REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 88 OF 2011

PETER KISUNA KARANJA …….........................……………… APPELLANT

VERSUS

REPUBLIC ………………………………………………………. RESPONDENT

JUDGMENT

The appellant **PETER KISUNA KARANJA** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at the Narok Law Courts. The appellant was arraigned before the trial court facing two counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) PENAL CODE** with particulars as follows

COUNT NO. 1

"On 12th day April 2009 at Engata Naado village in Narok North district within Rift Valley Province jointly with others not before court while armed with a rifle robbed NASISO NKIRIPPA of Nokia mobile phone and cash Ks 250/= valued at Ksh 4,250/= and immediately before the robbery threatened to use actual violence against the said NASISO NKIRIPPA.

COUNT NO. 2

"On the 12th day of April 2009 at Engata Naado village in Narok North district within Rift Valley Province jointly with others not before court while armed with a Rifle robbed REUBEN KIBET of a Motorolla mobile phone valued at Ksh 3,000/= and immediately before the said robbery used actual violence against the said REUBEN KIBET"

The accused pleaded **'Not Guilty'** to both counts. His trial commenced on 18/12/2009 at which trial the prosecution led by **CHIEF INSPECTOR NJIRU** called a total of four (4) witnesses in support of their case.

PW1 who was the complainant told the court that on 12/4/2009 at about 9.00 pm she was inside her house cooking when four thugs entered. They demanded to see her husband. **PW1** told them that her husband was not in. The men who were armed with *rungus* and swords led her to the main house all the while demanding money. They hit her and ransacked the house. They stole her mobile phone and locked her inside a room with her mother and children.

After the robbers had left **PW2** the driver managed to free them. **PW1** went and reported the matter to

Narok police station. She was later called to attend an identification parade at Narok police station where she positively identified the appellant as one of the men who had robbed her.

PW2 REUBEN KIBET was a driver employed by **PW1**. He told the court that on the material day at 9.00pm he and his colleague had already gone to their room to sleep. A gang of men armed with a gun and pangas entered their room. They beat them and ransacked the room. **PW2** was robbed of his mobile phone make Motorolla C113. After the thieves left **PW2** managed to climb through the ceiling and thus released the others. Later **PW2** was called to the police station where he identified his stolen phone. However **PW2** said he was not able to identify any of the robbers as it was dark in his room and they had been ordered to lie down.

After police completed their investigations into this matter the accused was arraigned in court and charged.

At the close of the prosecution case the accused was ruled to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied any involvement in the robbery in question. On 22nd March, 2011 the learned trial magistrate delivered his judgment in which he convicted the appellant only on the 1st count. The trial court acquitted the appellant on the 2nd count of the charge. After giving the appellant an opportunity to mitigate, he was sentenced to death. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

As a court of first appeal I am obliged to reconsider and re-evaluate the evidence adduced before the trial court and to draw my own conclusions thereon. **MR. MONGERI** Advocate acted for the appellant whilst **MR. CHIRCHIR** represented the State.

Counsel for the appellant submits that there is a contradiction between **PW1** and **PW2** regarding the number of attackers **PW1** says they were 4 men while **PW6** refers to six. I do agree with the learned State Counsel that such contradiction is not fatal to the prosecution case suffice to say the robbers were in a group.

The main issue which arises in this appeal is one of identification. **PW1** told the court that although the incident occurred at night 9.00pm she was able to see the robbers because there was a lamp inside her kitchen. She also told the court that she spent several hours with the robbers thus had ample time and opportunity to see them well. I am satisfied that **PW1** gave to the court a graphic description of the events of the night she has even testified as to the role which the appellant played in the robbery. However it must be borne in mind that the court only had the benefit of a single identifying witness. **PW2** told the court that he was not able to identify any of the robbers as it was dark in his room and he had been ordered to lie down.

In the case of **MAITANYI –VS- REPUBLIC 1986 KLR 198** the Court of Appeal held as follows:

"***1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.***

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description"

In this case the incident occurred at 9.00pm the only light available to **PW1** was a lamp. **PW1** does not describe what type of lamp she had in her kitchen. Was it a pressure lamp, a lantern or a tin lamp? Further **PW1** does not describe the quality of light emitted by the lamp – was it dim or bright. All **PW1** states is that **'there was a lamp and fire in the kitchen"** **PW1** states that the robbers had torches which they shone at her. Such torches if being shone at her would not serve to illuminate the faces of the attackers. Rather the effect of torches being shone at **PW1** would only serve to blind her vision.

In describing the robbers to the police **PW1** merely stated at page 9 line 35

"I told police I could identify a short brown person and another tall black person"

These were hardly peculiar descriptions. There are many short brown and tall black people in this city. The description given cannot be said to be exclusive to the appellant.

On 21/4/2010 **PW1** was recalled for further cross-examination by the appellant. On that date she stated at Page 14 line 13

"I saw the faces (of the robbers) 3 of the people had covered their faces but I could see part of their faces"

In her earlier testimony **PW1** had made no mention that any of the robbers had partially covered their faces. **PW1** did not state what was used to cover the faces *ie* did they have caps or masks and which part of the face had been covered *ie* the upper or the lower part. Further and more importantly **PW1** did not clearly indicate whether the appellant was one of those who had covered their faces. If so then identification would have been all the more difficult. All in all this court cannot rule out the possibility of mistaken identity.

A perusal of the proceedings reveals that on 28/12/2010 **HON S. B. ATAMBO** Senior Resident Magistrate took over the hearing of the case from **HON A. G. KIBIRU** Principal Magistrate. Section 200(3) of the Criminal Procedure Code provides for the procedure to be adopted when a new magistrate is staking over a case form a magistrate who is no longer available to hear that case. The incoming magistrate failed to apply the provisions of section 200. The magistrate failed to invite the appellant to elect whether he wished to have any of the witnesses who had previously testified recalled. Failure to comply with section 200(3) was in my view fatal. The only remedy would be to order a retrial. However I note that this matter commenced in the year 2009. The accused has been in custody for the past seven (7) years. To order a retrial at this point would certainly prejudice him. Not to mention that there is no guarantee that all the witnesses could be retraced.

For the above reasons I find merit in this appeal. The same is hereby allowed. The conviction of the appellant is quashed and his sentence is set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nakuru this 6th day of May 2016

Mr. Mongeri for Appellant

Ms Ngovi for State

M. A. ODERO

JUDGE

6/5/2016