



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

Criminal Appeal 64 of 2004

VINCENT GATHU MBUGUA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Musinga J) dated 24th January, 2004

in

H.C.CR.A. NO. 326 OF 2001)

JUDGMENT OF THE COURT

The appellant herein, *VINCENT GATHU MBUGUA*, was charged with robbery with violence contrary to *section 296 (2)* of the Penal Code but was after a protracted trial convicted of robbery contrary to *section 296 (1)* of the Penal Code by the Senior Resident Magistrate, Narok, and sentenced to ten years' imprisonment with ten strokes of the cane. He preferred an appeal before the High Court of Kenya at Nakuru (Musinga J) and when it came up for hearing, the learned Judge, pursuant to a notice of enhancement of the sentence, dismissed the appeal and revised the conviction to robbery with violence contrary to *section 296 (2)* of the Penal Code and sentenced the appellant to death.

Mr. Simiyu, advocate for the appellant, has drawn our attention to the provisions of ***section 359 (1)*** of the *Criminal Procedure Code* which refers to the hearings of appeals by two judges. Since the practice by the High Court is that appeals be heard by two judges unless there is a written authority by the Chief Justice directing that the appeal be heard by one judge we are satisfied that there was an error on the part of Musinga J in proceeding with the hearing of the appeal while sitting as a single Judge.

The facts narrated by the prosecution to the trial court are as follows.

The homestead of the complainant (PW1), ex – councillor ***Rimoine ole Sordor***, was raided by a gang of seven or so robbers on 30th January, 2000 between 5.00 p.m. and 6.00 p.m. The gang which had posed as police officers assaulted his two wives and children and stole a shotgun. The evidence by the wives as to

whether the appellant was among the robbers was contradictory and inconsistent. For example, though the robbery is stated to have taken between 30 minutes and one hour, indeed a long time, the two witnesses were at variance as to what the appellant was wearing. The elder wife **Nairo** (PW2) testified that he had an attire similar to police uniform but the younger wife, **Nainguta** (PW3), averred that the appellant was wearing “*black clothes*”. Secondly, the identification parade from which PW2 picked the appellant was not conducted according to the Force Standing Orders since PW2 and PW3 together with the appellant, who was then handcuffed, were ferried to the identification parade at the police station in one motor vehicle. This irregularity, in our view, shows that the parade was not conducted with scrupulous fairness and the value of the identification as evidence was lessened.

Further, it is trite that in such a case like this where the evidence relied upon to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. But, what do we find here? The main witnesses for the prosecution have contradicted themselves in the basic description of the appellant. The only conclusion, we can derive from their evidence is that they are mistaken about the identity of their assailants. As there is no positive identification of the appellant as the member of the gang, his conviction is unsafe and should not be upheld.

In the result, 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. That is the order of this Court.

Dated and delivered at Nakuru this 2nd day of March, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR