REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 56 OF 2010

RAPHAEL NDERITU MAINA ……..……APPELLANT

V E R S U S

REPUBLIC ……RESPONDENT

(From the original conviction and sentence in Criminal case No. 3 of 2007 of the Chief Magistrate's court at Kikuyu before D. Mulekyo, Principal Magistrate)

JUDGMENT

The appellant, Raphael Nderitu Maina and Gideon Kariuki Macharia were jointly charged with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code.

After a full trial the appellant was convicted of the said offence and sentenced to death. His co-accused was acquitted at the close of the prosecution case as no *prima facie* case had been established against him.

Aggrieved by the said conviction and sentence, the appellant lodged this appeal. At the hearing of the appeal the learned state counsel conceded the same but as the first appellate court, it is our duty to look at the evidence afresh, evaluate the same and come to independent conclusions.

The complainant, a taxi driver, was on 13th March 2007 at Ambassadeur Hotel at around 8 p.m. waiting for customers when three men approached him wanting to be taken to Thogoto PCEA church. They agreed on the charge and set off on their journey.

Upon reaching their destination, and as he prepared to reverse and drive back, thinking they were paying him instead, they suddenly held him at gun point and tried to force him to the back of the vehicle. He resisted their attempts and a scuffle ensued, whereupon they physically assaulted him and hit him with the rear part of a gun. They even threatened to shoot him. He somehow managed to open the door and jump out of the vehicle leaving behind his shirt and running in the direction they had come from to seek help.

He got some assistance and was taken by the police to Kikuyu Nursing Home for treatment. The complainant was robbed of his motor vehicle registration number KAN 471P Toyota Corolla AE 100 which he later located at the same place he left from when he escaped.

He recorded a statement at the Police and later learnt of the arrest of some suspects. However, he was categorical that he did not identify any of them at the time.

On the issue of identification, the trial magistrate was categorical that there was no direct evidence. In his defence the appellant denied the offence and advanced an alibi that, he was arrested during a police swoop and taken to the police station after he refused to part with a bribe, and causing a ruckus after the police took his Kshs. 8700 amongst other personal items. He denied knowledge of the recovered fire arm or the pair of blood stained jeans.

The foregoing notwithstanding, the learned trial magistrate in her findings relied heavily on circumstantial evidence and concluded that the prosecution successfully discharged its burden of proof against the appellant. She found the testimony of Pw7 the fire arms examiner on the pistol found on the appellant whose firing mechanism was faulty, corroborative of the complainant's evidence that the robbers though armed were unable to carry out their threats to shoot him. This incapacity could have been due to the faulty firearm.

In addition to the foregoing PW2, the police officer who arrested the appellant talked of recovery of the fire arm from him upon arrest. He was in the company of four of his colleagues. We note that although PW2, PW3 and PW10 talked of recoveries of exhibits namely jeans, pistol and blood stained handkerchief, there was no record of the recovered items produced in court or even the OB record. PW10 testified that prior preparation of such recovery forms solely depended on the investigating officer and the nature of the exhibits. He further added that an entry in the OB would suffice. However from the court record, none was produced in court.

The complainant, PW1, in his testimony regarding what might have been stolen from him he stated as follows,

> ***"My vehicle was found at the same place where I fell out. Nothing else was stolen from me besides the vehicle"***

These items were not recovered from the appellant and this in our view weakens the nexus between the appellant, the offence and exhibits produced in court. This further casts doubt on the prosecution case. Further, the DNA test done on the said exhibits by PW5 did not establish any link with the appellant but matched the DNA profile of PW1. The learned trial magistrate however made a contrary observation that,

> ***"The only evidence linking the 2nd accused to the crime is the blood stain on the handkerchief and the blue jeans trouser"***

Another shortcoming in the prosecution's case is the wanting investigation that was done especially pertaining to the recovered fire arm. The most obvious thing the investigating officer would have done would have been to dust and lift fingerprints so as to firmly rivet the link between the firearm and the appellant but this was not done.

Finally, PW9 testified that the link between the appellant to the crime was the evidence of the Government chemist. Further that the blood samples were taken at the laboratory of PW6 Dr. Kung'u." PW6 however in his testimony states that he could not recall being asked to take blood samples from the patient he examined.

In view of the above and considering the deficiency of the evidence as a whole, this conviction in our view cannot stand. This appeal must therefore succeed. Accordingly, the appeal is allowed, conviction quashed and the sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 4th day of March, 2014

A.MBOGHOLI MSAGHA **L.A. ACHODE**

JUDGE **JUDGE**