REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 319 of 2006

AMOS GITUMA ……………………………...……………… APPELLANT

AND

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

(*Appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Sitati, JJ) dated 25th October, 2006*

In

H. C. Cr. A. No. 4 of 2001)

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JUDGMENT OF THE COURT

The appellant herein, **Amos Gituma Kinyua**, was one of the three accused persons charged in Nkubu Resident Magistrate's Court in Criminal Case No. 52 of 2000 with two counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code and two counts in the alternative of handling stolen goods contrary to ***section 322 (2)*** of the Penal Code.

The allegations in the first count were that on 23rd December, 1999, at Kathera sub-location in Meru Central District within Eastern Province the appellant jointly with others not before court being armed with rungus, robbed Mwirigi M'Kirera of cash Ksh.2,000/- and a handbag all valued at Ksh.3,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Mwririgi M'Kirera . In the second count it was alleged that on the same day and in the same circumstances while armed with rungus the appellant and others robbed Patrick Mundia of cash Kshs.1,150/-, one radio cassette make Artech, a pair of headphones, one umbrella, one torch and one video deck make Panasonic serial No. H 4 TA12 – 088 all valued at Kshs.25,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Patrick Mundia. The alternative charge was that the appellant was on 8th January, 2000 found in possession of a pair of headphones and one umbrella knowing or having reason to believe them to be stolen goods.

At the end of the trial the learned Senior Resident Magistrate (Nduku Njuki, Esq.) found the appellant guilty on both counts of robbery with violence and sentenced him to death as mandatorily provided by law. Being dissatisfied with that decision of the learned Senior Resident Magistrate the appellant preferred an appeal to the superior court which dismissed his appeal. The appellant now comes to this Court by way of second and final appeal. That being so only matters of law fall for consideration by

virtue of ***section 361*** of the Criminal Procedure Code.

The facts as accepted by the two courts below may be briefly stated. On 23rd December, 1999 at about 3.00 a.m. the first complainant Mwirigi M'Kirera (PW1) was asleep with his family when suddenly he was woken up by a commotion and shouts within his compound. He heard his window panes being broken, the door being hit with a heavy object and when he peered through the window someone demanded that he should produce Kshs.5 million. PW1 stated that although there were many people outside, five of them were at his window and he threw out his wife's handbag and Kshs.2,000/- to the intruders. He was "*able to note two clearly* " He could do so, he said, because he had put on his house-lights and the security lights outside the house were also on. He said that he could identify the appellant. When the robbers left he reported the mater to the police. On 10th January 2000 he identified the appellant at an identification parade. He said that although he had not known the appellant before, nonetheless he identified him as he had a black trouser and he was "*tall with a dark complexion*."

As regards the second count it was the evidence of Patrick Kinyua Mundia (PW2) that on the material night he was woken up in his house by a great commotion and he put on the house-lights and the security-lights outside and then his door was hit as he shouted for help. He ran through the rear door and hid behind a window. While hiding he heard the mob asking his wife for money. By this time the robbers had broken all the lights and later, after fifteen minutes, they left but not before taking a video cassette player, earphones, a grey trouser, an umbrella and a torch as well as three Omax wrist watches. PW2 reported the incident to the police where he recorded a statement and later went to identify his stolen video recorder, earphones as well as a torch with his initials "KKM" inscribed on it. He stated that he identified the appellant as the leader of the gang. It was his evidence that he clearly saw the appellant as soon as the lights were put on.

Jane Wanjiku (PW3) who was a house help of PW1 also testified to the effect that she was present when the robbers struck and that she later identified the appellant at the identification parade.

Zuberi Osman (PW4) a technician at Nkubu market testified that on 25th December, 1999 at about 11.00 a.m. a certain man brought a video deck recorder for repairs but this recorder was later collected by the appellant who was subsequently arrested.

When put to his defence the appellant denied having been involved in the commission of these offences.

When the appeal came up for hearing before us on 19th May, 2008 Mr. A.M. Nganga appeared for the appellant while Mr. C.O. Orinda (Principal State Counsel) appeared for the State. Only two issues were raised for consideration in this appeal – identification and the appellant's defence. In his submissions Mr. Ng'ang'a pointed out that the evidence of identification was not free from the possibility of error in that there was contradiction in the evidence of PW3 and PW4. He went on to criticize the evidence of PW2 who had admitted having seen the appellant prior to the identification parade.

As regards the defence of the appellant Mr. Ng'ang'a drew our attention to the fact that the superior court had found that the trial court had ignored the appellant's defence.

On his part Mr. Orinda conceded that conviction in count 1 could not be supported but he all the same urged us to dismiss this appeal. We were rather puzzled by Mr. Orinda's stand in this appeal. He started his submissions by boldly opposing the appeal on the ground that the two courts below had been satisfied that the appellant had been properly identified. However, as he concluded his submissions he conceded that conviction in one of the counts could not be supported.

We have considered the evidence upon which the appellant was convicted and especially the circumstances under which he was said to have been identified. In our view, the main issue in this appeal is identification . We have considered the submissions by both counsel appearing and it would appear hat the first appellate court was alive to this fact as set out in its judgment. We, however, observe that there were serious errors relating to the manner the identification parades were conducted since PW2 admitted that he was either shown or somehow saw the appellant prior to the identification parade. This

was a serious error as it cast doubt on the value of the identification parade. Since this was not a case of recognition, the manner in which identification parades were conducted was most crucial. We are not surprised that towards the close of his submissions Mr. Orinda was willing to concede the appeal at last in respect of one count.

In the well known case of **RORIA V. R [1967] E.A 583** Sir Clement De Lestand V. P. delivering the judgment of the predecessor of this Court said:-

”***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 section 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:***

“***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.”***

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 Abdalla bin Wendo and Another v. R. (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.”***

We would similarly say that the evidence in this appeal was such that the trial court was called upon to treat it with greatest care - see ***KAMAU V. R.*** [1975] E.A. 139 and ***KINGORI V. R*** [2003] KLR 289. Having carefully considered the evidence of identification we have come to the conclusion that the appellant was convicted on insufficient evidence. We are therefore of the opinion that the appellant was convicted on evidence which fell short of the required standard in the circumstances of this case. We have no alternative but to allow this appeal.

Accordingly, the appeal is allowed, the convictions quashed and the death sentence imposed on the appellant set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 23rd day of May, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.