REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 159 of 2003
(From original conviction and sentence of the Senior Resident Magistrate's Court at Narok in Criminal Case No.527 of 2002 – S.GITHINJI (SRM)

SARAFIN GITONGA MUYANDI…..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUGDMENT OF THE COURT

The appellant, Sarafin Gitonga Muyandi, was charged with the offence of robbery with violence contrary to **section 296(2) of the Penal Code.** The particulars of the charge were that on the l4th day of July, 2002 at Ilmasharian area in Narok District, the appellant jointly with another not before court, and whilst armed with a dangerous weapon, namely a pistol, robbed Kepepei Ole Siololo of Ksh.8l,450/= and one Oris wrist-watch and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Kepepei Ole Siololo. The appellant pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged. He was sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court against the said conviction and sentence.

The appellant raised several grounds in his petition of appeal challenging the decision of the trial magistrate in convicting him for the offence charged. He was aggrieved that he had been convicted based on the unreliable evidence of identification of the complainant which evidence had not been corroborated. The appellant faulted the trial magistrate for holding that he had been identified by the complainant yet no identification parade was held to support the complainant's alleged identification. The appellant was aggrieved that the trial magistrate had disregarded his evidence offered in his defence without any reason. He further blamed the trial magistrate for shifting the burden of proof from the prosecution to the appellant and therefore arriving at the decision wrongly finding the appellant guilty as charged. At the hearing of the appeal, the appellant, with the leave of the court, presented written submissions in support of his appeal. He urged the court to allow the appeal, quash the conviction and set aside the sentence imposed.

Mr. Gumo, the Assistant Deputy Public Prosecutor opposed the appeal. He submitted that the prosecution had established beyond any reasonable doubt that the complainant had positively identified the appellant as the person who robbed him. Mr. Gumo submitted that the robbery was committed in broad daylight and thus all the conditions favouring positive identification were present. He further submitted that the appellant had a beard when he robbed the appellant and was identified by the complainant, who had him arrested when he saw him a second time at a hotel in Narok while he was sipping tea. He further submitted that the evidence of identification of the appellant was watertight. He urged the court to dismiss the appeal. We have considered the submissions by the appellant and the

prosecution. Before giving reasons for our finding, it is imperative that we set out the facts of this case.

On l4th of July, 2002 at about 7.00am PWI Kerepei Ole Siololo was walking from his home towards Ewaso Nyiro. As he was passing through a forest he was accosted by two men. The two men emerged from the forest and ordered PWI to stop. He was called by his name by one of the two men. A gun was pointed at him. He was ordered not to look at his assailants. He was ordered to lie on the ground on his stomach. The robbers then ordered the complainant (PWI) to surrender all the money that was in his possession. The complainant was robbed of Ksh.8l,490/=. At the time of the robbery the complainant's hand were tied behind his back. He was also blindfolded. He was frogmarched in the forest for about half a kilometre and then abandoned. After about one hour, PWI was able to untie himself. He discovered that his wristwatch make Oris had also been stolen from him. The complainant testified that he was not injured but was threatened by the two robbers who were armed with a gun.

On the l9th of July, 2002 at about 6.00 p.m. while PWI was at Narok township, he saw a person who he identified as one of the two men who robbed him five days prior thereto. The person was drinking tea at the Shield Hotel, Narok. PWI informed PW2 Police constable Martin Matiti who arrested the person (the appellant in this case) and took him to the Narok Police Station where he was interrogated and later charged with the offence which he was later convicted by the trial magistrate. PWI was certain that it was the appellant who had robbed him. He described the appellant the way he appeared on the dock during the day of the trial. He testified that the appellant was of a lighter complexion and taller that his accomplice. The appellant also wore a beard.

When the complainant made the report to PW3 Police constable Phillip Ndambuki on the l4th of July, 2002, he described one of his assailants as being tall, slim, bearded and brown and resembled a person from the Somali community. PW3 testified that the complainant did not observe any special or distinct mark that would have set out the appellant apart from any other person of similar appearance and stature. PW3 visited the scene of the robbery on the day the report was made by PWI. When the appellant was arrested, the police took him to his (the appellant) house which was searched. Nothing connecting the appellant with the robbery was found in his house. It is noteworthy that although the complainant said he described his assailant to the police, the OB entry No.l0 of the l4th of July, 2002 made at ll.00 a.m. of the day the report made by the complainant did not mention the description of the assailants. The OB report noted that the complainant had been attacked by thugs unknown to the complainant.

When the appellant was put on his defence, he denied that he was involved in the robbery. He testified that on the l9th of July, 2002 at about 5.00 p.m. as he was taking tea while chatting with his in-law who worked at Shield Hotel Narok township, he was summoned outside by a person who later identified himself as Police officer. The Police officer told him to accompany him to Narok police station . He was surprised when he was detained at the Police Station and later charged with the offence of robbery with violence. He denied that he had ever held, let alone owned a gun. He testified that he accompanied the Police on the 20th of July, 2002 to his house where a search was conducted. Nothing was however recovered that could connect him with the robbery. The appellant testified that he was beaten while in police custody before he was charged with the offence which he was convicted by the trial magistrate.

This is a first appeal. The duty of the first appellate court in criminal cases was restated in the case of **CHARLES MWITA** VS ***REPUBLIC, C.A. CRIMINAL APPEAL NO.248 of 2003*** (**Eldoret**) (**unreported**) where the Court of Appeal, at page 5, held that;

> **"In Okeno v R [l972] E.A. 32** at page 36 the predecessor of this court stated;-
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> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination *(Pandya v R [l957] E.A 336* and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion, (*Shantilal M. Ruwalla v R [l957*] EA 570 it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide**

whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post [1958] EA 424.*

The above sets out the duty of the first appellate court. We are of the view that it is upon the first appellate court to carry out that duty by actually reevaluating the evidence. It is not enough for the first appellate court to merely state that it has re-evaluated the evidence. Indeed, in Gabriel Njoroge v Republic [l982-88]1 KAR 1l34, at page 1136 this court said;-

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v R [l957] EA Ruwala V R. [l957] EA 570). If the high court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and nondirections on material points are matters of law."

In the instant appeal the issue that has emerged for determination by this court is whether on the evidence on record, the prosecution established its case against the appellant beyond any reasonable doubt. We have re-evaluated the evidence adduced before the trial magistrate and carefully considered the submissions made on this appeal.

The prosecution's case hinged on the evidence of the complainant who testified that he was able to identify the appellant as the one who robbed him while accompanied by another man. The complainant testified that the robbery took place at about 7.00 a.m. in the morning along a path in the forest. It was his testimony that the two robbers emerged from the forest and accosted him. Before ordering him to lie on his stomach, they called him by his name. From PWI'S evidence, the robbers apparently knew him. The complainant however, did not know the robbers. During the robbery incident, the robber pointed the gun at the complainant and warned him not to look at their faces. The complainant's hands were tied behind his back. He was also blindfolded. He was frogmarched a distance of about half a kilometre, robbed of the said sum of Ksh.8l,490/= and his Oris wrist watch. He was then abandoned in the forest.

After about an hour, the complainant was able to untie himself. He later reported the incident to the Police. In his first report to the Police, the complainant told the Police that he was not able to identity his assailants. The Occurrence Book (OB) report recorded by the police when the complainant made the first report indicated that the complainant did not know the persons who robbed him. Five days later, the complainant saw the appellant. He now recalled that it was the appellant who robbed him. He gave the description of the person who robbed him to be similar to the physical attributes of the appellant. He told the Police (PW3) that the person who had robbed him was tall, slim, of light complexion and of the appearance of a Somali. The complainant also told the police that the robber wore a beard similar to the appellant's. It is on the basis of this description that the appellant was arrested, charged and later convicted by the trial magistrate.

We have carefully re-evaluated the said evidence adduced by the prosecution this case. The evidence that the prosecution relied on to secure the conviction of the appellant is that of a single identifying witness. As was held by the Court of Appeal in ***Maitanyi vs Republic [l986] KLR l98 at page 200.***

*"Although the lower courts did not refer to the well known authorities **Abdulla Bin Wendo & another v R (l953) 20 EACA l66** followed in **Roria v Rep. [l967] EA 583,** it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet beat repetition:-*

"Subject to the well known exceptions it is trite Law that a fact may be proved by the

testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when www.kenyalaw.org Sarafin Gitonga Muyandi v Republic [2005] eKLR 7 it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether be circumstantial or direct pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

In this case, there was no other evidence, either direct or circumstantial. The gun mentioned by the complainant was not recovered. Neither was the stolen money nor the wrist watch recovered when a search was conducted in the house of the appellant. Having carefully re-evaluated the said evidence of identification by the complainant, who is a single identifying witness, we are not satisfied that he had properly identified the appellant as the person who robbed him. The complainant told the Police that he could not be able to identify the persons who robbed him. The OB report confirms this fact. The complainant did not give the description of the robbers to the Police when he first made the initial report. It was important for the complainant to have given the description of the robbers to the Police when the first report was made, so that upon the arrest of an accused person, his physical features would be compared to the initial report made by the complainant. Nothing of the sort happened in this case.

When the complainant purported to have identified the appellant five days later at the Shield Hotel, Narok, his identification could not therefore be said to be watertight. The description which the complainant then made to the Police could have been made after the complainant had seen the appellant. There is also a possibility that the complainant could have been mistaken that he had identified one of the robbers. The appellant did not have any distinct physical attributes that would have set him apart from other members of the populace. The complainant testified that the robbers (who apparently knew him) ordered him to lie down facing on the ground so that he was prevented from seeing the robbers. A gun was pointed at him. He was also blindfolded.

The complainant was obviously frightened. In the hectic circumstances of such moments, the complainant was not expected to have memorised the physical attributes of the robbers. He was blindfolded and frogmarched for about half a kilometre before he was abandoned in the forest after being robbed.

We do hold that the circumstances of this case makes it unsafe for this court to uphold the conviction of the appellant based upon the sole identifying evidence of the complainant. As there is no other evidence connecting the appellant to the robbery, we have no option but to allow the appeal. The conviction of the appellant is therefore quashed. He is set at liberty unless otherwise lawfully held.

DATED at NAKURU this 27th day of July, 2005.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE