REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 46 of 2003
(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 2047 of 2002)

ANTONY KIPNGÉNO TUEI……..……APPELLANT

VERSUS

REPUBLIC…….…..……..RESPONDENT

JUDGMENT OF THE COURT

The appellant, Antony Kipngéno Tuei, was charged with the another person (*whose appeal was abated after his death*) with the offence of robbery with violence. The particulars of the offence were that on the 29th of August 2002 at 9.00 pm at Baraka Farm, Molo in Nakuru District, the appellant jointly with others robbed TL of Kshs 1,000/= and at or immediately before or immediately after the time of such robbery threatened to use to the said TL. The appellant pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged and sentenced to death as mandatorily provided by the law. Being aggrieved by his conviction and sentence, the appellant filed an appeal against the said conviction and sentence to this court.

In his petition of appeal, the appellant raised five grounds of appeal against his conviction and sentence. He was aggrieved that the trial magistrate had convicted him on the basis of insufficient and contradictory evidence of identification. He faulted the trial magistrate for convicting him based on uncorroborated evidence and against the weight of the evidence adduced. The appellant was aggrieved that the trial magistrate had failed to put into consideration the evidence that he had offered in his defence before arriving at the said decision convicting him. The appellant finally faulted the trial magistrate for convicting him on the charge of robbery with violence whereas the prosecution had failed to establish the legal ingredients of the charge. At the hearing of the appeal, this court heard the submissions made by Mr Karanja Learned Counsel for the appellant and Mr Koech Learned State Counsel. Whereas the appellant urged the court to re-evaluate and reconsider the evidence adduced and overturn the decision of the trial magistrate convicting him, the State argued for the upholding of the conviction and sentence imposed by the trial magistrate. We shall consider the said submissions made after briefly setting out the facts of this case.

The complainant in this case TL (PW1) is deaf and dumb. During the hearing of the case her evidence was translated by sign interpreter. The complainant communicated to the court by sign language. She testified that on the 28th of August 2002 at about 9.00 pm as she was sleeping in her house at Baraka farm, three men broke into her house and threatened her with a knife. They demanded that she surrenders whatever money that was in her possession. She gave them Kshs 1,000/=. Two of the robbers then ordered her to undress after which they raped her in turns. After the robbery incident, the complainant reported the incident to the police. She was also treated and discharged.

The complainant testified that she identified her assailants after the lamp in her house was lit by one of

the robbers. She identified her assailants to be her neighbours who resided near the local Catholic church. She testified that being deaf and dumb and also being illiterate she did not know the name of her assailants but knew them by their physical and facial appearance.

She further testified that the same assailants tried to rob her again on the night of the 3rd of September 2002, but this time she screamed for help and managed to scare away her assailants. She conceded that she was very scared and feared for her life when she was threatened with the knife and raped. She testified that she endured the rape ordeal for four hours and was therefore able to positively identify her assailants. After the attempted robbery incident on the 3rd of September 2002, the complainant, with the assistance of PW2 Joseph Njoroge Macharia and other members of the public was able to point out the appellant as being in the gang of men who robbed and raped her.

PW2 testified that after the robbery incident had been reported they went around the village with the complainant to enable her point out the men who raped her. He testified that after going around the village, the complainant identified two people, the appellant and the deceased appellant whose appeal was abated. It is after the identification by the complainant that the two persons, one of whom was the appellant, were apprehended by the members of the public and taken to the police station where they were arrested and detained. PW2 testified that it is the deceased appellant who insisted that he was in the company of the present appellant when they robbed and raped the complainant. PW3 police Constable Celistus Wanjala a police officer attached to Mau Summit Police Station was the arresting officer. He arrested the appellant when he was brought to the police station by the members of the public who claimed that he had raped the complainant.

After the close of the prosecution's case, the appellant was put on his defence. He denied that he had robbed and raped the complainant. The appellant raised an alibi defence. He testified that on the material day he had undertaken his normal duties as a farmer. In the evening, he slept as usual in his house with his brother DW4, Simon Kipchumba. The appellant testified that he was shocked when on the 3rd of September 2002 he was arrested on allegations that he had raped and robbed the complainant. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its determination, this court had to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any opinion as to the demeanour of the witnesses. (See **Okeno –versus- Republic [1972]E.A. 32**). Having considered the submissions made on this appeal and re-evaluated the evidence adduced before the trial magistrate, the issue for determination by this court is whether the prosecution proved its case against the appellant on the charge of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

The evidence adduced by the complainant before the trial court raises several legal challenges. The complainant is deaf and dumb. She is illiterate. Her evidence was adduced in court pursuant to the provisions of Section 126 of the Evidence Act which provides that:

> ***"(1) A witness who is unable to speak may give his evidence in any manner in which he can make it intelligible, as, for example, by writing or by signs; but such writing must be written, and the signs made, in open court.***
>
> ***(2) Evidence so given shall be deemed to be oral evidence"***

Due to her disability, the complainant did not know the names of her assailants whom she claims were her neighbours and therefore known to her. She further could not give a proper description other than that the generic description that she gave before the trial magistrate. In this case, her evidence was that of a single identifying witness. Her identification of the appellant as being among her assailants was made in circumstances that were difficult. The robbery and the rape incident took place at night. The complainant testified that she was able to identify the appellant by the light of a lamp which had been lit when her assailants threatened her with a knife and subsequently robbed and then raped her. She testified that she was frightened and was very scared by the ordeal that she had undergone.

The challenge that this court faces is to determine whether the evidence of the complainant, being that of a single identifying witness and in light of the disability of the complainant, established to the required standard that the complainant had identified her assailants. As stated earlier in this judgment the robbery and the raping incident took place at night. The complainant was attacked twice; first on the 29th of August 2002 and for a second time on the 3rd of September 2002. During the second attack, the complainant raised alarm and therefore managed to thwart the break in attempt to her house. The complainant testified that after the robbery and the rape incident of the 29th of August 2002, she made a report to the police. There was no evidence adduced by the prosecution that the complainant had given the description of her assailants to the police when the said first report was made. Furthermore the complainant appears to have failed to give the description of her assailants after the robbery and the rape incident that took place on the 29th of August 2002. She did not tell anyone, including PW2, that her assailants were her neighbours or persons she had recognised. It is only after the attempt had been made on the 3rd of September 2002 to break into her house that PW2 took the initiative to take the complainant around the village so that she could identify her assailants. The complainant identified the deceased appellant. In turn, the deceased appellant named the appellant in this case. It is after the implication of the appellant in this case by his co-accused that he was apprehended by the members of the public and taken to the police station.

We have carefully re-evaluated the evidence on identification of the appellant adduced by the complainant. We are not satisfied that the appellant was properly identified by the complainant. In the absence of the description made by the complainant in the first report to the police, it is difficult for this court to determine, without any shadow of a doubt, that indeed the complainant identified the appellant. Being the evidence of a single identifying witness, this court treats the evidence of the complainant with caution especially considering the fact that the said robbery and the rape incident took place at night. Furthermore we find it difficult to believe that the complainant could have failed to point out that her assailants were her neighbours immediately after the robbery incident. We are unable to comprehend why it took the intervention of PW2 for the complainant to take a walkabout in the village with a view of identifying her assailants. If the complainant knew her assailants, as she claimed, why did she not lead PW2 directly to the house of the appellant?

Having considered the submissions made on behalf of the appellant, we are of the opinion that reasonable doubt was raised as to the evidence of identification adduced by the prosecution. Further it is clear that the police did not investigate this case to establish the veracity of the allegations made by the complainant. No investigating officer testified in this case. There was no evidence that a first report of the description of the robbers was made to the police by the complainant. PW2's evidence is further proof that the complainant's evidence that she had identified the appellant should be treated with caution. He testified that it is the deceased appellant who pointed out the appellant in this appeal. It is trite law that the evidence of an accomplice is the weakest kind of evidence against an accused person. In the circumstances of this case it is unnecessary to consider the defence offered by the appellant.

In the premises therefore, we have no option but to allow the appeal. Having reevaluated the evidence we have come to the conclusion that the prosecution failed to prove its case as against the appellant to the required standard of proof beyond any reasonable doubt. The conviction of the appellant is quashed. The sentence imposed set aside. The appellant is set at liberty and ordered released from prison unless otherwise lawfully held.

DATED at NAKURU this 18th day of November 2005.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE