REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 1070 OF 1997

(From original conviction(s) and Sentence(s) in Criminal case No. 6581 of 1996 of the Chief Magistrate's Court at Thika (E. O. Awino – S.R.M.)

RAPHAEL KAGOME MUCHUU...…..……..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant, **RAPHAEL KAGONYA MUCHUU** was with another **JOHN NJUGU MUGO**, charged with five counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The Appellant was the only one convicted. He was convicted in the 1st, 2nd, 4th and 5th counts and sentenced to death as by law provided. He was aggrieved by the conviction and so lodged this Appeal.

The facts of the Prosecution case were that on the night of 24th and 25th November 1996 at about mid-night, a gang of robbers struck at Gitwe Shopping Centre, Thika District. They were armed with bomb equipment which sounded like axes, sticks and such other crude weapons. They broke into the Complainant's shops and bars, whatever the case may be and robbed patrons and the business owners of cash money, and other shop and bar stocks including cigarettes. The Complainant in count 1 was robed of his vehicle which the robbers used to carry the stolen goods and to escape from the scene. In the course of this robbery, two watchmen were injured and one of them succumbed to his injuries and died.

Having stated the facts of the case, we wish to state further that the sole basis of the conviction entered against the Appellant was the recovery of certain cartons cigarettes in two houses. The Appellant was not identified by any of the Complainants and the eye-witnesses in the case.

This Appeal was conceded to by the State **MISS GATERU**, learned counsel for the State, submitted that the conviction was unsafe on two grounds. One, that the only evidence against him was that of a Police Officer, PW7, who alleged that he recovered certain stolen goods from the Appellant's house. That no evidence was adduced to establish that the house belonged to the Appellant. Secondly, **MISS GATERU** submitted that the Appellant's sworn defence alluded to the fact that we had been arrested before the alleged offence was committed and that no evidence was led by the Prosecution to rebut the same.

We have re-evaluated the evidence adduced by both sides in this case. The evidence of recovery of certain cartons of cigarettes and some cash was the basis of the conviction entered against the Appellant. PW7 the Police Officer who led the operation that recovered the said exhibits and also arrested the Appellant had this to say in his evidence: -

> ***"We were at Kamunyu during the day. While at Kamunyu we were tipped and we went to the house of the 1st accused (the Appellant). The Accused was not there. We searched the house. The informer showed us the house of the 1st accused…***
>
> ***Then we went to the next house. It is an adjacent house. It is the house of Njekehu. Before we reached there, I saw 1st, 2nd and Njekehu running from the house of Njekehu…. I arrested the 1st accused (the Appellant)."***

Since the basis of the conviction was this evidence of recovery, it was imperative that the learned trial magistrate exercise extreme caution while considering the evidence. We have re-evaluated it and find that there was no evidence adduced that was sufficient in establishing beyond any reasonable doubt that the first house visited by PW7 and his team belonged to the Appellant. PW7 did not claim that he knew the Appellant's house before this incident. From his evidence, PW7 relied on the information he allegedly received from some informer who was never called as a witness. That kind of evidence is very dangerous and the learned trial magistrate ought not to accept it on the face value. As long as the informer who allegedly tipped PW7 and his colleagues remained concealed, that bit of evidence should have been handled cautiously by the trial court, which should have ascertained if the evidence was corroborated by some other material evidence. In this case, the searches at the house yielded no further evidence. This means that there was no confirmation that the house belonged to the Appellant.

There was another difficulty with the evidence adduced against the Appellant. We noted from the evidence of PW7 that even though he was the one who recovered the alleged stolen goods, he did not identify them to the court. Those who identified the goods were two Complainants, PW1 and 2. PW1 only identified photographs, in which certain cartons of cigarettes had been taken.

Since the officer who recovered them did not identify them to the court, we find no nexus between the goods identified in photographs by PW2 and the items stolen either in her bar or from other Complainants.

We find that the evidence adduced against the Complainant fell far short of the required standard of proof in Criminal Cases. We agree with the Appellant and **MISS GATERU** that the learned trial magistrate erred in convicting the Appellant on this evidence.

The upshot of this Appeal is that the same succeeds. The Appeal is allowed, the conviction quashed and the sentence set aside. We order that the Appellant should be set at liberty unless he is otherwise lawfully held.

Orders accordingly.

Dated at Nairobi this 2nd day of December 2004.

LESIIT **F.A. OCHIENG'**

Ag. JUDGE

JUDGE