REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 347 of 2002

(Appeal arising from the original conviction and sentence in Criminal Case Number 966

of 2002 of the Chief Magistrate's Court at Nyeri by

M. R. Gitonga – S.R.M)

JAIRUS MAINA GITONGA……………………….....................................…………APPELLANT

VERSUS

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

J U D G M E N T

Jairus Gitonga Maina (hereinafter referred to as the appellant) has brought this appeal against the judgment of the Senior Resident Magistrate Nyeri in which the appellant was convicted and sentenced to the mandatory death sentence for the offence of Robbery with violence contrary to ***section 296 (2)*** of the Penal Code.

The Appellant has raised 5 grounds of appeal contending that the trial magistrate erred: -

§ **In failing to warn herself of the danger of convicting on the evidence of identification under conditions which were not favourable for a positive identification.**

§ **In admitting evidence of an identification parade which was not properly conducted.**

§ **In admitting a repudiated statement which was not voluntarily obtained.**

§ **In rejecting the defence without giving reasons for doing so.**

§ **In failing to consider that the prosecution did not call any independent witnesses.**

The particulars of the charge against the appellant alleged that:

On the 12th day of January 2002 at Mahigaini Springs in Nyeri District, while armed with a dangerous weapon namely a pistol, He robbed one Josphat Mutugi Muchue of cash Kshs.200/= and at or immediately before or immediately after the time of such robbery fatally injured Ethan Kamau Magondu.

During the trial in the Lower Court a total of 8 witnesses testified for the prosecution. The prosecution evidence was that on the 12th January 2002, John Kamau Macharia (P.W.1) and Josphat Mutugi Muchui (P.W.2) both of whom deal in tomatoes, were in a motor-vehicle being driven by one Ethan Kamau Magondu. They had stopped at Kiganjo petrol station where they were adding pressure to the tyre when the appellant approached them and asked for a lift. The driver of the vehicle told the appellant to get into the back of the vehicle.

The vehicle took off the appellant asked the witnesses to stop at the next petrol station so that He could fuel the vehicle for them. After fuelling the vehicle, the appellant moved to the cabin of the vehicle and sat together with the other 3 men. As they were travelling towards Karatina, the driver of the vehicle thought He heard a sound at the back of the vehicle. The appellant looked out of the window flashed a torch and said there was no one at the back of the vehicle. The appellant then pulled out a gun and asked the 3 men to produce Kshs.50,000/=. The men pleaded that they did not have that kind of money. The driver stopped the vehicle and the appellant demanded the keys. The driver gave the appellant the keys and then fled. The appellant was then given Kshs.250/= by P.W.2. The appellant took Kshs.200/= and returned Kshs.50/= to P.W.2. The appellant started the vehicle but upon being told that it had no fuel, abandoned the motor-vehicle and disappeared. P.W.1 and P.W.2 remained in the vehicle for about 3 hours before a passing vehicle rescued them and took them to Karatina Police Station where they reported the matter to Felix Wachira (P.W.4). The officer visited the scene and upon checking the area recovered the body of Ethan Kamau Magondu who had apparently fallen down a quarry and sustained fatal injuries. The body was taken to Karatina District Hospital Mortuary.

On the 18th January 2002, Dr. James Mburu (P.W.7) of Karatina District Hospital performed a post mortem examination on the body of the Ethan Kamau Magondu and formed the impression that the cause of death was cardio pulmonary arrest secondary to head injury.

On the 14th March 2002 P.C. Njagi (P.W.5) of Kiganjo Police Station received information acting on which He proceeded to Karichu where He found the Appellant and a lady locked in a house. He noticed that the appellant was dressed in a black leather jacket which was consistent with a description He had received of a person involved in several robberies in the area. P.W.5 arrested the appellant and upon interrogation the appellant led the officer to his home in Wanduta where P.W.5 recovered a toy pistol which was hidden under a Banana stem outside the house. Both the black leather jacket and the toy pistol were produced in court as exhibits.

On 22nd March 2002 Chief Inspector William Koskey (P.W.6) of C.I.D. Nyeri conducted an identification parade at Kiganjo Police Station during which the appellant was identified by P.W.1 and P.W.2 as the person whom they had given a lift and who had robbed them.

On the 24th March 2002 Inspector Benson Njeru Mucheche (P.W.8) took a charge and caution statement from the Accused in which the Accused admitted having committed the offence. The appellant challenged the admissibility of the statement, but the same was admitted in evidence after a trial within a trial.

In his sworn defence the appellant maintained that the evidence adduced against him was not true. He claimed that He was forced to record the statement and that the two witnesses identified him because one Njagi pointed him out.

It is evident that the appellant’s conviction was based on his identification by P.W.1 and P.W.2 and the confessionary statement made under charge and caution. Both P.W.1and P.W.2 maintained that they saw the appellant well because at Kiganjo Petrol Station where they gave him a lift there was electricity lights and that they also saw him when He sat at the front (carbin) with them. None of these witnesses however gave any description of the appellant nor did they make any mention of the “black leather jacket” a description P.W.5 claimed to have been mentioned to him by other people in connection with robberies in the area.

It is apparent that the two witnesses came into contact with the robber at night. It is contended that there was electricity lights at the petrol station, but there is no clear evidence of how far the lights were in connection to where the witness had stopped. The witnesses have not given any particular reason why they took any keen interest in the person being given a lift who was told to get into the back of the vehicle. Moreover at the time the person moved to the front carbin there were now 4 people seated at the carbin (i.e. including the driver. Obviously they were so squeezed that it was practically impossible for one to have a clear view of the other. The time the appellant is alleged to have threatened and robbed the witness which is the time the witnesses could now have taken an interest in his appearance, it was dark and they therefore could not have recorded his appearance in their memories.

Although the two witnesses identified the appellant at the identification parade, we are hesitant to accept this identification as the possibility of a mistaken identification could not be ruled out. There was also contradiction as to where the identification parade was done, P.W.1 and P.W.2 claiming it was at Karatina Police Station whilst the parade officer (P.W.6) claimed it was done at Kiganjo Police Station.

Further the evidence of P.W.1 and P.W.2 relating to how the robbery occurred raised some unanswered questions. For instance why would the robber abandon the vehicle that it had no fuel when the robber had just had the vehicle fuelled? Secondly why would He rob the witness of Kshs.200/= when He had just fuelled their vehicle for that amount? Thirdly why would a robber take Kshs.250/= and return Kshs.50/= back to his victims? The circumstances as explained by the witnesses were not supportive of a serious robbery attempt. It would appear that the witnesses may not have told the court the truth about exactly what transpired.

Though the statement under charge and caution purports to be a confession, it does not add much value to the prosecution's case. According to the evidence of P.W.5 they appear to have irregularly extracted a confession from the appellant on 14th March 2002, the possibility of the appellant having been forced to record the statement on 24th March 2002 which was 10 days after his arrest cannot therefore be ruled out.

In considering the evidence the trial magistrate did not take all these factors into account but appears to have erroneously shifted the burden of proof onto the appellant as per following remarks contained in her judgment.

"***The Accused has not at all challenged the evidence given regarding whether or not there were electricity lights at the petrol station………………………… The Accused has not strongly challenged this evidence ……………………………… Defence evidence does not rebut what was given against Accused by side of prosecution………………..….."***

The burden of proof rested squarely upon the prosecution and the appellant had no obligation to challenge or rebut the prosecution evidence. The appellant could not be condemned on the weakness of his defence.

Finally the particulars of the charge were not consistent with the evidence adduced. There was no evidence that the appellant "fatally injured" Ethan Kamau Magondu during the robbery or immediately before or after. The prosecution evidence was that the deceased appears to have fallen down a quarry whilst attempting to escape from the robber. Whilst the robber may have been held responsible for causing the death as defined under section 213 (c) in a charge of murder, this is not applicable in a charge of Robbery with Violence under ***section 296 (2)*** where actual personal violence is a prerequisite.

For all the aforestated reasons we find that the appellant's conviction was not safe. We therefore allow his appeal, quash the conviction and set aside the sentence imposed.

The appellant shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 5th day of October 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE