REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: GICHERU, TUNOI & SHAH, JJ.A.)
CRIMINAL APPEAL NO. 1 OF 1999
BETWEEN

SILAS MUNENE MWAURA .... APPELLANT
AND
REPUBLIC ....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nyeri (Etyang & Juma, JJ) dated 29th October, 1998

in
H.C.CR.APPEAL NO. 131 OF 1997)
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JUDGMENT OF THE COURT

The appellant, SILAS MUNENE MWAURA, was one of seven accused persons who appeared before the Senior Resident Magistrate at Kerugoya on a charge of robbery with violence contrary to section 296(2) of the Penal Code. After trial six of the accused persons were acquitted but the appellant was convicted and sentenced to death. His appeal to the High Court of Kenya at Nyeri (Etyang and Juma, JJ) was dismissed on 29th October, 1998. The appellant now appeals to this Court againTshte cocnavsiec tfioorn atnhde spernotseenccuet.ion was that on the night of 12th February, 1996, at about 9:00 p.m. the complainant, Naftaly Njeru Mukono, arrived at the gate of his house in a motor vehicle driven by one, Mr. Nyaga, whose relationship to the complainant nor his occupation was given to the trial court. As the motor vehicle stopped, some people approached the passenger side where the complainant had sat and as they prepared to attack, the complainant identified the appellant who, he alleged, was armed with something like a pistol and stood only about two metres away. The appellant shouted to the complainant that he had identified him but in response the appellant shot him in the chest rendering him unconscious. The complainant only regained consciousness at Embu Provincial Hospital, and in consternation realised that his right arm had been amputated. At the trial the complainant testified that there was electric security lights at the gate and that he had known the appellant since childhood.

This being a second appeal only matters of law fall for our consideration. The record shows that the conviction of the appellant was based entirely on evidence of identification by the complainant which the appellant has challenged in his petition of appeal. Mr. Nyachoti, for the appellant, has submitted that the alleged identification or recognition of the appellant was not free from the possibility of error and the trial court should not have made it the basis of a conviMcrt.i onN.yachoti vigorously assailed the evidence of Stella Wambui, PW2, the daughter of the complainant, who had looked through the window when she heard the commotion outside the gate. She did not identify anyone as it was dark. Mr. Nyachoti submitted that her evidence was in direct conflict with that of her father and contained sufficient contradiction such as would create a reasonable doubt that there were no electric lights at the gate. He submitted that the complainant, in the process of unconscious transference, might have confused a face he recognised at the gate with that of the appellant. With great respect to the two courts below, we think that the criticisms made by counsel are well founded.

The only other material witness called by the prosecution was the watchman, Wachira Njagi, PW3. But, he too, like Stella, did not identity the appellant.

These rampant contradictions, in our view, erode the probative value of the evidence of the complaint and had the learned Judges of the first appellate court directed their mind to this issue they might well have held that the complainant could have been mistaken and that the identification evidence upon which the appellant was convicted was not free from the possibility of error. The upshot is that the conviction is unsafe and ought not to be allowed to stand.

We deprecate the manner in which the trial magistrate, Wanjiku F. F., recorded the proceedings and wrote the judgment. The evidence of the witnesses, in this capital charge, was taken down in a staccato style while the judgment appears unintelligible and exhibits lack of seriousness on the part of the magistrate. The casual approach to such a serious case might not only prejudice the appellant and occasion him a miscarriage of justice, but, has constituted a total waste of time and resources on the part of the Republic for no conviction on a capital charge can be sustained on such a flawed record.

For these reasons, we allow this appeal, quash the conviction and set aside the sentence of death. The appellant may be released forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 16th day of April,

1999.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR