



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

CRIMINAL APPEAL 22 OF 2002

DAVID MUTUA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Juma & Tuiyot, JJ.) dated 13th September, 2001

in

H.C.CR.APPEAL NO. 166 OF 1999)

JUDGMENT OF THE COURT

DAVID MUTUA, the appellant, and three others whose convictions were quashed on appeal by the superior court in its appellate jurisdiction were convicted by the Senior Resident Magistrate, Meru, of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and each sentenced to death being the mandatory sentence under the law. The appellant's first appeal was dismissed by the superior court and hence this is a second appeal.

The facts presented to the trial court by the prosecution are simple. During the night of the 25th and 26th April, 1998 at about 1:00 a.m., the complainant, **Zakaria Kaigera (PW1)** was asleep in his house at **Kienderu Village** in **Meru District**. He heard his dog bark incessantly. He took his torch and a walking stick and went out to check why it was doing so. At some distance towards the main road he shone the torch and was able to spot five or so people, one of them he thought was the appellant, a person from his village and whom he had known before the robbery. Those people were carrying some cartons and a heavy sack. On asking them who they were and what they were doing there at that time, those people answered back by cutting him on the head, hands, on the back and all over his body. As he fell down he was kicked severally and dragged along the road for a distance of about 50 metres where they dumped him by the roadside. When he came to his senses PW1 discovered that Shs.250/= which was in his pocket had been stolen. With some difficulty, he was able to reach home and he narrated the incident to his wife **Cecilia Ciabara (PW3)**. He told her that one of their neighbours **Stanley Gitonga** alias "**Star**" and some other people had attacked him. It is worthy of note that PW1 never gave her the name of the appellant.

We have been informed by the Prison Authorities that **Stanley Gitonga** was convicted of robbery with violence by the trial Court but he died before his first appeal was heard.

In quashing the convictions of the appellant's co-accused, the first appellate Court said:-

“The other appellants Ndereba Kirinya and Robert or Douglas Mwiti were also probably at the scene. Indeed there is a strong suspicion that they were involved but we give them the benefit of doubt. The complainant did not give his wife or neighbours the names of these two. He might have mentioned them simply because while in hospital he heard that they had been arrested. The police did not also produce in evidence the statements by some of the accuseds where they implicated each other. Suspicion however strong is not sufficient to warrant a conviction. This is a criminal case and the prosecution had to prove its case beyond a reasonable doubt. It was upon the prosecution to tie up the loose ends.”

Mrs. Ntarangwi for the appellant has submitted before us that the evidence of identification of the appellant by PW1 was not safe and sufficiently positive to sustain the conviction. She argued that the torch being the only source of light was not enough in the circumstances. Moreover, she contended that the quality of identification had been dented by PW1's failure to readily give the name of the appellant to his wife, the neighbours or the police.

Mrs. Ntarangwi has further submitted that there was no appreciable distinction between the appellant's case and that of the co-accused. The first appellate court having concluded that the conviction of the co-accused could not be sustained on the ground of lack of positive identification could not draw a different and conflicting conclusion as regards the appellant's conviction when the facts and circumstances were essentially the same.

Mr. Orinda, the Principal State Counsel, readily conceded the appeal on the ground that there was no proper and positive 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 agree.

We cannot emphasize more that the evidence on identification in such circumstances as those existing in the case before us must be scrutinised 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. We have carefully considered all the matters addressed to us by Mrs. Ntarangwi for the appellant and Mr. Orinda for the Republic. We note that the only source of light PW1 possessed was that of a torch whose intensity was not given. Moreover, the witness did not immediately after the attack upon him give the name of the appellant to his wife, neighbours, nor the police. In the circumstances, the identification of the appellant by the witness (PW1) cannot be said to be positive.

As far as selective identification is concerned, this Court recently in **PETER NGIGE WERU V REPUBLIC** Criminal Appeal No. 51 of 2000 (unreported) stated this in the identification of several accused persons by the same witness:-

“Where one witness purports to identify two people under very similar circumstances and purported identification of one is rejected, then it would require very special circumstances to accept his identification of the other person”.

The above enunciated dictum equally applies to the situation presenting itself before us in this appeal. The first appellate court did not give any sufficient reason or circumstances why it accepted the testimony of identification of the appellant by PW1 while it rejected it over the co-accused and yet there were no special and varying circumstances.

For the above reasons, we allow the appeal, quash the conviction and set aside the sentence of death. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 12th day of May, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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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