



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 464 of 2010

SAMUEL KIUNGA GATUNGA ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Meru (Lesiit, & Kasango, JJ.) dated 29<sup>th</sup> October, 2010*

*in*

*H.C. Cr. A. NO. 131 OF 2007)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The appellant was convicted by the Chief Magistrate, Meru of the offence of robbery with violence contrary to **section 29(b)(2)** of the Penal Code and sentenced to death. His appeal in the High Court against conviction and sentence was dismissed.

The appellant was alleged jointly with another, to have robbed **Mohamed Abdi Noor Shariff** of a mobile phone worth Shs.7,000/- on 21<sup>st</sup> March, 2006 while armed with a gun.

The complainant **Mohamed Abdi Noor Shariff (Shariff)** testified at the trial that he was in his house on the material day at 8.00 p.m., that a person whom he identified as the appellant entered into the house saying that he was a police officer and demanded money; that he was joined by another person who was armed with a gun; that the appellant took his mobile phone and handed it over to the gunman who escaped; that the complainant's daughter **Aisha Shariff Mohamed [PW2] (Aisha)** closed the door before the appellant escaped trapping the appellant inside; that complainant and his daughter held the appellant; that the appellant struggled with them and the complainant stabbed him with a knife on the head near the neck; that the appellant hit the complainant with a metal bar, freed himself and escaped leaving behind a jacket, and that he identified the appellant through light from electricity.

According to the evidence of **Ag. I.P. Leonard Kiprotich [PW5]** who was the investigating officer, the police received information three days later that an injured suspect had been spotted at a slum in Meru town and police went there and arrested him.

The appellant stated at the trial that he was arrested on his way home on 17<sup>th</sup> April 2006,

The main ground of appeal is that the identification of the appellant was not free from error as the prevailing circumstances were not conducive for positive identification.

The conviction of the appellant was dependent on identification by complainant and his daughter Aisha. There was also the evidence of **Charles Masia** [PW3] that on the material day as he was going to the shop to buy kerosene for the complainant, he saw the appellant whom he had seen before at a gate, and that the appellant asked him whether the complainant was in the house.

The robbery took place at night inside a house. The complainant and Aisha did not know the appellant before. The appellant was accompanied by a man who was armed with a gun which must have instilled fear on the two witnesses. There was a struggle before the robber escaped. In the prevailing circumstances it is doubtful and both witnesses did not say so, that they had a good opportunity to observe the robber.

According to the evidence of Charles Masia, he saw the appellant at the gate at about 6.00 p.m. The robbery took place at about 8.00 p.m. It is probable that the person he saw at the gate is not among the people who robbed the complainant two hours later.

There was evidence by Ag. I.P. Leonard Kiprotich that no identification parade was held. In the absence of the identification parade for the appellant the identification by Shariff and Aisha, was a mere dock identification, which is not reliable in the circumstances of this case..

The appellant was arrested on suspicion. The police officer who arrested him did not testify and Shariff and Aisha did not say that the appellant had an injury on the head near the neck at the time of arrest.

**Mr. Kaigai**, the Assistant Deputy Public Prosecutor quite correctly conceded the appeal.

Had the High Court properly re-evaluated the evidence, it could have come to the conclusion that the conviction of the appellant was not safe.

From the foregoing, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held.

***DATED and DELIVERED at NYERI this 6<sup>th</sup> day of February, 2013.***

***E. M. GITHINJI***

.....

***JUDGE OF APPEAL***

***ALNASHIR VISRAM***

.....

***JUDGE OF APPEAL***

***M. K. KOOME***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**