



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 1191 OF 2002

(From original conviction (s) and Sentence(s) in Criminal Case No. 2377 of 2002 of the Chief Magistrate's Court at Nairobi by Injene Indech, SPM

DANIEL NDIRANGU KIMOTHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **DANIEL NDIRANGU KIMOTHO** was convicted for the offence of **ATTEMPTED ROBBERY** contrary to **Section 297 (2)** of the **Penal Code**. He was sentenced to death as by law prescribed.

The evidence of the prosecution was very simple. The Complainant, PW1, left for Pangani to meet his brother in a motor vehicle KAN 193F. Before he could reach the place they were to meet, he bumped into three men, two banged the roof of the car while a third one, who had a gun, ordered him to get out. PW1 switched off the engine of the vehicle but before long Police Officer came by the scene prompting the men to take off with the armed one shooting at the police. The police fired back. They shot a man whom they arrested. PW1 identified him as one of the three who confronted him. The man, the Appellant herein, was charged. In his defence the Appellant said that he was going home when he heard gun shots. Since people started running, he also ran. However, the Appellant said he was shot on the leg. Police Officers picked him up and took him to their vehicle. He denied the offence.

The Appellant has raised three grounds of appeal. One, that since the offence took place at night identification was poor since the source of light was not disclosed. Two that he was not found in possession of the firearm yet the evidence of the prosecution was that he was the one armed with a gun. Three that his defence was not given due consideration.

The appeal was opposed. **MR. MAKURA** for the State submitted that the evidence adduced by the prosecution was sufficient to prove the charge. On identification **MR. MAKURA** submitted that PW1 in his evidence said that he was able to see the Appellant by lights from vehicles along Muranga Road. That PW2 first heard shouts then saw the Appellant and others trying to carjack and rob the Appellant and that PW2 did not lose sight of the Appellant.

On the issue of identification, we have carefully re-evaluated the entire evidence adduced before the trial court and nowhere do we see any mention of lights. PW1 acknowledged that the incident occurred at 7.15 p.m. Definitely it must have been night time. He was driving in the street inside his vehicle. PW1

was clear that three men approached his vehicle in the traffic jam.

They approached from the two sides of his vehicle. Yet PW1 did not clearly say on which side the Appellant was. The Complainant does not disclose how he saw him. As opposed to learned counsel's submission, the Complainant did not anywhere claim that he saw any of the three men by lights from passing vehicle. It is trite law that identification particularly at night has to be treated with extreme caution and to base any conviction on it, it must be watertight.

MOHAMED MAFHABI & 2 OTHERS vs. REPUBLIC CA No. 15 of 1983 (NBI). We have considered the evidence of the Complainant and the arresting officer (PW1 and PW2) with great caution. There is a serious inconsistency in the evidence of these two witnesses. The Complainant said that the Appellant was the man who was armed with a gun. PW2 said the man with the gun escaped and that the Appellant was together with him and that he never lost sight of him. Taking the evidence of these two witnesses together, it is quite clear that the two could not possibly have been referring to one and the same person. There was no opportunity for the man with the gun to have disposed it off so that the man that the Complainant saw armed cannot by any stretch of imagination be taken to be the Appellant.

We are also disturbed by the lack of any evidence as to the condition of lighting at the scene and the visibility obtaining at the time of this incident. It is difficult to establish whether the circumstances of identification were conclusive for proper identification of the Appellant.

The evidence of PW2 was clear that there were many people at the scene of the incident. That means that the Appellant's defence that he started running as did others in the street at the time was not unreasonable or implausible. Taking into account the lack of evidence as to the conditions of light at the scene, the inconsistency in the prosecution case as to who was armed with a gun and in light of the Appellant's defence, we find that the conviction was unsafe and should not be allowed to stand.

We find merit in this appeal and allow it. The conviction is quashed and the sentence set aside. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 13th day of October 2005.

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE

Read, delivered and signed in presence of:

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE