REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINNAL APPEAL 74 OF 2004

(From original conviction and sentence in Criminal Case No.666 of 2003 of the Chief Magistrate's Court at Nakuru – H. WASILWA, SRM)

SENGA KINGOO MWASIA…….……..APPELLANT

VERSUS

REPUBLIC……...…..RESPONDENT

JUDGMENT OF THE COURT

The appellant faced three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. In the first count the particulars were that on the 20th April 2002, at Swift Farm in Nakuru District within the Rift Valley Province, the appellant jointly with others not before court, being armed with dangerous and offensive weapons, namely home made gun, bows and arrows, swords and helmet, robbed Stanley Kamau Ngige cash Kshs.25,000/-, a wrist watch make CK, Calculator machine, one trouser, one shirt and one coat, all valued at Kshs.27,300/- and at or immediately before or immediately after the time of such robbery, threatened to use personal violence to the said Stanley Kamau Ngige.

In count two, the appellant was charged of having robbed Joseph Mungai Gathukumi Kshs.2,000/-, wrist watch, one weighing machine, one handbag, one trouser, one shirt and one jacket, all valued at Kshs.5,500/- and in the third count he was charged of having robbed Ezekiel Njuguna Githukumi Kshs.1,000/-, one shirt, one trouser, one jacket and a belt, all valued at Kshs.2,600/- . The second and the third counts were said to have been committed on the same date and circumstances as in the first count.

The appellant denied the said charges and after a full trial he was convicted and sentenced to death in respect of all the counts. He was aggrieved by the said conviction and sentence and appealed to this court against the same.

The prosecution case briefly stated was as follows:-

On 20th February 2002, at about 5.00 p.m., at Subukia training centre, **Stanley Kamau Ngige, PW1, Ezekiel Njuguna Gathukumi, PW2** and **Joseph Mungai Gathukumi, PW3**, were approached by some two young men who had some maize for sale. PW1, PW2 and PW3 used to trade in cereals. PW1 and

his colleagues discussed the prize of the maize with the two young men and agreed at a price of Kshs.450/- per bag. PW1, PW2 and PW3 were led by the two young men to a place where they said they had kept the maize. As they went through a forested area, two young men who were wearing helmets and had covered their faces approached them. They were armed with bows and arrows, knives and something that looked like a gun. They ordered PW1, PW2 and PW3 (the complainants) to lie down. The two young men who had accompanied the complainants also turned against the complainants and started beating them up. They removed all their clothes and stole all the monies that the complainants had. From PW1, they stole Kshs.25,000/-, from PW2, Kshs.2,000/- and from PW3, Kshs.1,000/-. They also robbed them of all the other items as stated in the charge sheet. When the robbers left, the complainants went to some good Samaritans and were given clothes which they wore and then went back to Subukia trading centre. The complainants returned to the forest in search of their assailants and they recovered two helmets. PW1 said that he was able to identify the two young men who had first approached them at Subukia trading centre. In March 2003, PW1 heard that one of their assailants was staying at lower Subukia area. He reported the matter to the police who proceeded to arrest the appellants. The appellant was later identified by PW1 in an identification parade. PW1 did not state how he came to learn that the appellant was staying at lower Subukia area and neither did he state whether he had described him to the police before his arrest was effected.

PW2 corroborated the evidence of PW1 in all material aspects regarding the robbery. However, he said that three weeks after the robbery they were called by the police and asked to identify the appellant in an identification parade. PW2 said that he was able to identify the appellant. In cross examination by the appellant, PW2 said that he had talked to the appellant for about ten to fifteen minutes before the robbery took place. PW2 was not able to identify the robbers who were hooded but he could remember that the appellant wore a T-shirt written "**USA"** with a shirt on top.

PW3 also corroborated the evidence of PW1 and PW2. He said that the complainants were called by the police after they had arrested the appellant. PW3 further stated that he was able to identify the appellant because he had one bad leg.

Police Constable Kimathi Mukendia, PW4, testified that he was attached to Subukia police station and on 20th April 2002, he received a report that some robbers had attacked the complainants and robbed them in a forest near Subukia trading centre. He proceeded to the forest with the complainants and recovered bows and arrows and two helmets. PW4 further testified that on 23rd March 2003, he arrested the appellant and took him to Nakuru where an identification parade was conducted and the complainants identified the appellant. PW4 did not, however, tell the court how he arrested the appellant almost one year from the date when the robbery took place.

The appellant gave an unsworn statement of defence. He testified that on 23rd March 2003, he was going home, having attended a funeral of a person known as Musyoka. On the way, he met two police officers who ordered him to stop and tell them where he was going. He told them that he was coming from a funeral and he was going home. They accompanied him to their home and woke up his father and simply asked him to confirm whether the appellant was his son and his father confirmed the same. Thereafter the police took the appellant to a police station. On the following day, he was taken to Central Police Station, Nakuru. At 10.00 p.m., the police organized an identification parade and nobody identified him. On the following day, at about 11.00 a.m., another identification parade was conducted and again he no one identified him. He was returned to the flying squad police section and interrogated. Another parade was mounted but the appellant did not state whether the complainants identified him. The appellant said that he had been assaulted by the police and he produced before the trial court his treatment records.

The learned trial magistrate summarised the prosecution evidence as well as the appellant's defence. She then stated as follows:-

"***I have examined all the evidence on record. The issue for determination is whether the accused was properly identified by the witnesses. The accused is said to have approached the complainant at 5.00 p.m. during the day. They talked about maize and prices before leaving the centre. They walked***

together before the attack. There is no mistake that complainant saw accused well and later identified him on an i/d parade. Accused's insintance (sic) he was not involved is just a mere defence. I find prosecution have established their case against the accused beyond reasonable doubt. I find accused guilty as charged and I convict him accordingly under S. 215 of CPC".

Mr. Mbeche for the appellant was very critical of the trial court's judgment. He submitted that the judgment was contrary to the provisions of **Section 169(1)** of the **Criminal Procedure Act**. That Section states as follows:-

"***Every such judgment shall, except as otherwise expressly provided by this court, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."***

Mr. Mbeche referred the court to a book known as **CRIMINAL PROCEDURE IN UGANDA AND KENYA** by Douglas Brown, second edition pages 115 to 123. In that part of the aforesaid text, the learned author discusses in considerable details the provisions of **Section 169** of the **Criminal Procedure Code.** We agree with Mr. Mbeche that the judgment that was delivered by the trial court did not set out in full all the points for determination and the reasons for the decision that was arrived at. The learned trial magistrate did not properly consider the issue of identification of the appellant which was the most important one in the case. The learned trial magistrate did not also give any serious consideration to the appellant's defence as required. She dismissed the same as "a mere defence" and said nothing else about it. In ***OUMA VS REPUBLIC* [1986] KLR 619**, it was held that at the time of evaluating the prosecution defence, the trial court has to consider the accused's defence and satisfy itself that the prosecution had by its evidence left no reasonable possibility of that defence being true.

The complainants did not tell the police or the court how they were able to identify the appellant. The robbery took place on 20th April 2002. PW1 testified that in March 2003, he heard that one of the robbers was staying at lower Subukia. He did not tell the court how he got that information. He just reported the same to the police and the police proceeded to arrest him. PW1 said that he was able to recognise the appellant by his appearance although he had seen him nearly a year before. When he made his report to the police, he did not describe the appellant at all. Neither did PW2 and PW3.

PW2 testified that the appellant was arrested three weeks after the robbery and the police called the complainants to identify him. PW3 did not state the date when they were called by the police to identify the appellant. However, PW4 said that he arrested the appellant on 23rd March 2003. The evidence of PW2 regarding the date of arrest and identification of the appellant could not have been correct. From the evidence of PW1, PW4 and the defence of the appellant, the appellant must have been arrested on 24th March 2003. The complainants had seen their assailants very briefly on 20th April 2002, and in the absence of any other evidence as to how they were able to identify him after his arrest, we are of the view that their purported identification of the appellant during the identification parade was unreliable. There was evidence that several identification parades had been held earlier when the complainants identified some other people who were alleged to have been the appellant's accomplices. PW1 had testified in another case and when the appellant's case came up for hearing on 7th May 2003, before another magistrate, Mrs S. Muketi, she disqualified herself for the reason that PW1 had already testified before her in that other case where a different person had been charged and convicted for a similar offence as the one that the appellant was facing.

In ***FREDRICK AJODE VS REPUBLIC* Criminal Appeal No. 87 of 2004 at Kisumu (unreported),** the Court of Appeal held that before an identification parade is conducted, a witness should be asked to give the description of the accused and the police should thereafter arrange for a fair identification parade. We find that the appellant's identification by the complainants was improper and it could not have formed the basis of a conviction. In any event, no identification parade forms were produced before the trial court as required under the law.

For these reasons we allow the appeal, quash the conviction and set aside the sentence that was pronounced by the trial court. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment delivered in open court in the presence of the appellant and Miss Opati for the state.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE