REPUBLIC OF KENYA
AIN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 41 of 2004
(From Original conviction (s) and Sentence (s) in Criminal Case No. 3006of 2002 of the Chief Magistrate's Court at Machakos (J.R. KARANJA C.M) on 11/2/2004.

MUINDE HARRISON ……APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

J U D G E M E N T

MUINDE HARRISON was convicted of violently robbing the complainant ***ALBANUS KIOKO***, on the 28th November 2002, at Masaku Ndingo. It is alleged that the appellant with others robbed the complainant of cash 130/= and a torch and that the appellant also used actual violence. The appellant was then sentenced to death as by law prescribed. It is from this conviction and sentence that he lodged his appeal.

When the appeal came up for hearing, O'Mirera, learned counsel for the state conceded to the appeal on grounds that the evidence of the prosecution could not sustain a conviction.

We have carefully evaluated the entire evidence adduced before the court afresh. The case for the prosecution was that the complainant, PW1, was in company with his wife Elizabeth, PW2 going home. They were riding a bicycle and it was 10.p.m. On reaching a river, the complainant and his wife alighted from the bicycle in order to cross it. The complainant stated that his wife, flashed the torch she was carrying across the river and with that flash he saw the people with one holding a panga. The complainant said that he recognized one of them as the appellant who was his neighbour, that while the appellant's accomplice struggled with his wife before she fled, the appellant confronted him.

That he was robbed of 130/= and the torch before fleeing with his bicycle but not before he was cut and seriously injuring with a panga.

The appellant denied the offence in his defence.

The first ground of appeal raised was that the learned trial magistrate erred in convicting the appellant without considering the source of light at the scene was extremely poor being a torch. In his written submission the appellant relied on the case of ***CHARLES O MAIYANYI versus REPUBLIC C.A. No. 6 of 1986*** where the Court of
Appeal heed:

> ***"An inquiry ought to be made as to whether the complainant was able to give some description of identification of her assailants to those who came to her aid or to the police".***

It is the appellant's contention that neither the complainant nor his wife gave a description of their

assailants to the police. That further no such inquiry was made in court leaving an unfilled gap in the prosecution case which in turn creates a reasonable doubt.

Mr O'Mirera on his part submitted that the complainant did not give any name or description to the police and that it was not clear how the appellant was arrested. That the only name given to the police was one DANIEL GITAMBE who was arrested.

The complainant and PW2 in their evidence implicated the appellant that he was the one they saw across the river before they started crossing. They said that he was with another and that both of them attacked them. The evidence of PW1 and PW2 is contradicted by the investigating officer PW4.

PW4 said that only one suspect was mentioned and it was one DANIEL KIYUMBA. PW4 did not say who mentioned the said suspect but he said that the said suspect was eventually arrested. PW4 said that it was that DANIEL who implicated the appellant and caused his arrest. PW4 did not however say in what way the appellant was implicated. PW4's evidence materially contradicted that of the complainant and PW2. Going by PW4's evidence, the complainant and PW2 did not implicate the appellant with this offence at any one time. Their evidence that they saw him across the river is immediately put to doubt. On the other hand, PW4, who investigated the case acted irregularly. If indeed Daniel was the one the complainants implicated on what basis did he release him.

Most importantly, how could PW4 arrest and charge the appellant in the strength of hearsay evidence? If Daniel told PW4 that it was the appellant who attacked and robbed the complainant, that evidence was the weakest kind of evidence which was inadmissible in a court of law unless Daniel gave it himself in court. Daniel was not only released but was not only released but was not called as a witness. In this case therefore there are two important factors which the learned trial magistrate failed to examine with the care it deserved. One of the source and intensity of the light with which the complainant and PW2 claim assisted them to recognize the appellant. Two, the lack by the complainant and PW2 to describe those who attacked them to neighbours and the police. On the source of light, it was said to be a torch. We are not told how far the appellant was from the torch light when the complainant and PW2 saw him. We are also not told of its strength. We however find that despite asserting that they saw the appellant and that he was the one who attacked and robbed the, neither the complainant nor PW2 gave his name and or description to either the neighbours who went to their rescue or the police.

In the case of ***MAITANYI versus REPUBLIC (1988 – 1992) 2 KAR 72 at Page 77*** the Court of Appeal heed:

"There was a second leave of inquiry which ought to be made and that is whether the complaint was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description."

Going by the Maitanyi case, Supra, the complainant and his wife should have given the appellant's name to their neighbours or the police if they had seen and recognized him at the scene of crime.

We find the omission significant in the light of PW4's evidence that the name of the suspect he received was not that of the appellant. Having considered this appeal, we are in agreement with O'Mirera for the state that the conviction entered herein was unsafe and should not be allowed to stand. We consequently allow this appeal, quash the conviction and set aside the sentence. We order that the appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Machakos this 25th day of November 2005.

D.A. ONYANCHA

JUDGE

J. LESIIT

JUDGE