REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 243 of 2002
CONSOLIDATED WITH

Criminal Appeal 244 of 2002
(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 1996 of 2001 – S. MUKETI)

PETER KIMANI GICHUHI ..……...……..……...…1ST APPELLANT

MOSES OTIENO TINGA…….……..….2ND APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

JUDGMENT OF THE COURT

The appellants, Peter Kimani Gichuhi (1st appellant) and Moses Otieno Tinga (the 2nd appellant) were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the 10th of July 2001, at Bahati area in Nakuru while armed with dangerous weapons namely knives and a rope, they jointly robbed John Ngethe of motor vehicle registration number KAL 984G, Mazda grey saloon, Kshs.8000/- and other personal items listed in the charge sheet and immediately at or immediately after the time of such robbery used actual violence to the said John Ngethe Ngure. The appellants pleaded not guilty to the charge. After a full trial, the appellants were found guilty as charged. They were sentenced to death as mandatorily provided by the law. Being aggrieved by their conviction and sentence, each appellant filed a separate appeal against his conviction and sentence. At the hearing of the appeals, the two separate appeals filed by the appellants were consolidated and heard as one.

The appellants raised more or less similar grounds of appeal in their petitions of appeal. They were aggrieved that they had been convicted by the trial Magistrate who had relied on the prosecution's evidence which had not established their guilt to the required legal standard. The appellants were aggrieved that the trial Magistrate had convicted them based on the evidence of a single identifying witness. They faulted the trial magistrate for convicting them on the prosecution's evidence yet the investigating officer had failed to testify. The appellants were finally aggrieved that the trial magistrate had failed to consider their alibi defence before reaching the determination convicting them. At the hearing of the appeal, the appellants, with the leave of the court. presented to the court written submissions in support of their appeal. The appellants also made oral submissions in support of their appeal. They urged this court to find their appeals to have merit and allow the same. On his part, Mr Koech, Learned State Counsel opposed the appeals. He urged the court to uphold the conviction of the appellants by the trial magistrate. We will consider the arguments made before us after briefly setting out the facts of this case.

On the 10th July 2001 at about 10.00 am, John Ngethe Ngure *(the complainant)* was at his usual place of work outside Uchumi Supermarket, Nakuru. The complainant was a taxi operator. He operated his motor vehicle registration number KAL 984G, a grey Mazda as a taxi. He was approached by a person (whom he later identified as the *1st appellant)* who indicated to him that he wanted to hire his motor vehicle to take him to the Bahati area. The complainant negotiated with the person and a fare of Kshs 1,300/= was agreed. The person told him that he was a constructor and intended to go to the Bahati area with one of his employees. He went and fetched the other passenger. The two of them entered the motor vehicle. According to the evidence of the complainant, the 1st appellant sat on the front passenger seat whilst the second person, whom the complainant later identified to be the 2nd appellant sat on the rear seat behind the complainant who was driving the motor vehicle. Along the way, the 1st appellant requested the complainant to carry a bicycle. The complainant stopped the motor vehicle and tied the bicycle at the boot of the motor vehicle.

The journey to Bahati was uneventful. When the complainant and his two passengers reached Bahati, the 1st appellant punched the complainant. The complainant bled. The 1st appellant ordered the complainant to stop the motor vehicle. According to the complainant, the 2nd appellant who was seated at the rear seat, then put a rope on his neck and strangled him. The complainant was then thrown at the back seat where the 2nd appellant sat on him. The complainant testified that he lost consciousness. When he regained his consciousness, he found himself in a sisal plantation. It was about 4.00 pm. He discovered that all his personal effects had been stolen. He was able to retrace his steps to Bahati Police Station where he was able to make a report. He was later summoned to Nakuru Police Station by the Flying Squad where he attended a police identification parade. He was able to identify the appellants from the identification parade mounted by the police. The complainant testified that his motor vehicle had not been recovered at the time of the trial. The complainant testified that he was positive as to the identity of the appellants because of the length of time that he was with the appellants during the material day of the robbery. He was able to specifically identify the 1st appellant by the appearance of his teeth.

PW2 Police Constable Benjamin Cheruiyot testified how he was able to arrest the appellants at Isebania after being tipped by a suspect called Ester Wanjiku who had been arrested at Bondeni Estate. PW3 Inspector Patrick Musyoka conducted the identification parade whereby the complainant was able to identify the 1st appellant. The identification parade was conducted on the 11th of September 2001. He testified that he had conducted the police identification parade in accordance with the established rules. PW4 Inspector John Ngethe testified that he conducted a police identification parade where the complainant was able to point out the 2nd appellant. He testified that he had conducted the said identification in accordance with the established rules. The identification parade was likewise conducted on the 11th of September 2001. When the appellants were put on their defence, they denied being involved in the robbery. Both appellants gave alibi defence. They testified that they were at Isebania conducting their normal businesses when they were arrested by police officers attached to the flying squad.

This is a first appeal. As the first appellate court in criminal cases, this court is mandated to reconsider and re-evaluate afresh the evidence adduced by the witnesses before the trial magistrate and reach its own independent determination whether or not to uphold the conviction of the appellants. In reaching its determination, this court is required to put into consideration the fact that it neither saw nor heard the witnesses as they testified. This court is further mandated to consider the grounds of appeal put forward by the appellants on this appeal. (See Njoroge –vs- Republic [1987] KLR **19)**. In the instant appeal, the issue for determination by this court is whether the prosecution proved its case against the appellants to the required standard of proof beyond reasonable doubt. The evidence that was adduced by the appellants is that of identification by a single identifying witness. The evidence that was relied on to convict the appellants is that of the complainant. He testified that his taxi was hired by the 1st appellant who was accompanied by the 2nd appellant. He testified that his motor vehicle was hired at 10.00 a.m. It was in broad daylight. The complainant was able to see the appellants properly. He talked with them at close proximity. He stopped his motor vehicle once on the road to Bahati when he was required to load a bicycle belonging to the 1st appellant at the boot of the motor vehicle. The complainant was with the two robbers from Nakuru to Bahati when his motor vehicle was carjacked. The complainant was assaulted and strangled. He lost consciousness. When he recovered his consciousness, he made a report of the robbery

to the police.

Is the evidence of identification by the complainant sufficient to secure the conviction of the appellants? We have no doubt that it is. We have warned ourselves (*just as the trial magistrate did warn herself)* of the dangers inherent in relying on the evidence of a single identifying witness to convict the appellants. We have taken cognizance of the fact that the complainant saw and spoke to the appellants at close proximity. The appellants were with the complainant for a period of more than an hour. It was day time. Although we have noted that the complainant had not made the description of his assailants when he made the first report to the police, we are satisfied that the complainant positively identified the appellants. As was held by the Court of Appeal in **Maitanyi –versus- Republic [1986] KLR 198** at page 200 para 35:

> ***"Although the Lower Court did not refer to the well known authorities Abdulla bin Wendo & Anor vs Rep. (1953) 20***
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> ***EACA 166 followed in Roria vs Rep [1967] 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 bear repetition:-***
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> *"subject to 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 it is known that the conditions favouring a correct identification were difficult. In the circumstances, what is needed is other evidence, whether be circumstantial or direct, pointing to 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 any error."*

In the present case, the complainant identified the appellant in daytime. There was sufficient time to enable the complainant positively identify the appellants. The circumstances under which the complainant made the identification cannot, by an stretch of imagination, be said to be difficult. The complainant confirmed his identification of the appellants when, he, without hesitation pointed out the appellants in the identification parades which were held by PW3 and PW4. Following the Maitanyi decision (supra), the evidence of identification of the appellants at the police identification parade by the complainant lent assurance to the complainant's assertion that he had positively identified the appellants as the persons who robbed him of his motor vehicle.

Although nothing was recovered from the appellants to implicate them in the robbery, it is our holding, after re-evaluating the evidence, that the evidence of the complainant on identification was sufficient to sustain the conviction of the appellants. We have no reason to disagree with the finding of the trial magistrate who held that (pg 2 of the judgment):

> ***"The two accused (appellants) were identified by the complainant during the identification parade. The complainant described the circumstances under which he identified the two persons. It was during broad daylight when the complainant was hired – 10.00 a.m. He had conversations with the accused particularly the 1st accused. The circumstances he describes in the opinion of the court are conducive for positive identification. He was with the two suspects for quite a while. They even negotiated the***
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> ***fare. One of them, the 2nd accused at one point left the vehicle and he went to get a bicycle… the circumstances described by the complainant surrounding the identification leaves no doubt that the accused was positively identified.****"*

We have no reason to disagree with the finding of the trial court. For the reasons stated we find that the prosecution proved its case against the appellant to the required standard of proof beyond any reasonable doubt. The alibi defence by the appellants is a mere sham. It is evasive. It is meant to

exonerate the appellants from the offence which they obviously committed. We have carefully considered the appellants' submission and find no merit in the appeals filed against conviction. The appeals are consequently dismissed. The conviction of the appellants by the trial magistrate is upheld and confirmed by this court.

It is so held.

DATED at NAKURU this 3rd day of November 2005.

MUGA APONDI

JUDGE

L. KIMARU

JUDGE