REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 414 OF 2001
(From original conviction and sentence in Criminal Case No. 2543 of 1998 of the Principal Magistrate's Court at Nyahururu –S. N. Riechi)

JULIUS SEUREY LUNGUTON……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT OF THE COURT

The Appellant, Julius Seurey Lunguton, was charged with another person who was acquitted, with various offences. He was charged with five counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. He was further charged with the offence of rape contrary to Section 140 of the Penal Code. He was also charged with the offence of breaking into a building and committing a felony contrary to **Section 306(a) of the Penal Code**. He was further charged with the offence of handling stolen property contrary t**o Section 322(2) of the Penal Code.** The particulars of all the above offences arose from the events that took place in the night of the 27th and the 28th of July 1998 at Kiwanja Kanga, Laikipia District where it was alleged that the Appellant in the company of others while armed with dangerous weapons namely guns, pangas, rungus and other crude weapons robbed John Warui Kabo, Godfrey Kinyua Kariuki, Peter Kariuki Ndirangu, James Ndungu Muchiri of various household items listed on the charge sheet and in the course of the said robbery threatened to use violence on them. The Appellant was also charged with having unlawful carnal knowledge of one Peris Wanjiku Kinyua without her consent. He was also charged with the offence of breaking into the shop of one Samuel Kiplangat Kimaiyo and stole therefrom several items which had been stocked for sale. The Appellant pleaded not guilty to all the charges. After a full trial, the Appellant was convicted on two counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. He was however acquitted on all the other charges. He was sentenced to death as is mandatorily provided by the law for the two counts that he was convicted. The Appellant was aggrieved by the said conviction and sentence imposed and has appealed to this court.

The Appellant listed four grounds of Appeal which may be summarised as hereunder; The Appellant was aggrieved that he was convicted on the evidence of identification that raises doubt that he was positively identified at the scene of the robbery. The Appellant was aggrieved that the trial magistrate relied on the evidence of Police Identification Parade, which according to him was conducted contrary to the established rules. The Appellant further faulted the trial magistrate for failing to consider the evidence which was adduced by the prosecution witnesses which favoured him and thereby wrongly convicted him. Finally, the Appellant was aggrieved that the trial magistrate had not considered the evidence that he had offered in his defence, which in his view, exonerated him from the said offences. At the hearing of the Appeal, the Appellant, with leave of the court, presented written submissions in support of his Appeal. The Appellant also orally made submissions in support of his Appeal. He urged the court to allow his Appeal. Mr Koech, Learned State Counsel opposed the Appeal. He urged the court to uphold the conviction and the sentence imposed by the trial magistrate. We shall address the submissions made by

the Appellant and the Learned State Counsel in the course of this judgment.

From the outset we wish to state that the hearing of this Appeal proceeded on the basis that the proceedings before the trial magistrate were conducted in a legal manner. However upon our re-evaluation of the proceedings of the lower court we found that during the hearing of the case for the defence, the prosecution was conducted by Senior Sergeant Kiama. He is a Police Officer of a rank lower than that of an Assistant Inspector of Police. He was thus not authorised to prosecute criminal cases in a Magistrate's Court in accordance with the provisions of Section 85(2) and Section 88 of the Criminal Procedure Code. In the case of **Roy Richard Eliremah & Anor – versus- Republic C. A. Criminal Appeal No. 67 of 2002 (Mombasa)** (unreported) the Court of Appeal held that where a Police Officer of a rank lower than that of an Assistant Inspector of Police prosecutes a case or part of the proceedings before a magistrate's court, the entire proceedings thereto will be a nullity. In the instant Appeal, we declare the proceedings of the trial magistrate to be a nullity as a consequence of which the Appeal is allowed, the conviction quashed and the sentence imposed set aside.

The issue that remains for the determination of this court, is whether, on the evidence on record, a retrial should be ordered. It was the prosecution's case that the Appellant was identified by the complainants at the scene of the robbery. According to PW 1 James Ndungu Muchiri and PW 3 John Warui Kambo, they were able to identify the Appellant by the light of the hurricane lamp as the robbery took place at about 1.00 am at night. PW 1 testified that he was able to identify the Appellant from a group of about thirteen people who had raided his house on the night in question. It was his testimony the robbery took about two hours. PW 1 testified that he was able to specifically identify the Appellant as the Appellant requested him to show him how to operate the Television set that the robbers were later to rob PW 1 of. PW 1 testified that he was able to identify the Appellant because he was wearing a black overcoat and black trousers. He further testified that prior to the robber incident, he had not met the Appellant.

PW 3 testified that the Appellant was among the group of people that robbed him of his household goods. He testified that he was able to identify the Appellant because the Appellant was the one who was armed with a knife. He also testified that he was able to identify the Appellant because it was the Appellant who lit the lantern lamp. PW 1 and PW 3 were also able to identify the Appellant in a Police Identification Parade which was carried out by PW 8 Inspector Francis Njeru. The said Police Identification Parade was conducted on the 17th of September 1998 six hours after the Appellant was arrested. PW 3 also testified that the coat which the Appellant was wearing when he was arrested was robbed from him during the night of the robbery. The coat was produced as an exhibit in evidence.

When the Appellant was put on his defence he denied that he was involved in the robbery. He testified that he had been arrested by the Anti-Stock Theft Police Unit on suspicion that he had stolen cattle. He was detained at the Police Station and later requested to appear in a Police Identification Parade. He explained that the Police Identification Parade was not conducted according to the law as the witnesses who identified him had seen him prior to the holding of the said identification parade. He further explained that he had purchased the coat, which PW 3 identified to be his, from his co-accused in the lower court called Samson Luguoto Apanyem. PW 2 Police Constable Dominic Cheserem confirmed in his evidence the assertion made by the Appellant that he had explained that he had purchased the coat from his said coaccused.

The evidence that the trial court relied to convict the Appellant was the evidence of identification and the evidence of the recovery of the coat from the Appellant. Was the evidence of identification watertight such that it could be relied on by the trial court to convict the Appellant? We do not think so. PW 1 and PW 3 testified that they had not known the Appellant prior to the night of the robbery. The robbery took place at night. There were many robbers. The said witnesses did not tell how they were able to be certain that it was the Appellant who had robbed them. The said witnesses did not give a description of the Appellant in the initial report made to the police which could have confirmed their identification of the Appellant at the Police Identification Parade. Apart from the clothing which it is alleged the Appellant wore during the night of the robbery, the said witnesses did not state what distinct physical features possessed by the Appellant made them to be positive that they had identified the Appellant. We find this evidence of identification to be rather doubtful. It raised reasonable doubt that the said witnesses actually

identified the Appellant. In **Robert Gitau –versus- Republic C.A. Criminal Appeal No. 63 of 1990 (Nakuru)** (unreported) it was held at page 3:

> ***"… that evidence of identification should be tested with great care especially when it is known that the conditions favouring correct identification were difficult. The witness(es) who testified that they could identify the Appellant in the circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the appellant's face in the manner described by the witness. We are doubtful how the witnesses were able to identify the Appellant in the identification parade. In this respect, the Appellant complained that it was easy for him to be picked up because in the parade he was the only one from the cell."***

The observations by the Court of Appeal in the above case can equally be applied in this case. Further it is doubtful where the said witnesses could have recalled the identity of the Appellant to be able to identify him nearly two months later in a Police Identification Parade when the initial identification was made in circumstances that were difficult. The possibility that the said witnesses could have been mistaken in their identification of the Appellant cannot thus be ruled out.

On the issue of the coat which was worn by the Appellant at the time of his arrest, it is our finding that the trial court rendered short shrift to the evidence offered by the Appellant that he had purchased the said coat from his co-accused in the lower court. The trial court did not consider the explanation offered by the Appellant in his defence on how he came into possession of the said coat in light of the evidence that was adduced by the prosecution witnesses. The fact that the Appellant's co-accused appears to have been tortured after his arrest, renders the evidence of the Appellant plausible. In the circumstances, it would be unsafe to convict the Appellant on the evidence of the recovered coat.

In the circumstances therefore, and on our re-evaluation of the evidence adduced by the Prosecution, it is our view that no useful purpose will be served if a retrial is ordered. If a retrial is ordered, there is a possibility that the prosecution may fill up the gaps in their case. In the absence of any sufficient evidence which could sustain a conviction against the Appellant, it would be an exercise in futility if a retrial is ordered. The upshot of the above reasons is that the Appellant is ordered acquitted. The sentence of death which was imposed is set aside. He is set at liberty unless otherwise lawfully held.

DATED at NAKURU this 27th day of January 2005.

MUGA APONDI

JUDGE

L. KIMARU

JUDGE