IN THE COURT OF APPEAL

SITTING AT NAKURU

[CORAM: KARANJA, SICHALE & KANTAI]

CRIMINAL APPEAL NO. 262 (NAK 69) OF 2009

BETWEEN

JOHN MUIRURI GICHERU .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nakuru (Mugo & Koome, JJ) dated 23rd October, 2009 **In HCCRA NO. 22 OF 2006)**

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JUDGMENT OF THE COURT

This is a second appeal from the conviction and sentence of the appellant, **John Muiruri Gicheru**, who was tried by the Senior Resident Magistrate, Nakuru, on 2 counts of robbery with violence contrary to section 296 (2) of the Penal Code. Particulars of the first count were that on the 27th day of June, 2003 at Tipis Trading Centre, Mau Narok in the then Nakuru District, jointly with others not before Court while armed with dangerous weapons namely, pistols, he robbed **Stephen Mbaabu Kinoti** of Mastermind Tobbaco, a motor vehicle registration number KAK 748 G, a jacket and **Kshs 505/=,** all valued at Kshs. 1.2 million and that immediately before or immediately after the time of such robbery, they threatened to use personal violence on the said person.

Particulars of the second count were that on the same day at the said place while similarly armed and in company of others not before the Court, they robbed **Duncan Onyango Okech** of the said company **Kshs 95,175/=** and that immediately before or immediately after the said robbery, they threatened to use personal violence on the said person. The charge in count three was Being in Possession of a Firearm without a Certificate Contrary to Section 4(1) of the Firearms Act and the forth count was Being in Possession of Ammunitions without a Firearm Certificate Contrary to Section 4 (1) of the said Act. He was convicted on all the four (4) counts and sentenced to death on the first 2 counts and to a term of 5 years imprisonment on the 3rd and 4th counts. He filed an appeal to the High Court of Kenya at Nakuru and in a Judgment delivered on 22nd October, 2009 (**Koome,J** (as she then was) and **M. G Mugo, J**), the conviction and sentence in respect of the robbery with violence counts was upheld. The appeal was allowed in respect of the counts relating to firearms. The appellant was dissatisfied with the findings where his appeal was dismissed on the said counts and filed this appeal which is premised on homemade Grounds of Appeal where three grounds are set out. The appellant faults the Judges of the High Court for not finding that identification could have been mistaken; for not finding that there was a break in the chain of events and for not finding that his explanation in the defence was not considered.

Our mandate in a second appeal like this one is restricted by Section 361 of the Criminal Procedure Code to a consideration of issues of law only; matters of facts having been considered by the trial court and re-evaluated on first appeal. We should respect the findings of fact of those courts unless, on our own consideration, we find that relevant matters were not considered or the courts considered irrelevant matters or, on the whole, findings were reached on the basis of which a reasonable tribunal properly exercising its mind would not reach – see, for a judicial pronouncement by this Court on the mandate of the Court in a second appeal such cases as **Stephen M'Irungi vs. Republic [1982 - 1988] 1KAR 360,** where the following passage appears:

> **" Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."**

Our consideration of the facts of the case is limited to our examination of the case to satisfy ourselves whether the two courts below carried out their mandate of evaluating and re-evaluating the evidence as required, and as was held in the case of **Okeno V. Republic [1972] E.A. 32**.

On 27th June, 2003, **Stephen Mbaabu Kinoti** (P.W.1) (**Mbaabu)**, a driver with Mastermind Tobacco Company was in the company of the Company's Salesman, **Duncan Onyango Okech** (P.W.2) (**Okech**), and they went about their business of distributing cigarettes at various centres in the Nakuru County. He was driving a motor vehicle registration mark KAK 748 G. Towards midday, they reached a centre called Tipis where they sold 2 cartons of cigarettes to a regular customer, **Charles Mwangi Ndungu** (P.W.3) (**Ndungu**), who paid Kshs 15,250/= which was taken by Okech. **Mbaabu** and **Okech** proceeded back to their motor vehicle and when Okech was sitting at the passenger side, he observed four armed men confront Mbaabu. One of the men hit Mbaabu on the head with a soda bottle and both of them were then forced into the back of the motor vehicle and the vehicle was driven away very fast. Ndungu, who was observing all this drama, quickly went to a police post located near the scene and reported the incident. According to Mbaabu and Okech, the appellant was one of the two men who guarded them at the back of the motor vehicle as it was driven along. Sometime later, the vehicle stopped; the appellant and the other man alighted and locked them in the vehicle from which they were later freed by officers of local administration and the police. Mbaabu and Okech testified that they lost the money stated in the charge sheet and the other items to the thieves.

Meanwhile, after Ndungu made the report to police, various police units were activated. **No. 84055427 A.P Cpl Richard Okumu** (P.W.4) of Tipis Administration Police Post received a report of the robbery incident, so did **No.37279 P.C. Michael Kimaru** (P.W. 5), who was on patrol at Tipis Trading Centre. They followed the stolen motor vehicle which was being driven towards Mau Narok and when the occupants realized that the police were in hot pursuit, they stopped and attempted to flee. There was a shootout between them and the police where 2 of the robbers were shot dead. One escaped and according to **Corporal Richard Okumu**, the appellant surrendered by sitting down and dropping the gun that was in his hand. He was arrested.

An identification parade was conducted by **No. 230573, I.P. James Karanja (P.W.6)** of Nakuru Police Station on 3rd July, 2003 and both Mbaabu and Okech identified the appellant as one of the robbers who had attacked them.

No. 50482 P.C. Jeremiah Langat (P.W.7), was the Investigating Officer who produced various items as part of the evidence in the case.

The trial court considered the prosecution evidence and found a case to answer against the appellant who gave sworn testimony where he stated that he was a livestock dealer and that, on the material day, he was going about his business of buying goats when he heard a loud explosion and, fearing for his life, he fled the scene and hid in the bush where police found him and arrested him. The trial magistrate considered the prosecution case and the defence offered by the appellant and came to the conclusion that:

> **"In this particular case, the robbery took place at 12.30 p.m. in broad daylight. P.W.1 said that the accused was amongst the people who first approached him. This was corroborated by P.W.2. P.W.2 also said that the accused was the one who was left to guard him while the other robbers ransacked the cabin of the vehicle. From their evidence, it is clear that the witnesses were able to see the attackers, even though they might have feared for their lives. In my view, the light conditions were quite ideal for a positive identification. I find that the accused was properly identified.**
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> **The robbery was reported almost immediately and the police swung into action. The police could see the vehicle the robbers fled in. When they approached it, 4 men fled. Accused was ordered to stop and he complied. Contrary to his submissions, I don't think there is any break in the chain of events. P.W. 4 said that the accused placed the gun on the ground when he was ordered to surrender. I find the evidence of P.W. 4 quite forthright. I have no reason to doubt it."**

The High Court, on re-evaluation of the case, came to the same conclusion. When the appeal came up for hearing before us on 19th November, 2018, **Mr. K. L Sirma,** learned counsel appeared for the appellant while the learned Senior Assistant Deputy Public Prosecutor **Mr. A. J. Omutelema** appeared for the Republic. Mr. Sirma relied on the homemade grounds of appeal which we have already set out and submitted that there was no proper identification of the appellant to lead to a conviction. According to him, the appellant was arrested before a report was made and, and when a report was made, no description of the robbers was given. Further that both Mbaabu and Okech were frightened during the robbery incident and could be mistaken in the identification of the appellant. Mr. Sirma concluded his submissions by asking us to reduce the sentence of death that had been imposed to a lesser sentence.

In opposing the appeal, learned State Counsel submitted that the appellant was properly identified as one of the people who attacked the complainants as both Mbaabu and Okech had ample opportunity to see the robbers, Further, that it was the appellant who kept guard of the complainants in the motor vehicle thus giving ample opportunity for positive identification. Counsel further submitted that APC Okumu, who testified as P.W.4 arrested the appellant after giving a chase and having a clear view of the motor vehicle which he did not lose sight of.

We have considered the record of appeal and submissions made and we recognize as a legal issue for our consideration whether the appellant was properly identified as one of the robbers who attacked the complainants in the case before the trial magistrate.

It has been recognized by this Court in various cases that a suspect should be properly identified for a conviction to be made in a criminal case – see for instance, the holding of this Court in the case of **Roria vs. Republic [1967] E.A.583** where it was observed that evidence of identification must be scrutinized carefully and with extreme caution and that:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:**
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> "There may be a case in which identity is in question, and if any innocent people are convicted today, I should think that in nine cases out of ten - if there are as many as ten- it is in a question of identity."
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> **That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this**

Court to satisfy itself that in all circumstances, it is safe to act on such identification. In Abdala bin Wendo and Another vs. Republic (1) this Court reversed the finding of the trial Judge on a question of identification and said this (20 E.A.C.A. at p. 168):

> "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 the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to 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 possibility of error"

Looking at the record, it was the evidence of Mbaabu and Okech that they were attacked by armed men at around midday. They were forced into the back of their vehicle where the appellant kept guard as the motor vehicle was driven around. A witness -Ndungu who had observed the robbery immediately made a report at a police post nearby prompting police, including APC Okumu, to give chase of the stolen motor vehicle. It was Okumu's evidence that he did not lose sight of the motor vehicle and that, when he and other police officers ordered the thieves to surrender, the appellant surrendered by sitting down and dropping the gun that was in his hand. The appellant was arrested after alighting from the stolen motor vehicle and there was no break in the concatenation of events from when the robbery began to the time of the appellant's arrest. The appellant was later identified by both Mbaabu and Okech at an identification parade.

We agree with the findings of the two courts below that the appellant was one of the thieves who attacked the complainants. The conviction was sound and was supported by the evidence as there was no possibility of mistaken identity where there was no break in the chain of events leading to the arrest of the appellant who surrendered to police when ordered to do so. In view of the foregoing, we find this appeal devoid of merit as far as the conviction is concerned. The appeal on conviction is dismissed.

The appellant was sentenced to death on both counts of robbery with violence and **Mr. Sirma**, learned counsel for the appellant, has invited us to review the sentence. Learned State Counsel is of a similar view.

The appellant was sentenced to death on 9th January, 2006. Section 296 (2) of the Penal Code provides for a death sentence upon conviction. The Supreme Court in the recent decision of **Francis Muruatetu v. Republic [2007] eKLR** has held that imposing a mandatory death sentence is unconstitutional. This has freed the courts to consider an appropriate sentence depending on the circumstances of the case before the court. It is for that reason that we remit this appeal to the High Court to consider the appellant's mitigation and award an appropriate sentence.

DATED & Delivered at Nakuru this 21st Day of *March, 2019.*

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR