IN THE COURT OF APPEAL
AT NYERI

CRIMINAL APPEAL 122 OF 2009

MOSES KUBAI M'ITHAI ……………………………………APPELLANT

AND

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

(Appeal from a judgment and decree of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 11th May, 2009

in

H.C.CR.A. NO. 110 OF 2008)
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JUDGMENT OF THE COURT

MOSES KUBAI M'ITHAI, the appellant, was convicted on 6th May 2006 after trial by the Senior Principal Magistrate at Nanyuki of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and sentenced to death. He unsuccessfully appealed to the High Court of Kenya at Nyeri (Kasango and Makhandia JJ) which dismissed his appeal on 7th May 2009. Hence this is a second appeal.

On 2nd November 2010 when the appeal was called to hearing, Mr. Kaigai the learned Principal State Counsel, informed the Court that he did not seek to support the conviction and the sentence.

The prosecution case as presented before the trial court was as follows. On 20th November 2006 at about 10.00 a.m. the complainant Kimani Nduati (PW1) was alone walking towards Nanyuki town from Sportsman Arms Hotel when he spotted two men ahead of him near the gate of the hotel. One of them was seated while the other one was standing. As he neared them, the one standing stopped him and enquired from him if he knew a certain lady who was a teacher of two disabled boys. However, before PW1 could answer, the one seated suddenly stood up and held him by the neck. The man who had been making enquiries produced something like a gun with which he threatened PW1. The man then hit PW1 with it on the hand. PW1 tried to shout but the man holding his neck placed something that looked like tooth paste in his mouth and the mouth became numb and he could not scream. The man who had a knife then quickly ransacked PW1's pockets and took his cell phone – Motorolla C115, and cash Kshs.33,000/=. The same man also robbed him of his wrist watch make Disco. The two men then ran away. The robbery incident had taken less than two minutes.

The robbery was reported to Nanyuki police station but the police could not trace nor arrest the assailants who had vanished.

About five months later in April 2007 PW1 was passing through KANU grounds in Nanyuki town when he spotted one of the men he thought as having robbed him in November 2006. He informed matatu touts who were around and accosted the man. But on seeing him the man attempted to escape. PW1 and the touts gave chase and managed to arrest him outside CMC Showroom. The man was later handed over to the police. He is the appellant now before us.

The critical issue in this appeal, and indeed as it was in the two courts below, concerns identification. PWI testified that he had recognized the appellant by his looks. It is submitted by Mr. Gichimu, learned counsel for the appellant, that the identification of the appellant as a member of the gang which allegedly attacked and robbed the PW1 was not water-tight as laid down in the relevant case law on the point. Mr. Gichimu further submitted that the appellant was arrested five months after the event; and moreover, PW1 had not, before the date of arrest, positively identified the appellant. Above all, he averred the appellant did not have any peculiar features which could positively make PW1 identify him. Mr. Gichimu also argued that it was wrong for the two lower courts to have treated the evidence of identification as that of recognition.

Mr. Kaigai, in a brief address, submitted that in the absence of positive identification, the case against the appellant cannot be said to have been proved beyond all reasonable doubt and his conviction was quite unsafe and should not be sustained. We

would agree.

It is clear to us upon the analysis of the evidence on record that the evidence of identification by PW1, who was the only witness, was highly unsatisfactory and inadequate. In the circumstances, it would not be safe to rely on it to sustain the conviction. We say so because; firstly, the intervening period between the robbery and the arrest was over 5 months. This was relatively a long period and PW1 who had not given any special or distinctive features peculiarly identifying the appellant before arrest could be mistaken. Moreover, the chances of any other innocent person being taken as the robber could not be ruled out.

Secondly; failure on the part of PW1 to have described the robber before the arrest, in our view, meant that such evidence should have been reinforced by evidence of other witnesses, the absence of which rendered the conviction unsafe.

In the result, we hold that the identification of the appellant as the robber, is not positive and his conviction is unsafe and should not be upheld.

This appeal is allowed, the conviction is quashed and the sentence of death is set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nyeri this .4.day of November., 2010.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL