REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 209 OF 2010

MARTIN GITONGA MAINA.....APPELLANT

Versus

REPUBLIC….....RESPONDENT

(Appeal from conviction and sentence in Nyeri Chief Magistrate's Court (Hon. Kiare J) delivered on 29th July, 2010)

JUDGMENT OF THE COURT.

1. The appellant Martin Gitonga Maina was charged, tried and convicted of two counts of robbery with violence contrary to section 296(2) of the Penal Code.

2. He appeals to this court against conviction and sentence arguing on the main that:

a) **THAT** the trial court erred in law and fact in finding a conviction while there was no evidence to show that identification was proved beyond a shred of doubt.

b) **THAT** learned magistrate erred in law and in fact by being impressed by the mode of arrest.

c) **THAT** the learned magistrate erred in law and in fact by finding that his conviction was not contrary to section 198(1) and 197 of the CPC as read with section 77(c) of the Constitution;

c) **THAT** the learned magistrate erred in law and in fact by ordering him imprisoned in the main prison facility yet he was at the time of conviction a person under 18 years;

d) **THAT** the learned magistrate erred in law and in fact in finding a conviction based on the rejection of his evidence.

3. He therefore prays that the Court quashes his conviction and set aside the sentence and ultimately order that he be released.

4. The particulars of the offence laid before the trial Court in count I were that on 30/10/2008 at Kamakwa in Nyeri District, the appellant jointly with others not before the court robbed John

Mwangi Wanjima of mobile phone, make Nokia 3220, driving license, car keys, office and safe keys and cash Kshs.950 all valued at Kshs.10,750 and at or immediately before or immediately after the time of such robbery, used actual violence to the said John Mwangi Wanjima.

5. In count II, he is charged that on same date and place, he also similarly, and jointly with others not before court robbed Christine Nyambura Kihoro of black handbag, mobile phone make Motorola L.91, house keys, three ATM cards for Equity, K.C.B and Co-op. Banks, cash Kshs.2800 all valued at Kshs.12,800 and during, immediately before or after such robbery, threatened to use actual violence on the said Christine Nyambura Kihoro.

6. Prosecution's case as laid by PW1, Christine Nyambura Kihoro and her husband, PW2 John Mwangi Wanjima was that as they walked home at about 9.15 pm, they passed some three youths who PW1 stated she recognized by sight but not but not by names as they were from the neighbourhood and she used to see them. There were electric lights from building security lights. She had lived in the area for 1 ½ years. The youths then attacked them and robbed them of items listed above. PW2 was beaten with a jembe handle stick and also injured by a knife the youths had. They raised alarm and the robbers fled. PW1 gave their description to the neighbours who came to their rescue.

7. The group decided to go look for them in their home. Meanwhile PW2 was rushed to hospital and the matter reported to the police who later rushed to the scene. The rescue group went to home of the appellant looking for him but did not find him.

8. The appellant and another were later seen by police walk near the police motor vehicle and the police managed to arrest the appellant and the latter ran off and dropped a blood stained jembe handle he had.

9. PW1 later identified the appellant in the police custody and told them that the appellant was one of those who attacked them.
10. In his defence, the appellant denied the charges. He said he used to be a student at Gatathini Secondary School and that on 30/10/08, in evening at about 9.30 p.m he was sent to shops. On his way back as he walked with another young man who carried a piece of timber, they came across the police. The appellant did not know why the other young man carried the piece of wood and he did not know him either. The other person on seeing the police, ran off while the appellant was stopped, arrested and put in a motor vehicle. According to the appellant, people came and PW2 said he did not know him and that PW1 was not at scene.

11. In convicting the appellant, the trial court stated that the evidence of PW3, the doctor, corroborated the evidence of PW1 and PW2 that PW2 was injured. According to the trial magistrate the injuries seen on PW2 by doctor tallied with the evidence he gave. In this respect the trial magistrate stated that he had no doubt from the evidence that complainants were attacked and violently robbed of their property. According to the trial magistrate, PW 1 sufficiently identified the appellant since there was street lighting at the place of the attack and that she recognized the appellant as being from the neighbourhood where she had lived for one and half years. The trial magistrate in convicting the appellant wondered what the appellant being a youth who claimed was in form 1 was doing out in the company of a stranger who was carrying a jembe which was later found to be bloodstained.

12. Having critically reviewed the lower court's judgment, it would appear that the appellant was convicted solely on the evidence of identification by PW1. So what was her evidence in the lower court? We will reproduce excerpts of her testimony for the purposes of analysis to see if they met the standard required of a single witness identification evidence that can sustain a conviction. She states in her evidence in chief as follows:

"...I heard a bang from behind...we walked on... I saw three people behind us...they came up to us...I gave way..they were neighbours whose acres (sic) did not know...but I used to see them and we used to by

pass...there were electric security lights from residential houses in the area...the nearest security light was about 100 metres...they attacked us...one grabbed my neck, took my handbag...the one who held me released me and joined others and I rushed to my house screaming...there was a brown cap left at the scene...a neighbour said he knew the owner of the cap...I am the one who collected the cap when I returned to the scene...the neighbours decided to search for the owner of the cap as I also told them whom I had seen behind us and whose description I did give but no name."

In cross-examination she states: "...I never mentioned names to police...

13. Pausing here, the East African Court of Appeal held in the famous case of **Abdallah Bin Wendo v. R [1953]20 EACA 166** that:

> **"...subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstancial or direct pointing to the guilt, from which a judge, or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the posibility of error."**

14. From the foregoing, the evidence of PW1 taken on its own would subject to testing, suffice in convicting the accused since it was her testimony that the attack took place in a reasonably lit area and that the attackers were youths from the neighbourhood she had lived in for the past 1 ½ years. So which is the testing evidence? This is found in the evidence of PW2 and PW4.
15. PW2 states in his evidence in chief as follows:

"...there were three people...they caught up with us from behind... we moved aside to give way they pass...one grabbed my wife and one started to beat me with a rungu and fell on me...one had a mask and sat on me with a knife...I was not able to recognize the three from this who attacked me...at the scene was a cap...we picked it...I don't know whose it was...the neighbours said the cap was of a child of baba John whom I did not know."Evidence by PW1 is that she saw all three youths. She recognized them by physical appearance but not names. There was light. It was from security lights of homes near there."

16. PW4 states in his evidence in chief as follows:

"...controller called us and asked to move very fast to Kamakwa area as there were young boys attacking people going home...on arrival we found a big crowd...we talked to them a Christine said they were boys she knew...we patrolled the area...we saw some young men come towards us...we put off the motor vehicle lights...when they approached us we tried to arrest them...one managed to escape... we arrested one...he had this jembe handle...he wore this cap...

17. In cross-examination he states:

> "...Accused wore this cap...this handle was dropped by the one who ran off...it had blood stains...there are scientific methods of ascertaining blood...I did not use them."

18. According to PW1, one of the youth that attacked them she knew well and described him to the neighbours who responded to their distress call. It was here evidence that it was the neighbours who responded to their distress call who said the knew the owner of the cap that was left at the scene of the attack while she described her other attacker without giving any name. She did not however state in her evidence how this description was done to enable the police or the neighbours identify and apprehend this other attacker. PW4 on the other hand states in his evidence in chief that they saw some young men come towards them and one of them whom they arrested and

happens to be the appellant was carrying the jembe handle and was wearing the cap in issue.

19. The contradiction in the evidence of PW1 on one hand and PW4 regarding the cap are material and raises reasonable doubt about the accuracy of identification of the appellant by PW1. If the same cap was left behind by the attackers one of whom is alleged to be the appellant and was taken by the neighbours who said they knew its owner, it is perplexing that the appellant could be spotted wearing the same cap by PW4 who claims he arrested him while wearing the same and carrying a jembe handle. Besides, the attacker whom PW1 allegedly described to the neighbours and the police did not, according to her, wear a cap. These contradictions create a reasonable possibility that the appellant was not clear in her mind about the true identity of her attacker as claimed. The doubt created therefore could have been resolved by the trial court in favour of the appellant. This far, the court finds that it would not be safe to rely on her evidence to sustain the conviction.

20. Mr. Makunja who appeared for the state associated himself with the observations by the trial magistrate in questioning what a youth in form 1 would be doing out at 11.00 pm. Whereas this may sound plausible and suspicious, it may well be true that the appellant was right and honest when he said he was sent out to buy kerosene by his parents. Each family especially the low income ones, have their own challenges and it may not be unusual to find young people being sent out to ran all kinds of last minute errands for their parents who may have spent hours on end trying to put food on the table. To question and cast aspersions on what such a youth would be doing out at that hour was in our view prejudicial and unwarranted. Further, the manner in which the complainants' made their report to the neighbours and the police as much as may have been honest, was prejudicial to any youth who may have found himself out at that hour. The report tended to isolate and target the youth thereby leaving out other category of people who may well have been the real culprits.

21. From the foregoing we have come to the conclusion that this is not a proper case where it would be safe to sustain the appellant's conviction on the evidence of a single witness. The other grounds of appeal will not be considered as they do not raise any issue that if considered alone would have affected the decision of the trial court.

22. Therefore the appeal is hereby allowed, conviction quashed and the sentence of the lower court set aside.
23. The appellant is set free unless lawfully held.

24. It is so ordered.

Dated and delivered at Nyeri this 6th day of November, 2013.

OUGO R.E

….....

JUDGE

ABUODHA N.J

….....

JUDGE

Delivered in open Court in the presence of..... for the Appellant and..... for the Republic.