REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 470 of 2002

DAVID KAMAU MURIHIA ……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from original Judgment and Conviction in Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 1508 of 2001 dated 30th September 2002 by Mr. Abdul El-Kindiy – P.M. – Murang'a)

J U D G M E N T

David Kamau Murihia hereinafter referred to as the appellant was tried before the Principal Magistrate Murang'a for two counts of the offence of Robbery with violence contrary to section 296(2) of the Penal Code.

In the first count the appellant was alleged to have violently robbed Mercy Wangui Gichere of Kshs.6,000/=, whilst in the second count the appellant is alleged to have violently robbed Michael Thuku of cash Kshs.1,400/=. Three witnesses testified in proof of the prosecution's case. These were Nancy Wangui Gichere who explained how robbers went to her house and robbed her of Kshs.6,000/= she claimed that she recognized one of the robbers as a person she knew by a nick name "18". She reported the matter at Murang'a Police Station.

Samson Kanyagi Mwangi also testified that on the same night of 15th September 2001 thieves struck at their home and demanded money from his mother. He did not know whether the robbers took anything.

P.C. Robert Kariuki an officer attached to Murang'a CID received a report of the robbery and acting on a tip off traced the appellant and arrested him. The appellant was identified through his nick name "18".

In his defence the appellant gave unsworn evidence and called no witness he maintained that on the material night he went home after work, took his supper and slept. The next day he was apprehended by the police he was kept in custody for about 20 days after which he was charged with this offence.

In his judgment the trial magistrate convicted the appellant of the 1st count but acquitted him of the second count. The appellant has now brought this appeal contending that the trial magistrate was wrong in convicting him on doubtful evidence and in relying on the evidence of a single identifying witness and further that the trial magistrate rejected the appellant's alibi defence without giving any reason.

Learned Principal State Counsel Mr. Orinda has conceded the appeal accepting the fact that the case was prosecuted by an incompetent prosecutor. Mr. Orinda however maintains that there was reliable

evidence of identification and therefore urges us to make an order for retrial.

It is evident from the record of the lower court that the case was prosecuted partly by one police constable Machuki a person who was not competent as provided under section 85(2) of the Criminal Procedure Code. The trial of the appellant was therefore a nullity and his conviction cannot stand.

In determining whether to make an order for a retrial or not the case of **Fatehali Manji v/s Republic [1966] EA 343** provides guidance. In that case the court of appeal stated as follows:

"In general a retrial will be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a trial is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

There is no doubt that the appellant's trial was defective. It is however necessary to consider the sufficiency of the admissible or potentially admissible evidence. With this in mind we have reconsidered the evidence which was adduced before the lower court but are not convinced that the evidence was sufficient to sustain a conviction. The prosecution case rested entirely on the evidence of Mercy Wangui Gichere. We note that the typed proceedings wrongly reflect this witness as "Nancy Wangui Gichere", we are satisfied that this was a mere typing error as the original record reflect the correct names of the witness as "Mercy Wangui Gichere". This witness was the only witness who identified the appellant as the person who robbed her. The identification however was no more than a dock identification. This is because although the witness claimed to have recognized the appellant and given his nickname, the witness was not called upon to identify the appellant at an identification parade. Given that robbery took place late in the night and that the witness claimed the robbers only took about 5 minutes at her house, the circumstances were not favourable for a positive identification. The possibility of a mistaken identification cannot therefore be ruled out. Moreover the trial magistrate did not sufficiently warn himself of the danger of relying on the evidence of a single identifying witness. In the case of **Maitanyi v/s Republic [1986] KLR 198** the court of appeal held as follows:

"***1. Although it is trite law that a fact may be proved by the the testimony of a single witness this does not lessen the need for testing with the greatest care, the evidence of single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult.***

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is

not enough for the court to warn itself after making

the decision, it must do so when the evidence is

being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an

error of law and such evidence cannot safely support

a conviction."

We find that the failure of the magistrate to warn himself and to appropriately test the evidence of identification was an irregularity which the prosecution would have an unfair opportunity to attend to if an order for a retrial were to be ordered. We are further satisfied that the evidence adduced could not safely support a conviction and it would therefore be unfair and unjust to order a retrial.

We do therefore allow the appeal quash the conviction and set aside the sentence imposed. We order that the appellant shall be forthwith released unless otherwise lawfully held.

Dated signed and delivered this 4th day of May 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE