REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 212 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal case No. 2363 of 2001 of the Chief Magistrate's court at Nairobi (Mrs. R. Kimingi – P.M.)

DAVID MUTHEE MWANIKI……..……..……..APPELLANT

VERSUS

REPUBLIC ……..……..……..RESPONDENT

J U D G M E N T

The Appellant **DAVID MUTHEE MWANGI** was sentenced to death after being found guilty on two counts of **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the **Penal Code**. He was aggrieved with the conviction and by implication the sentence and therefore lodged this appeal.

The facts of the case are that two men entered **NAMUNYA BAR** in Kariobangi at 7.30 p.m. on the 12th September 2001. They ordered everyone to lie down after which they stole cash, drinks and cigarettes from the bar. They also ransacked customers in the bar robbing them of their valuables. An alarm was raised and police proceeded to the scene where they exchanged gunshots with the robbers. One police officer, **PC OJWANG PW4** was shot and seriously injured. The Appellant was also shot then arrested and eventually charged with this offence.

The Appellant has raised six grounds of appeal. In the first ground he challenges the conviction on the basis of the evidence of identification by PW4. The second and third ground also challenges the adequacy of the identification. The fourth ground challenges the adequacy of the prosecution case generally. In the fifth ground, the Appellant faults the learned trial magistrate for acting on the retracted and repudiated confession statement. The sixth ground contends that the Appellant's defence was not adequately considered. The appeal is opposed.

We have carefully analyzed and re-evaluated the evidence on record. On the first, second, third and fourth grounds the Appellant challenges the conviction entered against him on the basis of identification by PW4 and for the standard of proof applied to the prosecution case. In his written submission the Appellant contended that the evidence of identification by PW4, the Complainant in count 3 in which the Appellant was acquitted, was mere dock identification and therefore unreliable. He submitted that the evidence of PW4, being that of a single identifying witness needed to be tested with the greatest care. He relied on the Court of Appeal Case of **CHARLES O. MAITANYI vs. REPUBLIC CA No. 6 of 1986**.

MISS GATERU learned counsel for the State submitted that PW1, PW2 and PW3 identified the

Appellant as one of the robbers at the bar on the material day. Learned counsel also submitted that PW4 was a watch man who ran to the scene soon after hearing screams and shouts and that he met with the robbers as they came out of the bar. That PW5, a Police Officer who went to the scene of robbery as reinforcement arrested the Appellant at the scene. **MISS GATERU** submitted that when PW5 asked the Appellant to account for the bullet wound on his left leg, he was unable to do so. **MISS GATERU** supported the learned trial magistrate's finding that the injury on the Appellant was not a coincidence but proof he was one of the robbers. The conviction entered against the Appellant was partly based on the identification by PW4. We do not understand where **MISS GATERU** read that this witness, (PW4) was a watchman. In fact, PW4 was one of the first Police Officers to reach the scene while the robbery was still in progress inside the material bar. He told the court that no sooner had he reached the bar, than he was shot at. He, PW4, identified the Appellant as the one who shot him while armed with a pistol. PW4 said he returned fire and shot one of the robbers. We have noted that in his evidence, PW4 did not identify the Appellant as the person he shot. He identified him as the robber he saw come out of the bar shooting.

The identification by PW4 was made in difficult circumstances for two reasons. One, PW4 had just at the scene when he was shot and hit. The circumstances of identification are not clear from PW4's evidence. However it is clear that he saw the robbers come out of the bar under electric light. The strength of the lights under which the identification was made and the distance the lights were from the robber were all not inquired into by the learned trial magistrate, as she ought to have done, and are therefore unknown. The Appellant's cited authority of **MAITANYI vs. REPUBLIC CA 6 of 1986** is in tandem with the test to be applied to determine the safety of identification.

We agree with the Appellant's submission that failure to inquire into the circumstances of the identification made under difficult circumstances would justify a finding that the identification was unsafe.

The second reason why we find the circumstances of identification by PW4 was under difficult conditions was the fact that he received very serious injuries. PW4 said that he was shot twice on the head, once on the chest and once on the left arm. He was shot before he returned fire. In those circumstances we do find that the PW4 had a fleeting glimpse of the robbers and considering the serious injuries he received that necessitated being admitted in hospital for one month, the identification cannot be said to be free from mistake or error.

The evidence of identification needed corroboration. We find no corroboration in the prosecution case. PW4 identified the Appellant in the dock on 8th may 2002, eight months after the incident. An identification parade ought to have been held for purposes of identification by PW4 to conform his ability to identify the Appellant before his testimony in court.

MISS GATERU had submitted that PW1, PW2 and PW3 had identified the Appellant as one of the people who robbed their patrons and the bar property on the material day. That is not factually correct. All three of the witnesses were categorical that they could not identify anyone of those who robbed them. PW3 said that one robber was shot and he fell down. However PW3 said he could not identify him. PW4 did not disclose which officer he was with and whether he had fired any shots. There is insufficient evidence upon which a conclusion could be made that the Appellant was one of the robbers. Due to the intense exchange of fire between PW4 and the robbers, the possibility of members of Public being shot could not be ruled out. The mere fact that the Appellant was shot cannot be conclusive proof that he was one of the robbers in the circumstances.

In the fifth ground, as stated earlier, the Appellant contends that the learned trial magistrate should not have acted on the retracted statements.

MISS GATERU submitted that the learned trial magistrate finding that the Appellant was not truthful and that he had not been tortured to sign the statement was right.

We are disturbed with the admission of the repudiated statements of the Appellant especially in the light of the doctor's evidence, DW2, (**DR. STEPHEN**) in the trial within trial. He saw the Appellant at

the prison clinic on 21st October 2001 and found that he had a gun shot wound which was both swollen and bleeding as a result of which he was anaemic. Dr. Stephen stated that he directed that the Appellant be taken to Kenyatta Hospital urgently. He confirmed that he was taken there the same day and admitted for three months. There is evidence to show that when PW5 arrested the Appellant, he had been shot. So the Appellant was still nursing his wound on 1st October, three weeks earlier when PW7 took his statement. That was also two weeks after the robbery. It was likely that the Appellant was tortured by poking the bullet wound as he claimed in his evidence in the trial within trial. It was therefore unsafe to admit the statement. Without the statement, the only evidence against the Appellant was that of PW4.

The Appellant alleged that his defence was not duly considered. He called three defence witnesses. **MISS GATERU** submitted that the learned trial magistrate dully considered the Appellant's defence before rejecting it and that having seen the witnesses, the learned trial magistrate's finding on the demeanour of the defence witnesses could not be faulted. The learned trial magistrate analyzed the Appellant's defence before rejecting it as false and inconclusive. The Appellant stated that on that day he made three trips to collect sand from Machakos to deliver to Nairobi. He stated that his employer who was DW2 Michael Ngugi had sent him. DW2 confirmed sending the Appellant to collect sand for purposes of delivering to his customer. DW3, IANSON NJOKA. DW3 confirmed that the Appellant delivered sand to him that day in three lorry loads. DW4 was the turn-boy who confirmed accompanying the Appellant to Machakos and back on all three times.

The learned trial magistrate rejected DW4's evidence on the basis that he was a confirmed traffic offender serving a prison sentence at the time of giving evidence. The evidence of DW2 and DW3 was found inadequate on the basis that the two could not tell if later that day the Appellant had been involved in the robbery in question.

With due respect to the learned trial magistrate the Appellant had no burden of proof. He did not have to prove his innocence or prove his defence. All he needed to do was raise a reasonable doubt to the charge and that was sufficient to secure an acquittal. In the constant case, the entire evidence of the prosecution did not give any nexus between the Appellant and the offence. The evidence of PW4 was merely dock identification which, in trite law, is almost worthless unless there is corroboration. See **OLUOCH vs. REPUBLIC 1985 KLR 349**. There was no corroboration and therefore the prosecution case was insufficient to sustain a conviction. In the circumstances we find that there was doubt in the prosecution case and that the benefit of doubt should have been given to the Appellant. We find that this appeal has merit. We allow it, 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 Nairobi this 28th day of July 2005.

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA,

JUDGE