REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 569 of 2006

SAMUEL NJOROGE MUTHONI……......………………APPELLANT

AND

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

(From Original Conviction and Sentence in Criminal Case No. 5142 of 2006 of the Chief Magistrate's Court at Kibera, Nairobi)

JUDGMENT

The Appellant, Samuel Njoroge Muthoni, was convicted in the Chief Magistrate's Court, Nairobi of robbery with violence contrary to **Section 296(2)** of the **Penal code a**nd sentenced to death as by law provided. He appealed to this court against conviction and sentence.

The particulars of the charge against the Appellant were that on the 28th day of June, 2005 at Muthama Stage in Riruta within Nairobi Area Province, jointly with others not before court, being armed with dangerous weapons namely knife and pieces of timber, robbed ANTHONY MUTUA of one mobile phone make Motorola C115 valued at Kshs, 5,000/= one packet of Embassy cigarette (*sic*) worth Kshs. 80/=, a bunch of keys and cash Kshs. 5,800/=, shoes worth 1,000/=. ATM Card, ID card all valued at KShs. 10,880/= and at or immediately before or after the time of such robbery threatened to use actual violence to the said ANTHONY MUTUA MUTISO.

The prosecution called three witnesses; these were the complainant himself (PW1), the Doctor (PW2) who attended to the complainant, and the investigating officer (PW3). The complainant's evidence was that he was a businessman at Waithaka where he sold wines and spirits. On the night of 27th and 28th June, 2005, he closed work at midnight and started going home. Along the road there were some kiosks from which a piece of wood or metal was thrown at him. Before long he felt someone hold him by the neck and hit him on the forehead three times with hard wood or a metal. The person who attacked him was called Samuel, the Appellant, and PW1 had known him for 4 years. Soon, PW1 realized that the Appellant was not alone, but was accompanied by two other attackers. After they had collected the items stated in the charge sheet, he awakened some neighbours who took him to the house of one Makau from where he managed to call his cousin, Dr, Nyaruka, who came and took him to Kikuyu Mission Hospital. He was treated and discharged. Later, on 2nd July, 2005 he reported the matter to the police. He found that the Appellant ***"had already been arrested on 28th June, 2005 over another case."***

PW2 was Dr. Zephania Kamau. He examined PW1 who had an injury on the right face and over the

mouth. He also had scratch marks on the right side of the back and a wound that was healing on the left knee. He went to see the doctor after 4 weeks, and the injury other than the scratch marks could have been caused by a ***"blunt injury'' (sic).*** The witness assessed the injury as ***"harm"*** and produced the P3 as an exhibit.

The Appellant raised three main grounds of appeal. These were that-

1. The learned trial Magistrate erred both in law and in fact by convicting the Appellant without the need to observe that the gangster purported to be the Appellant was not satisfactorily identified and recognized by the sole identifying witness.

2. The learned trial Magistrate further erred in both law and in fact to convict the Appellant to suffer death by upholding that the sole identifying witness recognized the Appellant without seeing that the complainant reported one week later while the Appellant was in police custody over another matter.

3. The learned trial Magistrate erred both in law and in fact by convicting the Appellant in the absence of the arresting officer's evidence which would have cleared any doubt as to why, where and how the Appellant was arrested and that nothing belonging to the complainant was found in the Appellant's possession.

At the hearing of the Appeal, the Appellant appeared in person while Mrs. Kagiri appeared for the State. After hearing both the learned State Counsel and the Appellant, we find that in so far as the alleged attack on the complainant is concerned, all we have is the evidence of the complainant (PW1) which is not corroborated by anyone else. Yet, PW1 stated that he left his business premises around midnight on the night of 27th and 28th June, 2005 and that he was with a friend called Ngaruiya. Why wasn't Ngaruiya called to confirm that he was with PW1 before the latter was attacked? Secondly, PW1 stated that he awoke his neighbour Kihara and told him that he had been robbed, and that both Kihara and the watchman took the complainant to Makau in the next plot from where the complainant rang his cousin, Dr. Nyaruka, to come and take the complainant to hospital. The complainant also testified that his cousin came in 10 minutes and took him to Kikuyu Mission Hospital where he was treated and discharged. Why were the three i.e. Kihara, the watchman and Makau not called to confirm those movements? Why wasn't Dr. Nyaruka called to confirm that he took PW1 to Kikuyu Mission Hospital on that fateful night? And why is there no evidence of his treatment at Kikuyu Mission Hospital? The complainant's evidence raises more questions than answers and this points an accusing fingure at a substandard investigation as it leaves the complainant's evidence uncorroborated.

The evidence of PW2, the doctor who attended to PW1, introduces some contradiction. He states in his evidence that he examined PW1 on 5th July, 2005, and that PW1 had come to him after 4 weeks! Yet the event took palce on the night of 27th and 28th June, 2005. The evidence of PW3, No. 78028 P.C. Kennedy Njeru, who was the Investigating Officer, also contradicts that of PW1. He said that-

"On 2nd July, 2005 was on duty at Riruta Police Station. While in the office one Mutua (PW1) told me that he had been beaten by 3 men the previous night of 1st."

Coming from the investigating officer, this statement contradicts that of the complainant that he was attacked on the night of 27th and 28th June, 2005. If the date given by the investigating officer is the correct one, might this explain why the people mentioned in connection with the allegations of 27th and 28th June were not called as witnesses? Such a conclusion would constitute the complainant an unreliable witness.

This leads us to the last issue that we wish to address, which is the issue of identification. Apart from PW1 himself, there was no other person who witnessed the incident complained of. The witness gave evidence twice. The first time the evidence was taken by Ms Muchira, Senior Resident Magistrate. The witness testified that –

"… There was moonlight and the security lights from a high-rise building next were on…"

When the witness was recalled after there was a change of magistrates, he testified before Mrs. Wasilwa as follows-

"… I saw a person jump from the kiosks holding a piece of wood or iron bar. He tried to hit me. The moon was full so I could see him clearly."

In cross-examination by the Appellant, he said-

"There was moon light and the security lights from the high building next …"

This description of the lighting conditions is not fool proof. It does not tell us how far the witness was from the high rise building, and the relative position of those lights in relation to the suspect. Even though there may have been full moon, there is no evidence as to how bright it was, especially as it could have been partly cloudy.

Regarding identification at night, the Court of Appeal observed in **MAITANYI v. REPUBLIC [1986] KLR 186,** at page 201, that-

"It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident … if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve… It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters were inquired into…"

On the evidence in this case, we are not told the size of the lights on the high rise building, and their position relative to the suspect, or how bright they were. Consequently, there was a possibility of mistaken identification of the suspect.

The complainant in this case went a step further and stated that he recognized the suspect. He put it thus-

"… I knew your voice and looks. You are tall (court notes accused is about 6 feet tall)."

Even though recognition might be better than identification, we still have to be cautious while accepting that a complainant has clearly recognized a suspect. Cases of mistaken identity sometimes occur. In the English case of **R.v. TURNBULL [1976] All ER 549,** Lord Widgery, CJ, stated at page 552-

"…recognition maybe more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

If mistakes can be made in recognition of close relatives and friends, many more such mistakes will certainly be made in purported recognition of acquaintances.

Finally, we note that the Appellant was never arrested in connection with the offence. By the time the complainant went to file his complaint in this matter, the Appellant was already in custody in connection with a different matter. How was he prosecuted in respect of an offence for which he was never arrested?

On account of the totality of the above irregularities, we find it unsafe to uphold the conviction on the basis of the evidence adduced. We accordingly allow the appeal, quash the conviction of the Appellant for robbery with violence, and set aside the death sentence against him. He is accordingly set

free forthwith unless he is otherwise lawfully held.

DATED and **DELIVERED** at **NAIROBI** this 13th day of July, 2012.

L. NJAGI
JUDGE

M. WARSAME
JUDGE