



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Criminal Appeal 503 of 2001**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 23475 of 2001 of the Chief Magistrate's Court at Makadara (Mrs. Juma– PM)**

**STEPHEN MURIGATHIA IRUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The Appellant **STEPHEN MURIGATHIA IRUNGU** was convicted for one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death as by law prescribed. He was dissatisfied with the conviction and by implication the sentence and therefore lodged this appeal.

The facts of the prosecution case were that at 8.00 p.m. on 22<sup>nd</sup> December 2000 the Complainant left his place of work at St. Teresas to go home. He walked along Juja Road. That the Complainant walked past a kiosk where he saw the Appellant whom he had known for four years. As he passed, the Complainant saw two more people. The place was lighted by lights from a petrol station nearby. He walked on to the gate of his home where a person held him from behind and pinned him down. The Complainant alleged that it was the Appellant who pinned him down and also stole a hammer, Kshs.1800/- and a tape measure. The three ran away. The Complainant decided to report to police and on his way met three police officers who were on patrol. The three walked around with him and managed to get the Appellant at a kiosk near the petrol station. He was arrested. He had a hammer which the Complainant identified as his because of a curved area of the metal part of the hammer. In defence the Appellant said he was arrested from his cousin's kiosk.

The Appellant's first ground of appeal was that the learned trial magistrate relied on single identification evidence without warning herself. Learned counsel for the State **MISS GATERU** did not respond to this issue of relying on a single identification witness. We agree with the Appellant that no where in the trial court's judgment did the Court caution itself of the dangers of relying on single identifying witness. The Appellant relied on **WAIGANJO MWANGI vs. REPUBLIC 1977 EACA.**

We are not aware of that authority. However, words the appellant quoted are similar to the all familiar quotation in **RORIA vs. REPUBLIC 1967 EA 583 at page 584** letter 9 which state as follows: -

***“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”***

Dealing first with the issue raised by the Appellant, it is trite law that a trial court is required to caution itself of the dangers of relying on evidence of a single identifying witness before basing any conviction on it. The learned trial magistrate did not warn herself of this danger. Before we rule on whether or not the conviction is safe we wish to re-examine the evidence before Court. The evidence of PW1 is very clear that he saw the Appellant whom he knew before near a kiosk as he passed. After the robbery he found him near a kiosk and caused his arrest. The Complainant did not say whether it was at the same kiosk he had seen him earlier. More importantly whereas the Complainant discloses the condition of lighting at the kiosk where he saw the Appellant, he made no mention of lighting at the gate where he was robbed. His evidence was also clear. He said;

***“When I neared my gate someone held me from behind. I was pinned on a hole. I was held around the neck. I could not even talk. It is Faida (Appellant) who held me.”***

The Complainant says he was held from behind. He does now claim he turned back to see who held him. He was robbed and the robbers ran away. He did not claim he saw or recognized them as they ran. Even though he claimed that some people walked behind him after he passed the Appellant, since he had seen two people ahead of where he saw the Appellant it was important for the Complainant to say why he thought the Appellant was among those who followed him. Having been held from behind and knocked down, we find it difficult to imagine how the Complainant could see his attackers. In the Court of Appeal case of **ODHIAMBO vs. REPUBLIC CA No. 77 of 2001 (Mom)**, it was held: -

***“Courts should receive evidence on identification with the greatest circumspection particularly where circumstances are difficult and do not favour accurate identification. Where the evidence of identification rests on a single witness and circumstances of identification are known to be difficult what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which, the Court may reasonably conclude that identification is accurate and free from the possibility of an error.”***

We find that the evidence of identification by the Complainant was not received with circumspection by the trial court. Had the Court done so, it could have noted the insufficiency of the identification at the gate where the robbery took place.

As to whether there was other direct or circumstantial evidence against the Appellant, that forms the basis of the second ground of appeal. The Appellant submitted that there was insufficient proof linking the Appellant to the hammer. **MISS GATERU** for the State submitted that the Complainant's evidence received corroboration from PW2 and PW3 that indeed the Appellant had in his possession the hammer. The possession of the hammer was sufficiently proved in our view. However we were concerned about its identification by the Complainant. The Complainant said that he could identify the hammer as his by a curved area on the metal part of the hammer. The trial magistrate did not record any observation of what the curving was and neither did she go further to find out whether that curving was so unique as to sufficiently prove it was the Complainant's property. A hammer is a curved object especially at its metal part and that is what distinguishes it as a hammer. Without evidence to show that the curving is unique as to justify a finding that the court was satisfied that the curving was exclusive to the Complainant, that piece of evidence is worthless. The evidence of the recovery of the hammer from the Appellant does not satisfy the other evidence needed to fortify the evidence of identification adduced in this case. The

conviction based on the identification of the Appellant by the Complainant and the recovery of the hammer from the Appellant was dangerous. In the circumstances of this case, was wholly unsafe and cannot be sustained.

The Appellant also argued that his defence was not given due consideration. We have included the Appellant's defence in this judgment. In it he merely stated that he was arrested "from" a kiosk. That is not disputed because PW1, PW2 and PW3 said they arrested him at a stall. Had the Court inquired further during the trial, may be it could have come out clear whether by "from" the Appellant meant inside or outside the kiosk. That would have been significant but due to the lack of inquiry we shall go no further.

Having considered this appeal, we find that it has merit. We find that the conviction was unsafe and cannot be sustained. We allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 18<sup>th</sup> day of October 2005.

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**LESIIT, J.**

**JUDGE**

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**M.S.A. MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

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**LESIIT, J.**

**JUDGE**

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**M.S.A. MAKHANDIA**

**JUDGE**