



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS**

Criminal Appeal 143 of 2004

(From Original conviction (s) and Sentence (s) in Criminal Case No. 627 of 2003 of the Principal Magistrate’s Court at Kajiado (S.D. NDUNGU H.N. (MISS) SRM) on 17/8/04

PETER WANJOHI MAINA APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant **PETER WANJOHI MAINA** was charged with two counts of Robbery with violence Contrary to Section 296 (2) of the Penal Code in the first count the appellant and others armed with pistols are alleged to have robbed Grace Wanjiku Kinyanjui of 20,000/= and in the course of the robbery shot dead one **PETER KIMITI MUNGAI**. In the second count it is alleged that the appellant and others armed with pistols robbed on Corporal Benson Munua Chege of a Ceska pistol serial No. G2133 and 15 rounds of ammunition the property of the Kenya Government and in the course of the robbery shot dead the said Corporal Chege. After a full trial the appellant was found guilty and convicted in both counts. He was subsequently sentenced to death in both counts. Being aggrieved by the convictions and sentences the appellant lodged this appeal.

We wish to make an observation on the sentence that the learned trial magistrate erroneously sentenced the appellant to death twice. That cannot be correct. Such a sentence is unexecutable. The proper procedure to have followed would have been to sentence the appellant to death in the first count and to suspend the sentence of death in the second count.

Be that as it may we now go to the facts of the case. The complainant in count 1, PW1, Grace, was at her Wines and Spirits shop at 8.00 p.m when thugs struck. Grace said that she heard an order to people to lie down and that she immediately did. She then heard one gun shot; saw a man jump over a stole to the cash box where the money was before hearing other gun shots. Grace said that despite there being electric lights on inside the shop she could not identify any of the robbers.

PW2, one Wairimu, Grace’s cashier also saw people entered their shop at 8.00 p.m. She also heard the order that people should lie down. Wairimu said that she chose to run to the rear of the shop and that as she did she heard gunshots. She hid under a bed until Grace called her out. It was then that she told Grace that she, Grace was bleeding on the right breast. Grace had not realized that she had been shot during the robbery. She was admitted for 4 days at Mater Hospital. The P3 form completed in her retard, exhibit 1, by PW4 Doctor Ndeti indicated that the injuries she suffered were classified as

maim.

PW 3 was sole identification witness. He said that he was a police sergeant and that he had left Isinya Road block at 6.30 p.m. that evening for Kitengela. PW3 was at a neighbouring bar when he heard gunshots. He went out to investigate and saw a masked man standing at Kina Wines and Spirits shop. That the masked man entered the wines shop and shouted that 'Kalau' meaning police were outside. That is when PW3 said that he saw a man come out of the shop who shot at him. Two others a man and a woman also came out of the shop each with a gun. PW3 says that he shot at them and hit the man who went to his left and he fell down. That one of the others lifted him up and he shot at him also. The one who had lifted the injured man abandoned him and fled. PW3 said that he then went to the injured man whom he identified as the appellant.

The appellant on his part denied the offence and said that he had just alighted at the bus stop when he heard gun shots and saw people running. He also started running but was shot by a person he could not tell. That he found himself at Kajiado Police Station.

We have carefully evaluated and re-analysed the evidence that was adduced before the trial court bearing in mind that we neither saw nor heard the witnesses and giving due allowance for same. See **OKENO versus REPUBLIC** 1972 EA 32. Mr Orieyo learned counsel for the appellant argued four grounds of appeal in tandem with the filed petition of appeal. Learned counsel submitted that the main issue for consideration is whether the appellant acted in consent with others to commit the offence and secondly whether the court can come to the conclusion that the appellant was properly identified and convicted.

Mr Orieyo, submitted that the appellant was not properly identified by the sole identifying witness, PW3. He submitted that since there were many people at the scene at the time who were running about, in those circumstances, PW3 could not be sure that the appellant whom he says he shot came from the shop. Learned counsel submitted further that the learned trial magistrate convicted on that evidence without giving it the seriousness it deserved and without having himself as required before convicting on the evidence of a single witness.

Mr O'Mirera, learned counsel for the state opposed the appeal. He also distinguished two cases cited by the appellant's counsel on the basis that in both cases, the identification witnesses were victims of the robbery. That in instant case, the identifying witnesses were a police officer and not a victim. Learned counsel also submitted that the circumstances of the instant case did not require that the learned trial magistrate warn himself before convicting and that therefore the failure to warn himself was not fatal.

Mr Orieyo, relied on the case of **MAITANYI versus REPUBLIC (1986) KLR 198** in which the court held that the evidence of a single witness needed to be tested and that the court needed to warn itself before convicting on such evidence. Counsel also relied on the case of **KIARIE versus REPUBLIC 1964 KLR 739, ARSWAO versus REPUBLIC C.A No. 2 of 1998 and BOSCO versus REPUBLIC C.A. No. 41 of 1998** which all direct on the need to warn oneself of the danger of relying on such evidence. We have considered each of these authorities. Learned counsel for the state agrees with the principles of law propagated in each of them with which we also agree. The need to take the evidence of identification with circumspection and care especially where it is made in circumstances which are known to be difficult cannot be emphasized enough. This is particularly important where such evidence is that of a single witness. PW3 was the sole identification witness. It is important to note that he did not witness the offence, he went to investigate the cause of gun shots he heard as he relaxed in a bar which was a distance from the scene of crime. PW3 saw a masked man run towards the shop shouting a warning that there was police. PW3 then saw a man open a door from outside and fire a shot at him. He then saw two people described as a man and a woman both armed with guns also come out of the shop. PW3 said he fired a shot and hit the leg of a man who ran to his left before he, PW3 hid behind an electric post. PW3 did not say who the man he shot was in relation to those he had described. He did not identify him in relation to the masked man, or the man who fired at him or the two armed man and woman who came out of the shop after the warning by the masked man. The failure on PW3's part to pin down who among the four he

described, as above, he shot, if at all, left a serious lacuna in the prosecution case which remained unfilled by the time the prosecution case was closed. Only PW3, in the circumstances of this case had the key that could have provided the necessary vexes between the appellant and the people he saw leaving the shop. They could also have tested the bullet that hit the appellant to confirm whether or not it came from PW3's gun. That was important for two reasons. One, since other guns were fired by the thugs it was necessary to eliminate a possibility it was not PW3's gun which hit the appellant. Two, in light of the appellants own defence that he did not know who shot him. As learned counsel for the appellant submitted, it was the duty of the prosecution to prove that the appellant acted in concert with those who robbed the complainant in both counts. No such attempt was made. The evidence connecting the appellant with the offence needed to be water tight considering; one that the sole identifying witness did not witness the crime nor see the perpetrators of the crime, two, the fact there were customers in PW1's Grace's shop just before the robbery was committed in the shop and three, due to the fact there was a lot of movement in and around the scene of the offence by others other than the offenders.

In the circumstances of this case, what was needed was other evidence whether direct or circumstantial connecting the appellant to the offence. We have looked for such other evidence and find none.

We must comment on other factors which have disturbed us in this case. Despite the fact that two people lost their lives no proper investigations were carried out in this case. The lack or insufficiency of investigations bears itself out by the failure on the prosecution part to adduce any evidence touching on the second count. The complainant seems to have been a police officer. He was shot dead. No evidence was led to show he had the gun and ammunition cited in the particulars of the charge as having been stolen from him in the course of this robbery. No evidence was led to show he was in that shop and what his mission was. No evidence was even led of how he or his body was removed from the scene. In the whole of the prosecution case, the only evidence which mentions a person fitting the deceased complainant was that of Wairimu, PW2, who said she saw one customer by name Chege lying down on the floor of the shop dead. We would say that much more was required of the police in terms of properly investigating this case.

In light of our finding that PW3 fell short of identifying the appellant as anyone of these who appeared to be part of the gang that robbed Grace on the material night, we found that the conviction entered herein was not safe. We agree with the Judges in Abwao's case, (**Supra,**) that in the circumstances of this case, the conviction which rested entirely on a single witness, who had not himself witnessed the robbery and so was in no position to tell who the culprits were, causes us a great degree of uneasiness. We find that the evidence of PW3 could not strictly be defined as sole "identifying" witness for the reasons we have given that he did not himself witness the offence. We are satisfied that even without going into other issues raised by learned counsel or the appellant that on this ground alone this appeal can be disposed off. We find merit in this appeal and consequently we quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated this 25th day of November 2005, at Machakos.

D.A. ONYANCHA

JUDGE

LESIIT L

JUDGE