



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 351 & 352 of 2003

DUNCAN MWANGI NGATIA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Judgment and Conviction in Senior Resident Magistrate's Court at Karatina in Criminal Case No. 213 of 2003 dated 9th September 2003 by Mr. J. N. Nyaga – S.R.M. – Karatina)

HIGH COURT CRIMINAL APPEAL NO. 352 OF 2003

**SILAS WERU GICHOHI
APPELLANT**

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Judgment and Conviction in Senior Resident Magistrate's Court at Karatina in Criminal Case No. 213 of 2003 dated 9th September 2003 by Mr. J. N. Nyaga – S.R.M. – Karatina)

J U D G M E N T

Duncan Mwangi Ngatia the appellant in High Court Criminal Appeal No. 351 of 2003 (hereinafter referred to as the 1st appellant) and Silas Weru Gichohi the appellant in High Court Criminal Appeal No. 352 of 2003 (hereinafter referred to as the 2nd appellant), were jointly tried and convicted by the Senior Resident Magistrate Karatina of 4 counts of Robbery with violence contrary to section 296 (2). Each appellant was sentenced to the mandatory death sentence. Being dissatisfied they have now each appealed against their conviction and sentence.

The grounds of appeal put forward by each of the Appellants are similar. The crux of the appeal is that

the trial magistrate erred in relying on the voice identification and that a mistaken identification could not be ruled out. That the circumstances were not favourable for a positive visual identification and that the identification parade was not properly conducted.

Learned Principal State Counsel Mr. Orinda has conceded the appeals accepting that the robbery took place at night, and that the complainants not having known the Appellants before and not having participated in the arrest of the appellants, the purported identification of the appellants at the identification parade was doubtful and the conviction unsafe.

It is apparent from the evidence of the 4 complainants who testified before the trial magistrate that the robberies occurred sometime between 7.30 p.m. and 8.00 p.m. of the four complainants, only two were able to identify the two appellants at an identification parade. The other two complainants explained that they could not identify their assailants because they were in shock. The complainants who purported to identify the appellants were Boniface Wamai Gatimu (P.W.1) and Beatrice Wangari Muturi (P.W.2). They claimed that they saw the two appellants with the aid of a moon light and were therefore able to identify them through visual appearance. P.W.1 claimed he was also able to identify 1st appellant through voice recognition.

It is evident that this incident occurred at night. P.W.1 was driving a pick-up at the time he was attacked. The incident also took a very short time. P.W.1 estimates that it took just about 2 minutes. As per his evidence he was attacked by the robbers who hit him on the head and also injured his eye. Under these circumstances it was practically impossible for P.W.1 to have no more than a glimpse of his assailants. For persons he did not know it was not feasible that he would be able to identify any of the assailants after such a short encounter.

Similarly for P.W.2, she jumped out of the vehicle immediately they were attacked. Obviously she was more concerned about escaping than having a good look at her assailants.

The evidence leading to the arrest of the appellants was not correlated with the evidence of the complainants. P.W.7 Cpl. David Kamende who recovered the vehicle of the 1st complainant relied on a description given to him by P.W.1 which was “*one as brown and short and the other tall and black.*” That description was such a general description as to fit half the population in this country. P.W.7 did not explain why he zeroed in on the 1st and 2nd appellant. We concur with the learned Principal State Counsel that the conviction of the appellants was not safe and is unsupportable. We therefore allow both the appeals quash the convictions and set aside the sentences imposed.

The appellants shall each be set free unless otherwise lawfully held.

Dated signed and delivered this 26th day of September 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE