REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 63 OF 2007

JOSEPH MACHARIA NJUGUNA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 1993 of 2006 in the Chief Magistrate's court at Kibera – Mr. Maundu (SRM) on 30/1/2007)

JUDGMENT

1. This appeal stems from a conviction for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** in **Kibera Cm Cr. C no. 1993 of 2000**. It had been alleged that on 7th day of March 2006 at Ongata Rongai in Kajiado District within the Rift Valley province jointly with others not before the court, being armed with offensive weapons namely a pistol they robbed **Wekesa Musimi** of a motor vehicle registration number KAL 120Q Toyota L Touring, Nokia 1100 mobile phone and cash Kshsh.9,000 all valued at Kshs.470,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said complainant. He was sentenced to death as by law prescribed.

2. The appeal against both conviction and sentence, is premised on six grounds, which in summary the appellant contends that he was detained in police custody for a prolonged period before being charged. Further that the circumstances of identification were not conducive, and the identification parade was not properly conducted. Lastly that the prosecution did not prove their case beyond reasonable doubt, and that his defence was rejected without good reason.

3. Mr. Muriithi, the learned State Counsel, opposed the appeal on behalf of the state, urging that the evidence on record was sufficient to sustain conviction. Further that the succeeding magistrate did comply with **Section 200** of the **Criminal Procedure Code**, and that the magistrate who wrote the judgement warned himself of the dangers of relying on the evidence of a single identifying witness. He also argued that the circumstances were favourable for the positive identification, and that the identification parade was properly conducted.

4. This being a first appeal, the court is mandated to look at the evidence adduced during the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, we must warn ourselves that we did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot comment on their demeanour. See **Odhiambo v Republic Cr. App No. 280 of 2004 [2005] 1 KLR**.

5. The prosecution's case in summary was that **PW1** was driving home in Kiserian on 7th March 2006 at about 9.15 p.m. when he was flagged down by people he believed to be police officers. One of them ordered him out of the car, frisked him and took Kshs.10,000/= and a Nokia Mobile phone from him. He and 7 other persons whom he found at the scene were ordered into the back of a van that was waiting nearby. They freed themselves ten minutes later after he had heard his motor vehicle being driven away, and reported the matter to Kiserian Police Station.

6. Three weeks later he was called to the police station and informed that some suspects in his case had been arrested. He picked the appellant in an identification parade the following day and thereafter the appellant was charged as read.

7. On the question of identification the court notes that there were no recoveries made from the Appellant and no other evidence adduced to connect the Appellant with the offence other than the fact that the Complainant claimed to have identified him. The court notes that the learned trial magistrate properly warned himself of the dangers of convicting the Appellant on the basis of a single identifying witness.

8. We examined the manner in which the trial court dealt with the evidence of identification because the evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. The case against the appellant depends wholly on the correctness of the identification of the appellant by **PW1**, which the appellant alleges to be mistaken. We therefore warned ourselves of the special need for caution before convicting him in reliance of the correctness of the identification. See **KARANJA & ANOR VS. REPUBLIC [2004] 2 KLR pg 140**. Even when a witness purports to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.

9. We note that out of the four prosecution witnesses only the complainant links the appellant with the commission of the offence alleged. He claims that he identified the appellant by aid of moonlight, lights from another vehicle and also by reflection of the light from the head lights of his vehicle. He further stated that the appellant came very close to him, and peeped through the vehicle window and that he was able to see his facial appearance.

10. **PW1** testified that there was light at the scene and that one robber was close to him as he searched him bodily, and further that he picked the appellant from a subsequent identification parade of note is that the said identification parade came three weeks after the attack, and in **PW1**'s testimony the van which had stopped at the scene and whose lights were shining in their direction was at a distance.

11. An inquiry into the evidence also reveals that the persons who attacked **PW1** were strangers to him, and the encounter at the scene lasted only some three minutes. He did not give a description of any of the men to the police when he made his report and he did not play any part in the appellant's arrest. The appellant was arrested with the help of an informer and no recoveries either of the goods stolen or the guns used in the robbery were made in connection with him.

12. The appellant's defence consisted only of testimony relating to his arrest and a general denial of any involvement in the robbery. This being a criminal case he was under no obligation prove his innocence or to explain himself at all.

13. After a careful scrutiny of the entire record, we have come to the conclusion that, in the circumstances of this case, and given the nature of the light available and the conditions prevailing as set out above, we cannot state with any degree of certainty that the witness was able to make a true impression and to identify his attacker.

14. For the foregoing reasons we find that the appeal is meritorious. We quash the conviction and set aside the sentence imposed on the appellant, and order that the appellant be and is hereby set at

liberty forthwith unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **12th day** of **August 2013.**

A. **MBOGHOLI MSAGHA** **L. A. ACHODE**

JUDGE **JUDGE**