REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 398 of 2001

(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 2047 of 2000 – J. KIARI E [S.R.M])

DAVID KARANJA CALEB………………………..APPELLANT

VERSUS

REPUBLIC…………………...…….….…………..RESPONDENT

JUDGMENT OF THE COURT

The appellant, David Karanja Caleb was charged with another before the subordinate court with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 27th of September 2000 at Tayari Farm, Molo, jointly with another not before court and while armed with pangas and rungus robbed Paul Mwangi Ndirangu of one Radio Cassette make Fisher, one TV Greatwall, assorted shop goods and cash Ksh.11,000/= all valued at Ksh.25,500/= and at or immediately before or immediately after the said robbery threatened to use actual violence to the said Paul Mwangi Ndirangu. The appellant pleaded not guilty to the charge and after a full trial he was convicted as charged. His co-accused in the lower court was however acquitted. The appellant was sentence to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his "*memorandum*" of appeal (*it should actually be a petition of appeal*), the appellant raised four grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted on improper evidence of identification. He faulted the trial magistrate for failing to take into account his alibi defence before convicting him. He was aggrieved that he had been convicted on insufficient and unsatisfactory evidence of the prosecution witnesses which did not prove the charge against him to the required standard of proof.

At the hearing of the appeal, the appellant with the leave of the court, presented this court written submissions in support of his appeal. Mr. Koech, learned state counsel however told the court that he did not support the conviction of the appellant as it was unsafe. Before giving our reason for the judgment, we shall set out the brief facts of this case. On the 27th of September 2000, at about 1.00 a.m., while PW1 Paul Mwangi Ndirangu (*Ndirangu*) was asleep in his house at Tayari Farm Molo, a gang of robbers broke into his house and ordered him to give them money. Ndirangu gave them the money that he had. The robbers ordered him to escort them to his shop where they robbed him of several shop items. They

returned to his house and robbed him of two radios. Ndirangu however testified that he was not able to identify the persons who robbed him during that material night of the robbery. The evidence of Ndirangu on the circumstances of the robbery was corroborated by the testimony of his wife PW2 Anne Wanjiru Mwangi (*Anne*). Anne similarly testified that during the course of the robbery she did not recognize the any of the robbers who robbed them.

Ndirangu testified that after the robbers had left his premises, he mobilized his neighbours who included PW3 Richard Kiguro Kirige and PW4 Elijah Ogoti Migisi. Ndirangu and his said two neighbours followed the footprints of the robbers. They were also assisted in retracing the direction that the robbers took by the sweets and other shop items which the robbers kept dropping as they were walking towards the direction of a nearby forest. The three witnesses testified that they were able to recover several items in the forest which included a bicycle, a radio, three long trousers, several coats, a shirt, and a pair of shoes. They also recovered a jacket which had been used to carry some of the goods which had been stolen from the shop of Ndirangu. All these items were found abandoned in the forest some distance from the house of Ndirangu.

According to PW3, the properties of the Ndirangu which were recovered, including the stock-in-trade of his shop were equivalent to one load of a Land-Rover. No one was seen near the site where the said items were recovered. After the goods had been taken to the police station, Ndirangu testified that he recognized that the jacket which was used to carry some of the items which were robbed from his shop belonged to the appellant. He gave this information to the police. PW6 CPL Suleiman Cheruiyot accompanied Ndirangu to the house of the appellant. In the house of the appellant, PW6 recovered a poster under the bed of the appellant. Ndirangu and his wife Anne identified the poster as the one which was removed from their shop during the night of the robbery. Anne testified that she was able to identify the poster from the writings and some nail marks on the poster. She was positive that the poster was the one which used to hang outside their shop. PW6 arrested the appellant and charged him with the offence.

When the appellant was put on his defence, he denied that he was involved in the robbery. He denied that the jacket which was recovered in the forest with the goods that were robbed from Ndirangu was his. He further denied that the poster which was recovered from his house was robbed from the shop of Ndirangu. He adduced evidence to the effect that the jacket which allegedly connected him to the robbery was in fact a common jacket which could not be specifically connected and identifiable to him. He produced a jacket as an exhibit which he alleged was the one which he owned. He denied ownership of the jacket which was recovered with the goods which were stolen from the shop of the appellant.

This is a first appeal. As was held by the Court of Appeal in **Isack Nganga Kahiga vs Republic CA. Cri. Appeal No.272 of 2005 (Nyeri)** (*Unreported*) at page 5;

"***It is trite that a trial court has a duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demenour and so the first appellate court would give allowance of the same."***

In the present case, the issue for determination is whether the evidence adduced by the prosecution establishes the guilt of the accused to the required standard of proof beyond reasonable doubt on the charge of robbery with violence. We have carefully considered the written submission presented to us by the appellant. We have also re-evaluated the evidence that was adduced before the trial magistrate.

It is apparent that the evidence that was used by the trial magistrate to convict the appellant was the recovery of a jacket at the scene where the goods which were stolen from the house and the shop of the complainant were recovered. The complainant and his wife did not recognize any of the robbers who robbed them. The robbery took place at night. According to the testimony of the complainant and his wife, the robbers used torches to illuminate the house and the shop as they robbed them. It is when the

complainant mobilized his neighbours that they were able to recover the stolen goods which had been abandoned in a forest some distance from the house of the complainant. Among the abandoned goods was a jacket which the complainant and PW4 allegedly identified to belong to the appellant. It is upon this alleged identification that the complainant informed the police who accompanied him to the house of the appellant where a search was conducted.

None of the items which were stolen from the house and the shop of the complainant were recovered in the house of the appellant save for a poster which the complainant and his wife identified to having been removed from their shop. The complainant and his wife testified that they were able to identify the poster because of some writings and some holes which had been caused when nails were used to hang the poster on the wall. The appellant on his part denied that the jacket which was recovered with the goods which were stolen from the shop of the complainant belonged to him. He further denied that the poster which was found in his house was the one which was removed from the shop of the complainant.

Having carefully evaluated the above evidence, it is clear that the said evidence is tenuous, to say the least. The jacket which the trial magistrate found as a fact to belong to the appellant did not have any distinctive marks that would have pointed to the appellant and only the appellant as a person who owned the said jacket. From the evidence adduced, it is clear that the said jacket was a common jacket which could have been purchased from any shop that sold clothes. No item that could be identified to belong to the appellant was found in the said jacket. Indeed when the appellant was put on his defence, he produced a jacket which he claimed was the one which belonged to him. He further raised an issue of an existing grudge between himself and the complainant.

Taking into account the totality of the evidence adduced, it is most improbable that the appellant could have robbed the complainant and not be found with any stolen item in his house other than a poster. From the evidence adduced it is evident that the said poster had no value. In fact it was an advertisement poster for some consumer product. The question that we ask ourselves is this; if indeed the appellant participated in the robbery of the complainant's house and shop, could he be so careless as to leave a jacket with the stolen goods so that the same could be traced back to him? We do not think so.

Further, what was the probability that the appellant could have been arrested and his house searched and the only item recovered be a valueless poster which was allegedly removed from the wall from the shop of the complainant? It is clear that there is no evidence which could have led the trial magistrate to convict the appellant on the charge of robbery with violence. No one identified the appellant at the scene of the robbery. None of the stolen items were found in possession of the appellant. The fact that the existing grudge between the complainant and the appellant could have motivated the complainant to make the complaint cannot therefore be ruled out. There was no evidence which could support the charge of robbery with violence.

The upshot of the above is that the appeal filed by the appellant is hereby allowed. Mr. Koech for the State did not support the conviction, rightly in our view. The conviction of the appellant is quashed. He is acquitted of the charge of **Robbery with violence** under **Section 296 (2) of the Penal Code**. He is ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 12th day of October, 2006

M. KOOME

JUDGE

L. KIMARU

JUDGE