REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 158 OF 2009

SULEIMAN OTIENO AZIZ …….APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 2132 of 2008 in the Chief Magistrate's Court at Nairobi – S. Muketi (SPM) on 8th April 2009)

JUDGMENT

1. This is an appeal from the conviction and sentence to death as by law prescribed, of **Suleiman Otieno Aziz** by S. Muketi Senior Principal Magistrate (as she then was), in **Cr. case Number 2132 of 2008 Nairobi**, for robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

2. The facts of the case were that on the 8th day of December 2008 along Moi Avenue within Nairobi area, jointly with others not before court, they robbed Agnes Muthoni Njenga of Kshs.300,000/= and at or immediately before, or immediately after the time of such robbery they used actual violence against the said Agnes Muthoni Njenga.

3. The gist of the appellant's five grounds of appeal as amended, was that the evidence of the prosecution was uncorroborated and insufficient to prove his guilt. He also averred that his defence and submissions upon the close of the case, were not challenged by the prosecution, and that his rights under **Article 49 (f)(i)(ii)** of the **Constitution** were breached.

4. Mr. Kadebe the learned state counsel opposed the appeal on behalf of the respondent. Mr. Kadebe contended that the offence occurred at 3 p.m., and that after the complainant's handbag was taken, the complainant turned and saw the appellant and raised an alarm. That the appellant was arrested in her presence. Mr. Kadebe urged that the learned trial magistrate did caution herself on the dangers of convicting on the evidence of a single identifying witness.

5. Mr. Kadebe also submitted that the appellant did use physical force to rob **PW1** of Kshs.300,000/= and that the complainant had produced a bank statement to prove that she had the money which is the subject matter of the robbery. He therefore submitted that the case had been proved beyond reasonable doubt, and urged us to find that the appeal had been defeated and uphold both conviction and sentence.

6. The law as regards the circumstances under which a court of law can convict a suspect on the

evidence of visual identification and particularly by a single witness is now well documented. In the well known case of **Abdalla Bin Wendo & another vs. Reginam [1953] 20 EACA 166**, the predecessor to the Kenya Court of Appeal was clear that evidence of a single witness as to identification must be tested with the greatest care before it forms a basis for conviction, so as to eliminate the possibility of error or a mistake.

7. The extra caution required when considering evidence on visual identification applies more to the evidence of a single witness in difficult circumstances, but is required in respect of visual identification in all circumstances. In the case of **Roria vs Republic [1967) EA 583 at page 584**, Sir Clement De Lestang V. P. observed that:

> **"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:**
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> > ***"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.""***

The sentiments of Lord Gardner were captured in the case of **Kamau vs. Republic [1975] EA 139**, where it was stated that:

> ***"The most honest of witnesses can be mistaken when it comes to identification."***

8. Pursuant to the concerns on the need to ensure that no person is convicted of an offence on the basis of the untested evidence of visual identification by a witness, the Kenya Court of Appeal has set out certain guidelines to ensure that a person is convicted only when it is beyond *per adventure* that he was properly identified. Those guidelines may be found in the case of **Cleophas Otieno Wamunga vs. Republic [1989] KLR 424**, as follows:

> ***"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. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C. J. in the well-known case of Republic vs. Turnbull [1976] 3 ALL ER 549 at page 552*** **where he said:**
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> > ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.""***

9. To ensure that we properly tested the evidence of visual identification in the case before us, we ruled out dock identification to establish whether there was evidence upon which conviction should proceed. See - **Gabriel Kamau Njoroge vs. Republic [1982 – 88] KAR 1134**, where the Court stated, *inter alia, as follows:*

> ***"A dock identification is generally worthless and courts should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the suspect and the police should then arrange for a fair identification parade."***

10. **PW1** testified that she was walking along Moi Avenue on 8th December 2008 at 3.30 p.m. with a

handbag in which she carried Kshs.300,000/=, when she came upon a man who appeared to be talking on his mobile phone. As she went to pass him by, the man leaned on her side blocking her way. Suddenly someone gripped her neck from behind so tightly that she could not breathe and she wet herself. In that moment she felt her handbag being taken from her.

11. The complainant testified that at that point she shifted her body and held onto the shirt of the person that held her neck. The man however broke loose and started to flee but the complainant screamed attracting the attention of members of the public, who apprehended the man a short distance away in the middle of the road. It was her testimony that she did not lose sight of the man and that it was she who identified him for purposes of arrest by members of the public.

12. Although the witness could not state with any certainty how many assailants descended upon her on the ill-fated afternoon it is evident from the record that there were more than one assailant. The complainant testified that she only identified the one who held her neck. That this man came from behind but she held onto his hand. Further that the man who snatched her bag fled first, but the one who held her neck took time to allow his cohorts to run away.

13. Nothing was recovered from the appellant at the time of arrest either by way of what had been stolen from the complainant, or in form of a weapon. The complainant herself stated that she did not know whether the appellant had any weapon on him.

14. In light of the complainant's evidence as to the circumstances of the appellant's arrest set out above, the appellant's defence that it was his colleagues who set upon him and beat him for not giving up the proceeds of the aluminium, that he had delivered at Kamukunji is not tenable.

15. The appellant was under no burden to explain the circumstances of his arrest, or indeed, his innocence for reasons that this is a criminal trial and the burden of proof rests unshiftingly with the prosecution. Having tendered his evidence however, it must be considered alongside the rest of the evidence on record. Having done so, we found it implausible that none of his partners in trade came forward to protest his innocence or that **PW1** picked on a hapless person whom she chanced upon in the street as her robber, if events unfolded as he stated. We therefore discarded his defence as being contrived and not truthful.

16. On the basis of the foregoing, we are satisfied that the assailants having numbered more than one, and having applied violence by holding the complainant in a stranglehold, the ingredients of **Section 296(2)** of the **Penal Code** have been satisfied. In the result, the conviction and sentence are confirmed and the appeal is dismissed.

SIGNED DATED and **DELIVERED** in open court this **24th day** of **September 2013**.

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

JUDGE **JUDGE**