REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 1047 OF 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 4156 of 2001 of the Principal
Magistrate's Court at Thika (Mary Kiptoo – S.R.M.)

PHILIP KIOKO MUASYA……..……..……..APPELLANT

VERSUS

REPUBLIC……....RESPONDENT

J U D G M E N T

The Appellant **PHILIP KIOKO MUASYA** was convicted of the offence of **ROBBERY WITH VIOLENCE** contrary to Section 256(2) of the Penal Code and sentenced to death as prescribed in the law. Being aggrieved by the conviction and sentence he lodged this Appeal. In his grounds of Appeal, the Appellant raised three grounds;

1. That the learned trial magistrate erred in law and fact in believing the evidence of PW2 that he shot the Appellant without tangible proof.

2. That the learned trial magistrate erred in law and fact in convicting the Appellant for the offence.

3. That the learned trial magistrate erred in law and fact in rejecting the Appellants alibi evidence.

The Appeal was opposed. **MR. MAKURA** appeared for the State in the matter.

The facts of the case are very simple and clear. It was the Prosecution case that the Complainant, who was PW1, was attacked by three men as she crossed the road at 6.00 p.m. on the material day. One of the three men grabbed her, and in the struggle which ensued they both landed in a ditch. That the man identified as the Appellant then pulled out a knife and menacingly demanded for money from the Complainant. He took 200/- which she had in her hand but continued to strangle her. Two Police Officers in civilian clothing and on patrol duties, PW2 and 3 witnessed the whole episode. PW3 fired in the air to warn the Appellant to stop accosting the Complainant but he did not stop. PW2 then shot him once in the leg and retrieved the knife and the stolen money from the Appellant. He was then arrested and eventually charged with the offence. His two accomplices however, managed to escape arrest.

MR. MAKURA submitted that in his understanding of the first ground of Appeal, the Appellant was challenging the single witness evidence of identification adduced by the Prosecution. We have re-evaluated the entire record of the proceedings. We are unable to agree with MR. MAKURA that the evidence of identification adduced by the Prosecution was that of a single witness. The evidence adduced by the Complainant that the Appellant robbed her using a knife and while assaulting her was corroborated

by PW2 and 3, Police Officers on patrol duties, at the place where the incident occured. The two Police Officers testified that they witnessed the scuffle between the Complainant and the Appellant and also saw the Appellant assaulting the Complainant while threatening her with a knife. That evidence cannot be classified as that of a single identifying witness.

In the Appellant's written submission, he contended that there were contradictions in the evidence of the Prosecution witnesses. He contended that since the Complainant's evidence was that he (the Appellant), was shot after she explained to the Police what had happened, then the Police had shot him by mistake.

We have re-examined the entire evidence by the Prosecution. We find no contradictions in the evidence of the Prosecution witnesses. It is clear from the Complainant's evidence that the Police Officers shot the Appellant on the leg, after he disregarded their order to stop what he was doing to the Complainant. By the time the Appellant was shot by PW2, the Complainant was lying on the ground under him. As a result of the shot, the Complainant stated clearly that the Appellant fell on her. The Appellant's contention that there were contradictions in the Prosecution case, that could create doubt as to his identification as the man who robbed the Complainant is misconceived and untenable.

On the second ground, that the Prosecution evidence was insufficient to sustain a conviction, MR. MAKURA submitted that the evidence was not only sufficient but real. He submitted that the Complainant's evidence that the Appellant attacked and robbed her while armed with a knife was supported by the production of both the knife and the money in evidence.

The Appellant on his part contended that since the Complainant stated that the knife was found at the 'graves' then, it was proof he did not have any knife on him. We have re-evaluated the Complainant's evidence. The Complainant clearly stated that the Appellant was armed with a knife and he released it after he was shot on the leg. Both Police Officers and the Complainant corroborated each others evidence when they categorically stated that the knife was recovered at the spot where the Complainant and Appellant were struggling. We see nothing in the evidence to suggest that the Appellant was not the one armed with a knife during this incident. We agree with the learned trial magistrate's conclusion that from the evidence adduced, the Appellant was arrested in the very act of committing violent robbery against the Complainant.

On the final ground of Appeal that the Appellant's defence of alibi was not given due consideration by the Prosecution, MR. MAKURA submitted, and correctly we must say, that the Appellant having admitted that he was arrested at the scene of crime, the Appellant's defence could not be termed an alibi. Besides, we are unable to find any fault in the learned trial magistrate's finding that the Prosecution proved the charge against the Appellant. We noted from the trial court's judgment that the Appellant's defence was not included in the summary of the evidence adduced before the court. However, we are satisfied that no prejudice was suffered by the Appellant. Having taken the Appellant's defence into consideration, we are satisfied that it was a bare denial and a sham. It could not shake the overwhelming evidence of the Prosecution.

Having considered this Appeal, we find that the evidence against the Appellant was watertight. The offence was committed in broad daylight. The Appellant was also arrested on the spot in the very act, when robbing the Complainant and as he assaulted her demanding for more money. We have no doubts in our minds that the Appellant committed the offence for which he was charged and convicted.

We find that the Appeal lacks in merit. The result of the Appeal is that it fails and is dismissed. We uphold both conviction and sentence.

Dated at Nairobi this 27th day of January 2005.

LESIIT **F. A. OCHIENG'**

JUDGE **JUDGE**

Read, signed and delivered in the presence of;

Ms. Nyamosi for Mr. Makura for Respondent

Appellant in person – present

CC: Muia/Odero

LESIIT **F. A. OCHIENG'**

JUDGE **JUDGE**