned trial magistrate's finding that the Complainant was a honest witness and therefore credible cannot be faulted by this court and we see no reason to find otherwise.

On the prosecution evidence being inconsistent **Mr. Makura** for the State did not agree with the Appellant on that point. **Mr. Makura** submitted that the Complainant held onto the Appellant at the locus in quo of the offence and did not let go until his two brothers went to his aid. Subsequently the three handed the Appellant over to P.W.5 at Kiambu police station. Counsel submitted that not only was the identification of the Appellant as one of the robbers unquestionable but that the evidence of all four witnesses was consistent and in harmony.

In the Appellant's written submission he highlighted alleged inconsistency in the prosecution evidence as being the fact that P.W.5 stated in evidence that he received the Appellant from members of public who were not called as witnesses. We have perused the evidence of P.W.5. P.W.5 actually stated that he received the Appellant from the Complainant and members of the public. P.W.2 and P.W.3 qualify to be members of public and from the evidence of P.W.5 he was not aware of the relationship between the Complainant and the two. In any event we are satisfied from the evidence adduced before the trial court that P.W.5 received the Appellant from the Complainant among others and that therefore the link between the Appellant's arrest at the scene in the course of the commission of the offence and his re-arrest by P.W.5 at the police station was not broken. We find no merit in this ground and dismiss it.

The Appellant's third ground are actually two grounds in one. The first of these grounds is that certain

essential witnesses were not called to testify. The said witnesses are the members of public which, the Appellant maintained in his written submissions handed him over to the police according to the evidence of P.W.5 the re-arresting officer. He relied on two cases. In **AHMED RAMSON –V- REPUBLIC (1955) EA. Vol.22** where the court held that it is the duty of the prosecution to avail all material witnesses to enable the court arrive at a fair and impartial decision. We agree with the proposition given in this case. **Mr. Makura** submitted that all material witnesses in the case were called and the prosecution case could not be said to be threadbare. We agree with the learned State Counsel. The Complainant and his two brothers testified of the Appellant's involvement in the offence and to his arrest. P.W.6 testified concerning injuries sustained by the Complainant. P.W.5 re-arrested the Appellant from the Complainant. P.W.4 gave evidence in support of a different count. In regard to Count 3 for which the Appellant was convicted we are satisfied that essential witnesses were all called to testify and that based on their evidence, the trial court had sufficient evidence to help it make a fair and an impartial decision.

The Appellant also relied on the case of **GIDRAF THUO NDOLA vs. REPUBLIC C.A. No.13 of 2000**. Where the Court of Appeal allowed the Appellant's appeal on grounds that the manner of his arrest was not clearly explained. The case does not apply to the instant case. The manner of the Appellant's arrest is very clear in this case. The Complainant held on to him and did not let go until P.W.2 and P.W.3 went to his assistance. The manner of arrest was clear as day and beyond reproach.

The final ground of the Appellant's appeal was that the Complainant's evidence as to the cause of injury he sustained during the attack and the part of the body injured was contradictory. The Appellant in his written submission stated that P.W.3 contradicted the Complainant by saying that the Complainant was bleeding on his right eye while the Complainant said it was the left face where he was hit. The Appellant wrote further that the weapon which caused the injury according to the complaint was an iron bar while P.W.6 the clinical officer said it was a sharp object.

**Mr. Makura** for the State submitted that the P.W.6, the clinical officer stated that the Complainant had nose bleeding and swollen eyes when he went to her for treatment. That the said injury was consistent with the Complainant's evidence.

We agree with the Appellant that there is inconsistency between the Complainant's evidence and that of P.W.3 as to the side of his face which was injured and or from which he bled. We do not however find the inconsistency material or significant as it regards were details and not the substance. The evidence of the Complainant and P.W.6 was that the Complainant was bleeding heavily from the face. Being at night and the injury having been attended to the same night, in the circumstances of the case, we find that the inconsistency was immaterial. The other inconsistency is the nature of injury sustained. The Complainant said that he was hit with an iron bar. P.W.6 found the injury on the complaint as having been caused by a sharp object. We fail to appreciate the inconsistency in this piece of evidence and find it immaterial. The weapon used to injure the Complainant was not recovered. No one could tell whether it had a sharp edge on it. P.W.6 was also not questioned on that point, whether an iron bar could cause a cut injury. We agree that the prosecution failing which the court ought to have made an inquiry into that issue. However, we are satisfied that despite the lack of inquiry on that point the evidence adduced by the prosecution was sufficient to find that the Complainant suffered an injury to his face at the hands of his attackers. We find that the Appellant has not suffered any prejudice in regard to this issue and therefore the ground raised has no merit.

As to the Appellant's contention that his age ought to have been assessed, the issue did not arise during the trial. However we note that the Complainant described his four attackers as youths. The Complainant testified on 13<sup>th</sup> October, 2003 which is 3 years ago. The Appellant did not strike us as youthful anymore at the time of appeal. Just to clear the doubt, we shall send the Appellant for age assessment before dealing with the issue of sentence.

Finally we wish to point out that the Appellant's conviction was predicated by a single witness's evidence the Complainant in this case. The learned trial magistrate carefully considered the Complainant's evidence and before convicting on it, applied the mandatory caution of the dangers of relying on single evidence of identification to convict. We are satisfied after analyzing and evaluating the

evidence adduced before court afresh, that the conviction was quite safe and should be sustained. We therefore find no merit in this appeal against conviction. We dismiss the appeal and uphold the conviction.

The issue of sentence will be considered after the report on age assessment.

Dated at Nairobi this 26<sup>th</sup> day of September, 2006.

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**J. LESIIT**

**JUDGE**

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**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Mr. Makura for State

Tabitha/Erick – CC

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**LESIIT, J.**

**JUDGE**

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**MAKANDHIA**

**JUDGE**