



**IN THE COURT OF APPEAL
AT NYERI
CORAM: TUNOI, AGANYANYA & NYAMU, JJ.A.
CRIMINAL APPEAL NO 69 OF 2008
BETWEEN**

GERALD KURIA MATAHE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Lady Justice Kasango & Makhandia, JJ) dated 22nd May 2008

in

HCCA NO. 313 OF 2004

JUDGMENT OF THE COURT

GERALD KURIA MATAHE, the appellant before us, and two others whose convictions were quashed on appeal by the superior court in its appellate jurisdiction, were convicted by the Principal Magistrate, Murang'a, on two counts of robbery with violence contrary to **section 296(2) of the Penal Code**, one count of attempted robbery with violence contrary to **section 297(2) of the Penal Code** and one count of rape contrary to **section 140 of the Penal Code**. Each of the appellants was sentenced to death on the convictions for robbery charges and life imprisonment for the conviction on rape.

The first appeal preferred by the appellant, resulted in the conviction for the rape charge being quashed. The convictions for the robbery charges were confirmed.

On 16th March 2003 at about 9 pm, Eunice Kariuki (PW 1) received two visitors Jane Wanjiku (PW 3) and Margaret Muthoni (PW 2). They had visited her at her home at Iyego. They took a meal together and whilst PW 1 was relaxing with the visitors, she realized that there were intruders in the compound. On opening the door the intruders forced her into the bedroom wherein they threatened to cut her with an axe unless she gave them money. She handed them a total of Shs.14,600/- which belonged to her local church. However, the robbers were not satisfied and demanded more money. She was made to remove some clothes from a box wherein she had hidden Shs.60,000/-. PW 1 gave them that money as well. When the robbery was taking place Josephat Kariuki (PW 5), the husband of PW 1 arrived home and was attacked outside the gate. He, too, was ordered to hand over all the money he had. PW 1 testified:

“I heard my husband being told to give out money. I instantly recognized the voice of the person who was asking my husband to give out money. It is the 3rd accused (the appellant). I often met him there and he sometimes sought passengers for our matatu. In our dealings we often talk and I know his voice”

PW 5 testified that as he opened the gate to his house, he saw five people approach him. They ordered

him to lie down. As he hesitated they advanced towards him. They tried to force him down but they fought. In that confrontation and because the headlights were on, he identified the appellant. He also recognized the appellant's voice as he was the one ordering him (PW 5) around.

The appellant in an unsworn statement stated that on 25th July 2003, he boarded a *matatu* for Murang'a. He worked as a tout. On arrival in Murang'a, passengers boarded the vehicle to be driven to Nairobi. It was at this time that he was arrested and charged with the present offence. He denied committing the offences as charged.

Mr Gacheru, learned counsel for the appellant, has submitted before us that the evidence of identification of the appellant by PW 1 and PW 5 was not safe nor sufficiently positive to sustain the conviction. He argued that the voice being the only mode of recognition was not enough in the circumstances. Moreover, he contended, the quality of voice recognition had been dented by the witnesses' failure to readily give the name of the appellant to the police.

Mr Kaigai, the Principal State Counsel, readily conceded the appeal on the ground that there was no proper and positive voice identification of the appellant as a member of the gang that attacked and robbed the complainant. He submitted that the evidence against him is, to say the least, shaky as to sustain the conviction. With respect, we do not agree. The evidence on identification in such circumstances as those existing in the case before us must be scrutinized carefully and that the court must be satisfied that identification is positive and free from the possibility of error. All surrounding circumstances, particularly circumstances under which identification was made must be scrupulously considered.

In relation to the identification by voice, PW 1 and PW 5 had known the appellant before the robbery and had spoken to him severally. They testified that they were familiar with his voice and did recognize it. Moreover, the two courts below had made concurrent findings that at the time the appellant was shouting ordering PW 1 and PW 5 the conditions obtaining were such that, there was no mistake in testifying as to who was shouting, especially in that the appellant had been touting at the *matatu* stage for the witnesses. He had done so for so many months before the robbery.

In this case, there also existed other evidence which established that the appellant was among the robbers who had attacked PW 1 and PW 5 during the fateful night. PW 5's motor vehicle's headlights had been directed at him and PW 5 could clearly view the appellant at close range.

Having analysed the entire evidence on record, we are satisfied that the case against the appellant was proved beyond all reasonable doubt and the conviction is safe. We uphold all the concurrent facts of the courts below.

The appeal fails and is accordingly dismissed.

Dated and delivered at Nyeri this 8th day of July, 2011.

P. K. TUNOI

JUDGE OF APPEAL

D. K. S. AGANYANYA

JUDGE OF APPEAL

J. G. NYAMU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR