REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 635 OF 2001

From original conviction(s) and Sentence(s) in Criminal case No. 1642 of 2000 of the Chief Magistrate's Court at Nairobi (Mrs. C. Githua– S.R.M.)

DAVID MAINA MWANGI..……..…….……..…..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant, **DAVID MAINA MWANGI** was on the 22nd May 2000 convicted of **ROBBERY WITH VIOLENC**E contrary to Section 296(2) of the Penal Code. He was sentenced to death as provided in the law. Being aggrieved by the sentence, he filed this Appeal. He had been charged with an alternative count of **HANDLING STOLEN GOODS** contrary to Section 322(2) of the Penal Code. The trial court entered no finding on the said alternative charge.

The facts of the Prosecution case was that the Complainant who was PW1, drove PW2 and PW3 to Kayole from Homeland Inn, along Thika Road where they had attended a party. They reached Kayole, at the gate to PW2's house at 3.00 a.m. PW2 alighted from the Complainant's vehicle and knocked at the gate. PW1 sat at the driver's seat while PW3 sat at the rear seat with the lights still on. PW1 reversed the vehicle with his window open when a man put a pistol on his head with another armed man across him.The two armed men had approached the vehicle from behind. PW1, 2 and 3 were then squeezed into the rear seat of the vehicle, and then one of the robbers drove for a distance. The vehicle was stopped and PW1 and 2 were ordered out. That the Appellant was identified by PW1 and 2 as the Appellant ordered them to lie down. They were ransacked in their pockets and the Complainant was robbed of cash, 3000/-, shoes, wrist watch and jacket by the Appellant. PW3 was driven for a short distance and thrown out of the vehicle. They later reported the incident to the Police. On the way back to his home, the Complainant saw his vehicle abandoned near a bar with the radio cassette missing. On the 2nd July PW4 in company of PW1, 2 and 3 arrested the Appellant after he was identified to him by PW1. PW4 later accompanied the Appellant ho his house where a car radio cassette Serial No. 6505837 Fujistu and 2 Sanyo speakers were recovered. PW1 identified them as those stolen from his car.

On 6th July the Appellant was identified in an identification parade by PW3. The parade was conducted by PW5. PW1 and 2 said they knew the Appellant before. The Appellant in his unsworn defence in court merely denied the charge. He narrated how he was arrested.

In his Petition of Appeal the raised four grounds summarized as follows: -

1) The learned trial magistrate erred in law and fact in relying on identification by PW3 and by identification by recognition by PW1 and 2.

2) That the evidence of the Prosecution was inadequate to sustain a conviction.

3) That the learned magistrate shifted the burden of proof from the Prosecution to the defence.

In his written submission and address in open court, the Appellant challenged the ability of the three identifying witnesses to identify him. He submitted that since the attack was sudden, unexpected and at night, they could not have been in a state to identify anyone.

MISS GATERU, learned counsel for the State did not agree with the Appellant on this point. It was her submission that the Appellant was positively identified by the 3 witnesses. That there was sufficient light to enable them identify him.

It is important to consider the circumstances under which each of the witnesses identified the Appellant. The Complainant said that he recognized the Appellant as he ransacked their pockets at the rear of the vehicle. He saw him with the help of the brake lights. He said he recognized the Appellant as a conductor of some Matatu and also as a frequent customer in his (the Complainant's) bar and lodging in Kayole. PW2 on his part said that he saw the Appellant and recognized him. PW2 said that after knocking at the gate and noticing the lights in his house go on, he turned back and approached the Complainants vehicle when he saw two men. The one on the co-drivers side walked to him and grabbed him. That, through the head lamps of the vehicle he was able to recognize him as a conductor in Matatus Plying Route 17, whom he had seen for about one year.He said he used the Matatus daily to and from Nairobi. PW3 on her part did not know the Appellant before. She was able to identify him in an identification parade, six days after the incident. She said she identified him as the man who sat on them after the trio were bundled to the back seat of the car. PW1, 2 and 3 all say that the Appellant sat on them inside the vehicle after his accomplice took over the driving. PW3 said he saw him on the front side of the vehicle as he approached them just before they committed the offence. He said that she was able to see him clearly by the head lamps of the vehicle.

We have carefully considered the evidence of the identifying witnesses. The incidence took place at night. It is trite law that before a court can base a conviction on the evidence of identification at night, such evidence should be absolutely watertight. That was the holding in **REPUBLIC vs. ERIA SEBWATO 1960 E.A. 174 and KIARIE vs. REPUBLIC 1984 KLR 739.**

In the case before us, we have noted some discrepancies in the evidence of the identifying witnesses. PW1, the Complainant, was clear in his evidence that both robbers approached from behind the vehicle and not the front. Indeed, his evidence was that he managed to see and therefore, recognize the Appellant not by the head lamps of his vehicle but the brake lights. Further, he recognized him after the robbers had taken over his vehicle and driven for a distance and after stopping it, ordering them to get out.

PW2 on the other hand says that the Appellant went for his neck while he was outside the gate waiting for his wife to open for him. That the Appellant had walked towards him, as he walked towards the Complainant's vehicle, and had grabbed him by the neck. It was at that point that he saw him by the head lamps and recognized him. PW3's version of the circumstances leading to her seeing the Appellant whom she did not know before, are different from the rest. As already mentioned, her evidence is that she saw him as he approached the vehicle from the front.

We did consider that the Complainant's evidence is the one which seems to contradict PW2 and 3. However, taking into account the fact that he had started reversing the vehicle at the time of the attack, and that he first realized what was happening when a pistol was placed against his head, it is possible for him not to have been clear of which direction the two attackers approached from. From all their testimonies, it is clear that the Appellant, did at one point, walk to the front of the vehicle and that it was at that point the two, PW2 and 3 saw him with the head lamps. Considering that the Complainant was himself accosted by a different attacker, it is expected for him not to have observed the other whom PW2 and PW3 seem to have keenly watched.

Having made those observations, it is our belief that what appeared to be contradictions in the Prosecution evidence was in fact variations of the 3 witnesses evidence which did not go to the substances of identification.

We found it important however to consider the quality of the light the witnesses said helped them see the Appellant. For PW2 and 3, they saw him by headlamps which was stronger. The fact that PW3 was able to pick him out in an identification parade went further to strengthen the evidence of identification.

In **AMOLO vs. REPUBLIC {1988 -1993} 2 KAR 254**, it was held that visual identification must be treated with greatest care and ordinarily dock identification alone should not be accepted unless the witness had in advance given description of the assailant and identified the suspect on a properly conducted parade.

PW3 identified the Appellant in a properly conducted parade. Further, the Complainant pointed out the Appellant to PW4, the arresting officer, at a bus stage, the day following the robbery. Taking all this factors into consideration we are satisfied that the Appellant was identified, not merely by visual identification, but was recognized by PW1 and 2 who knew him before for one year and identification in a parade by PW3 six days after the incident. All these, in our view, lends evidence to the Appellant's identification as one of the two assailants, by the three identification witnesses. We are satisfied that the identification was positive and free from any possibility of error or mistake.

The issue of the recovered car radio cassette and speakers was given much weight by this court. We are satisfied that taking the recovery of the same together with the evidence of identification of the Appellant by all three eye witnesses, the said recovery of the radio cassette offers further corroboration to the Prosecution case of identification. We note that the identification of the radio and speakers was by a mark. It was not unique in any circumstances. However, it was recognized one day after the robbery, and from the Appellant who offered no explanation for his possession. Taking all these factors together with the identification by recognition and in the identification parade, we do find that the Appellant was in recent possession of a recently stolen item.

In M**AINA vs. REPUBLIC C.A. No. 11 OF 2003, OMOLI, TUNOI and GITHINJI JJA**, held: -

> ***"'3. where there is evidence that the person is found in actual possession or had shortly after the robbery, so ld one of the items stolen during the robbery he is deemed to be in recent possession of the stolen item.***
>
> ***4.Evidence of recent possession of a stolen item alone is sufficient to found a conviction for the offence of robbery with violence."***

We found the evidence of the Prosecution was sufficient and that the Appellant was positively identified. We dismiss the two grounds of Appeal.

On the third ground that the learned trial magistrate shifted the burden of proof, we find no evidence of this in the learned trial magistrate's judgment. That ground cannot be sustained and is also dismissed.

Having considered this Appeal, we are in agreement that the learned trial magistrate's decision was correct and that the conviction was safe.

As for the sentence, that is the sentence prescribed by law, and the trial magistrate had no power to exercise any discretion over that issue.

We find the Appeal fails and so dismiss it in total. The conviction is upheld and the sentence confirmed.

Dated at Nairobi this 7h day of October 2004.

LESIIT

JUDGE

OCHEING'

Ag. JUDGE

Read, signed and delivered in the presence of;

LESIIT **OCHIENG'**

JUDGE **Ag. JUDGE**