REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 81 OF 2004

(From original conviction (s) and Sentence(s) in Criminal case No. 5201 of 2003

of the Chief Magistrate's Court at Kibera (Ms. Mwangi – S.P.M.)

DAVID KABIRU WARORUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **DAVID KABIRU WARORUA** was convicted of the offence of **ROBBERY** contrary to **Section 296(1)** of the **Penal Code** and sentenced to serve four years imprisonment. He was aggrieved by the conviction and sentence and therefore filed this Appeal.

When the appeal came up for hearing, the State through learned counsel **MRS. GAKOBO,** gave the Appellant notice that it would be asking the Court to substitute the conviction from **SIMPLE ROBBERY** contrary to **Section 296(1)** of the Penal Code to **CAPITAL ROBBERY** contrary to **Section 296(2)** of the **Penal Code.** That it would also be asking for enhancement of sentence.

In spite of the warning, the Appellant maintained he was ready to prosecute his appeal.

The facts of the case was that on 20th April 2003 at YMCA Nairobi, three men walked into the reception area and spoke with PW1 asking for hostel rates. Before he could respond, one of them whipped out a pistol and ordered PW1, PW2 and PW3 to lie down. The three robbed those present and some guests before leaving. On 28th April 2003, PW4, **CPL. LATEMA** was found at **TIGONI POLICE STATION** by a lady not called as witness. He was led to the Appellant's home where PW4 took a bag containing a ring and 2 trousers. The bag and ring were later identified by PW2 as belonging to a guest who was checking in at the YMCA hostel on 20th April. PW3 identified the Appellant in Court as the man who was armed with a pistol during the robbery. PW4 was the officer who arrested the Appellant on 8.6.03 and later handed him over to PW5.

The Appellant in his unsworn defence denied the offence. He also called a witness, his brother, who said that he was present when Police Officer went to his brother's (Appellant's) house. That the police supervised as the Appellant's estranged wife carried away her personal belongings. The defence witness said that he did not see the Police recover any items connected with an offence.

The first ground of the Appellant's appeal challenged the evidence of identification adduced by the Prosecution, PW3, the only witness who identified him did so at the dock in Court. The Appellant submitted that at the time he reported to the Police, PW3 said he could not identify any one of the robbers. The Appellant submitted that there was no identification parade and therefore the learned trial magistrate was wrong to accept the evidence of identification by PW3.

MRS. GAKOBO, learned counsel for the State submitted that the evidence of identification by PW3 was

taken into consideration together with the evidence of recovery of exhibits. **MRS. GAKOBO** submitted that the diamond ring recovered from the Appellant's house by PW4 was identified by PW2 as one of the things stolen in the raid. MRS. GAKOBO also submitted that DW2, the Appellant's brother confirmed that PW4 had been to the Appellant's house.

The Appellant challenged the evidence of PW4 that he recovered anything from his house on grounds that PW4 did not say so to DW2 who was present. The Appellant submitted that PW4 was led to his house by the Appellant's estranged wife who was not called as a witness.

I have re-evaluated the evidence adduced before the trial court and the learned magistrate's judgment. The basis of the conviction is the identification by PW4 and the recovery of stolen items by PW4. In her judgment the learned trial magistrate observed: -

> ***"Having gone through the evidence on record, I do take note that the offence took place inside a room where lights were on. PW3 said he saw the accused who was later to be found in possession of part of the stolen items in his house by PW4. The accused and his brother even by their demeanour never looked convincing. It was an arrangement to lie that never worked."***

To put everything into perspective, it is clear from the record that PW3 did not tell anyone that he could identify any of the robbers. Therefore, there was no description of the robbers by any of the victims of this offence. PW3 identified the Appellant in Court as he gave evidence on 30.7.03. That was exactly three months after the offence in question. The lapse of time between the date of the offence and the date PW3 gave evidence is quite long. Taking into account the fact that PW3 did not claim at the time he reported to the police that he was capable of identifying anyone. Taking into account that PW3 had not given any descriptions of the Appellant before identifying him in Court the identification of the Appellant in Court was mere dock identification. Considering all the circumstances, that identification is worthless and does not assist the prosecution case.

That leaves only the recovery of stolen goods from the Appellant's house. There are two issues that must be taken into account. The first is the nature of the evidence adduced by the recovery officer, PW4. All the evidence he gave touching on information he was given by the Appellant's estranged wife was hearsay and ought not to have been admitted in evidence. The learned trial magistrate misdirected herself when she admitted that evidence in Court. The evidence includes the estranged wife's allegation that the Appellant had stolen items in his house. The evidence cannot therefore be regarded even at this stage of the Appellant's appeal. That means even the recovery of the items from the Appellant's house is also questionable. I noted from the record that when the Appellant asked PW4 in cross-examination why he did not show DW2 the recovered bag and contents, PW4 said he did not do so. PW4 explained that why he hid the recovery from DW2 was so that the Appellant never got to hear of it and therefore would avoid arrest.

Another aspect of the recovered items comes out clearly from the prosecution case. PW4 said in cross-examination that the ring, two trousers, a shirt and bag belonged to a student who had gone to Italy for studies and so could not be called as a witness. PW1 did not identify any of the recovered items. She was the Complainant in count 1. PW2 identified the bag and also the ring exhibit 1. PW2 was Complainant in count 2. She identified the ring as looking similar to one robbed off from a guest of the hostel. The owner of the ring was not called as a witness. PW2 was not certain of the identity or the ownership of the ring. All she said was that it looked like the one stolen from a guest. PW3 identified the bag exhibit 2 as belonging to a guest who was checking into the hostel. In essence therefore both the ring exhibit 1 and the bag exhibit 2 did not belong to any of those who testified in the case. The identification of PW2 and PW3 was uncertain and hearsay. The effect is there was no Complainant in respect of the exhibits. Since that was the only evidence against the Appellant, it was both dangerous and insufficient to sustain the conviction. In the circumstances I find that the conviction entered herein was unsafe and should not be allowed to stand. I quash the conviction and set aside the sentence.

The upshot of the appeal is that the same is allowed.

Dated at Nairobi this 8th day of June 2005.

LESIIT, J.

JUDGE