REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 140 of 2004

(From the original conviction and sentence of the Senior Resident Magistrate's court at Molo in Criminal case No.862 of 2004 – R. K. Kirui – S.R.M)

JULIUS CHERUIYOT KOECH……..APPELLANT

VERSUS

REPUBLIC……..…….…….RESPONDENT

JUDGMENT OF THE COURT

The appellant, Julius Cheruiyot Koech was charged with Robbery with violence contrary to **Section 296 (2) of the Penal** Code. The particulars of the offence were that on the 3rd of March, 2004 at Shantra Flora Sumeek in Nakuru District, jointly with others not before court, while armed with poles, pangas and rungus robbed Peter Wafula Kilali of a communication radio set make Motorola GP 340, a jacket, a wrist watch make Disco and a spot light all valued at Ksh.60,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Wafula Kilali. The appellant pleaded not guilty to the charge and after a full trial was convicted as charged and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court against the same.

In his petition of appeal, the appellant raised three grounds of appeal challenging his conviction by the trial magistrate. He was aggrieved that the trial magistrate had relied on an alleged evidence of recognition which identification was made in an unclear circumstances. He faulted the trial magistrate for relying on uncorroborated evidence of the prosecution to convict him. He was further aggrieved that the trial magistrate had relied on the evidence of identification whereas the witnesses who purported to have made the identification did not confirm the identification by attending a police identification parade. At the hearing of the appeal, Mr. Oumo, learned counsel for the appellant made submissions urging this court to allow the appeal. On the other hand, Mr. Koech, for the State, submitted that the prosecution had established its case to the required standard of proof and therefore this court should not interfere with the said finding of the trial magistrate. Before giving reasons for our judgment we shall set out the facts of this case albeit briefly.

On the 2nd of March 2004, PW1 Peter Wafula Kilali was guarding his employer's premises at Shantra Flowers. He was working with Joseph Ngige (PW3). He testified that at about 2.45 a.m., while they were at their place of work they were attacked by a gang of robbers who numbered about ten. He testified that the robbers broke into the farm while armed with crude weapons and robbed him of his rain coat, radio and gate padlock before leaving. PW1 testified that he was able to recognize the appellant as being among the robbers because at the gate of the farm, the powerful security lights had been put on. He recalled that he was able to identify the appellant because the appellant used to be his fellow guard at the flower farm before he left employment. He testified that he was able to identify the appellant because the

robbery took place for a period of between 25 - 30 minutes.

After the robbery, PW1 testified that he informed the police that he had recognized the appellant as being among the gang of robbers who robbed them. PW2 Jacob Pola Ombuya, a security guard at the flower farm, corroborated the testimony of PW1 as related to the circumstances under which the robbery took place. However, he was not able to identify any of the robbers. He recalled that after the robbery had taken place, PW1informed him that he had recognized the appellant as being among the gang of robbers. PW3 similarly testified that they were robbed on the material night but was not able to identify any of the robbers. He however testified that PW1 had told him that he had recognized one of the robbers.

After the report was made to the police, PW5 PC Isaac Chebii accompanied by other police officers went to the house of the appellant on the 5th of March, 2004 and managed to arrest him. They searched his house but were unable to recover anything that was stolen during the robbery. A piece of wire which was used to tie the guards during the robbery was produced as an exhibit during trial.

When the appellant was put on his defence, he denied that he had participated in the robbery at the flower farm. He testified that on the 5th of March, 2004 after completing his work, he went home and slept. At night, he was woken up by the police who searched his house and later arrested him on the allegation that he had participated in the robbery at the flower farm. He testified that when the police searched his house, they did not recover anything in connection with the robbery. His wife DW2 Sharon Chepkoech Birir similarly testified that her husband was not involved in the robbery.

This being a first appeal, this court is required in law to consider the appeal by way of rehearing. This court is required to reconsider and re-evaluate the evidence adduced by the prosecution witnesses so as to reach its independent determination whether or not to uphold the conviction of the appellant. Of course, this court has to put in mind the fact that it neither saw nor heard the witnesses as they testified (*See* **Njoroge Vs Republic [1987] K.L.R 19**). The issue for determination by this court is whether the prosecution proved its case on the charge of robbery with violence against the appellant to the required standard of proof beyond reasonable doubt. We have considered the submissions made by Mr. Oumo on behalf of the appellant and by Mr. Koech on behalf of the State.

Both the appellants and the prosecution in this case are agreed on the fact that the trial magistrate relied on the evidence of a single identifying witness to convict the appellant. It is the evidence of PW 1 that the trial magistrate relied on to convict the appellant. According to PW 1, he identified the appellant as being among the robbers who robbed them on the material night. He testified that he was able to identify the appellant because the appellant used to be his former colleague at their place of employment. It was his testimony that the appellant had by the time of the robbery ceased to work for the flower company in the position of a security guard. He testified that he was able to identify the appellant by the powerful security lights which were illuminating the area next to the gate of the flower farm. He however did not tell the trial court what made him to be so certain that it was the appellant and no one else resembling him who could have participated in the robbery. He did not tell the court the clothes that the appellant wore on the material night of the robbery.

From the testimony of PW 2 and PW 3, it is clear that when the robbers went to the farm on the material night, they terrorized the security guards who were guarding the flower farm. PW 2 and PW 3 did not identify any of the robbers. It is clear that in the hectic circumstances of the robbery, PW 1 could have mistakenly thought that he had identified the appellant. PW 1 did not describe the role that each of the robbers played during the robbery. He did not particularly state what role the appellant played in the said robbery. It is therefore clear that there is doubt that PW 1 could have identified the appellant as being among the robbers who robbed them on the material night. It is also highly unlikely that the appellant could have participated in the robbery at his former place of employment without wearing any disguises because there was a possibility that he would have been identified by his former colleagues.

We have carefully re-evaluated the evidence that was adduced by the prosecution witnesses and that which was offered by the appellant in his defence. To sustain a conviction of an accused person on the sole evidence of a single identifying witness, this court must be certain that when the said identification

was made, it was free of an error. As was held by the Court of Appeal in the case of **Maitanyi Vs Republic [1986] K.L.R 198** at page 200:

"***Although the lower courts did not refer to the well know authorities of Abdullah Bin Wendo & Another Vs Reg (1953) 20 E.A.C.A 166 followed in Roria Vs Republic [1967] E.A 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated yet bears repetition;***

'Subject to 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'."

In the present case, there is no other evidence which connects the appellant to the robbery at the flower farm. Immediately the police received the information that PW 1 had identified the appellant as being among the robbers who robbed the flower farm, they went to the house of the appellant and searched it. They did not however recover anything that was stolen from the flower farm. Nothing connected the appellant to the robbery that took place at the flower farm. In the circumstances of this case, we are not prepared to reach a determination that the identification of the appellant by PW 1 was watertight and free from error. The circumstances of the robbery is such that this court can not with certainty reach a determination that the single identifying testimony of PW 1 is sufficient to sustain the conviction of the appellant.

The upshot of the above reasons, is that the appeal by the appellant against conviction must be allowed. His conviction is quashed. The death sentence imposed is set aside. The appellant is ordered set at liberty and released from prison unless otherwise lawfully held.

Dated at Nakuru this 14th day of November 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE