



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 46 OF 2011**

**RICHARD MAINA THIOMI ..... APPELLANT**

**versus**

**REPUBLIC .....RESPONDENT**

*(arising from the judgment of Hon. J.Kiarie , Senior Principal*

*Magistrate Nyeri in Criminal Case No. 536 of 2010)*

**JUDGMENT**

1. The Appellant herein was charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal code the particulars of which were that on the 1st June 2010 at Babito area in Nyeri North District within Central Province jointly with another not before the court robbed **PETER MWANGI MWANIKI** of cash Ksh. 9000/- and at or immediately before or immediately after the time of such robbery wounded the said **PETER MWANGI MWANIKI**
2. He faced a second count of Robbery contrary to section 296(1) of the Penal Code the particulars of which were that on the 1st June 2010 at Babito area in Nyeri North District within Central Province jointly with another not before court robbed **RUTH WANGECHI MWANGI** of cash Ksh. 3000/- and immediately before or immediately after the time of such robbery threatened to use actual violence to the said **RUTH WANGECHI MWANGI**.
3. He pleaded not guilty and was tried convicted on both counts and sentenced to death with the second count being held in abeyance.
4. Being aggrieved by he said sentence he filed the present appeal and raised six grounds of appeal.
5. When this matter came up for hearing before us the Appellant who was not represented filed an amended petition of appeal and submissions as follows:

***a) That the trial court erred in law and fact by failing to hold no evidence on record so support his identification.***

6. He submitted that P.W.1 did not know who attacked them and therefore did not give any physical description. Further P.W.2 did not give credible description since the name Maina is common amongst the Kikuyu and that evidence of P.W.3 supported his submission that he was never described to the police. He further submitted that key witness was never produced by the Prosecution that is the Chief who was given his description by the complainant.
7. He further submitted that the P.W.2 did not tell the court the strength of the moon light and that he was at the station on another issue then the complainant identified him whereas she had never given the police his description.
8. Mr. Njue for the state submitted that the appellant was convicted on the evidence of a single witness P.W.2 who was the complainant and that there was evidence that there was sufficient

- moonlight which was enough. He further submitted that P.W.1 corroborated the testimony of P.W.2 on the strength of the light.
9. He further submitted that P.W.2 testified that the appellant was her regular customer for a period of one and half months and therefore his identification was proper.
  10. This being a first appeal we are in law required to reevaluate the evidence tendered before the trial court and to come to our own conclusion though taking into account the fact that we did not have the advantage of seeing and hearing the witnesses.

## **EVIDENCE**

11. The prosecution case against the appellant was that P.W.1 **PETER MWANGI MWANIKI** had at about 9.30 – 10.00 pm closed his business and were going home with P.W.2 **RUTH WANGECHI** his wife when they were attacked. He was hit on the head and fell unconscious. He was robbed of Ksh. 9000/-. P.W.2 **RUTH WANGECHI WAMBUGU** who was with P.W.1 stated that she saw a person hit her husband while another grabbed her by the throat and told her to lie down which she did while being asked for money.
12. P.W.2 further stated that she showed him where the money was and that one of the attackers threatened to hit her with an iron rod and that in the process she was able to see him as he bent to search into the paper bag being a person she used to see for about 1½ months at the hotel and that she reported to the police and the chief who told her that the person she had described may be one of the several at the police station. Having described him to the chief and that she used to hear young men call him Maina.
13. Under cross examination she stated that the chief told her to go to the police station to see if the Maina she had described was the one held there and that she was able to identify him at the police station and that she did not know whether there was a grudge between him and the chief.
14. P.W.3 **CHARLES WESISI**'s evidence was that the complainant P.W.2 and her husband came to the station and reported the attack and that on 2nd June 2010 the appellant was brought to the station by security guard of Idris company on allegation of theft and while there the complainant identified him as the person who had robbed her and that she told him that the moonlight was strong enough she was able to hide her mobile phone in the grasses and able to retrace it.
15. P.W.4 **DR. FRANCIS MAINA** produced P3 form in respect of P.W.1 and when put on his defence the appellant gave unsworn statement and stated that on 1st June 2010 he used to work at a place where fuel was stolen and when he went to the police station to record statement the chief and the complainant came and she stated that he was the thief. He further stated that he had a grudge with the chief who had employed him before but refused to pay him. He further stated that if the complainant had known his name she would have given it at the time of her initial report.
16. From the evidence here and the submissions by the appellant and the state we have identified the following issues for determination:-

***a. Whether the conditions prevailing were suitable for identification and if so whether the appellant was properly identified.***

***b. Whether the prosecution case against the appellant was proved to the required standard.***

## **IDENTIFICATION**

17. The issue is whether the scene of crime was suitable for the P.W.2 to identify the appellant as stated in her evidence stated herein above. From the evidence before the trial court we are of the considered opinion that the light was sufficient enough for the witness to see but whether she was able to identify the appellant is in disputed as per her evidence herein as she stated that she saw a person hit her husband and another grabbed her by the throat and another came and threatened to kill her with an iron bar. It is therefore not clear whom the witness had seen and whether it was the appellant who attacked her or her husband and the benefit of the doubt should have been given to the appellant.
18. It was the evidence of the complainant that she had recognised the appellant as her customer but

we take the view that evidence of recognition should be tackled with great caution as a witness may be honest but mistaken and therefore evidence must be credible and free from possible error as was stated in **NZOMBO CHAI v R MOMBASA CRIMINAL APPEAL NO. 256 OF 2006**.

19. We have noted that the appellant herein was linked to this crime by the chief who was the person the complainant allegedly gave description of the appellant to but the said chief was never called as a witnesses even after the appellant had stated in cross examination that he had a grudge with the same. We are therefore of the opinion that the prosecution case against the appellant was not proved beyond reasonable doubt.

## **CONCLUSION**

20. Having analysed the evidence herein and the submission we find that the conviction of the appellant was unsafe and therefore allow the appeal herein, reverse the conviction and sentence and order that the appellant be set free immediately unless otherwise lawfully held.

Delivered, dated and signed this 5th day of February 2014.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE

Appellant in person

Mr. Cheboi for the state

Court: The judgment is read in open court in the presence of the appellant and Mr. Cheboi for the state.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE