REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 250 of 2009

JAMES MUGAMBI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Judgment arising from the Senior Resident Magistrate's Court at Karatina in

Criminal Case No.382 of 2008 by L. Mbugua – Ag. P.M. dated 14th December 2009)

JUDGMENT

James Mugambi Njeru, the Appellant herein, and one Eliphas Muthuri were tried on a charge of attempted robbery with violence contrary to Section 297(2) of the Penal Code. After undergoing a full trial, the Appellant was convicted and sentenced to suffer death whereas his co-accused was acquitted. The Appellant was aggrieved hence this appeal.

On appeal, the appellant put forward the following grounds in his petition:

1. The learned magistrate erred in law and a fact, not finding that appellant was positively identified by the circumstances surrounding his mode of arrest that was made at night.

2. The learned magistrate erred in law and facts, not finding that there wasn't or there is no evidence spelling the source of light or to suggest that one could see vividly, chasing the other from the scene of act without losing sight.

3. The learned magistrate erred in law and facts, not finding that at the scene witnesses had not been able to identify the appellant.

4. The learned magistrate erred in law and facts, not finding that there are remote possibilities appellant could be a victim of mistakenly.

When the appeal came up for hearing, Miss Maundu, learned State Counsel conceded the appeal on two grounds namely:

First, that the Appellant's identification could have been that of mistaken identity.

Secondly, that the Appellant's defence was not seriously taken into account.

Before delving deeper into the merits or otherwise of the appeal, we wish to set out in brief, the case that was before the trial court. The particulars of the offence the Appellant was convicted for are that: ***on 1.7.2008 at Gathehu village the Appellant together with others not before court, attempted to rob Patrick Muchoki Muriithi of a hand bag with personal effects and cash Ksh.12,000/= and at or immediately before or immediately after the time of such attempt used actual violence to the said Patrick Muchoki Muriithi (P.W.1).*** The complainant, Patrick Muchoki Muriithi (P.W.1) and Rose Wambui (P.W.2) told the trial court that on 1.7.2008 at around 8.30 p.m. they shut their shop and drove home.

The duo reached a steep section of the road and decided to park their motor vehicle in a neighbour's from and walked for the remainder of the journey. Shortly, it is alleged, that two men emerged and accosted the couple. They demanded to be given money. P.W.1 was cut with a panga on the head. He was also hit using a metal bar. P.W.2 whose face was covered by the hand of one of the assailants began to scream. Michael Kagondu Mathenge (P.W.3) responded to P.W.2's distress call by rushing to the scene. The assailants fled the scene. When P.W.3 arrived at the scene, P.W.1 pointed the direction the thugs had taken to escape. P.W.3 said he saw someone running and he gave a chase. David Karugu Mwai (P.W.5) stated that when he heard the screams of P.W.2 he rushed to his gate and that is when he saw someone running at a high speed. P.W.5 managed to stop that person. Shortly, P.W.3 arrived, and the duo managed to arrest the Appellant and took him to the Police Station where he was re-arrested.

When placed on his defence, the Appellant told the trial court that on the fateful night he was just going downhill at Ihwagi area when he was bypassed by someone moving at high speed. He alleged that someone emerged from his gate and seized him. The then learned Ag. Principal Magistrate, formed the opinion that the evidence of P.W.3 and P.W.5 were clear and concise. She came to the conclusion that their evidence put the Appellant at the scene of crime.

Having set out in brief the case that was before the trial court, we now wish to address our minds to the substance of the appeal. The first ground of appeal raised and argued by the Appellant is that his identification was not free from error. He argued that his identification was mistaken. Miss Maundu agreed with the Appellant. We have on our part re-examined the evidence of P.W.1, P.W.3 and P.W.5. It is obvious that the offence was committed at night. The complainant (P.W.1) was assaulted with a panga. P.W.2 whose face was covered, screamed. P.W.3 responded to the distress call of P.W.2. The assailants fled the scene. P.W.1 pointed the direction the attackers took. P.W.3 is said to have shone his torch and saw someone running. He gave a chase. P.W.5 came out of his gate when he heard someone scream. Shortly, he saw someone running. He seized him before the arrival of P.W.3. After a careful analysis of the evidence, we have come to the conclusion that there was a break in the chain of movement from where the complainant was attacked and the place where the Appellant was seized. There is no doubt that P.W.1 had no torch. P.W.3 was the only witness who had a torch. P.W.3 flashed the torch when he arrived at the scene and that is when he saw someone running. In other words, he did not see the appellant take off from the scene of crime. There was a break in the chain. It is possible the Appellant is a victim of mistaken identity.

We are satisfied that Miss Maundu, properly conceded the appeal. We will give the Appellant the benefit of doubt. The other ground which was ably argued is to the effect that the trial court did not consider the appellant's defence. The Appellant had stated that he was going downhill on that fateful night when someone who was running at speed passed him. It is after that person passed him that P.W.5 opened his gate and seized him Basically the Appellant was saying that his case was that of mistaken identity. The learned Ag. Principal Magistrate was of the view that P.W.3 had not lost sight of the person he was chasing. With respect, we think the trial magistrate misapprehended the point. It is clear from the evidence that P.W.3 arrived at the scene after the assailants had fled the scene. It is possible the person whom he flashed at and saw running was the person who had by-passed the Appellant. We think that, had

the learned Ag. Principal Magistrate considered the Appellant's defence and the fact that there was a break in the chain of movement, she would have come to the conclusion that the defence had created some doubt. The Appellant should be given the benefit of doubt.

In the end, we allow the appeal. The conviction is quashed and the sentence of death is set aside. We order that the Appellant be set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 8th day of June, 2012.

J. K. SERGON
JUDGE

J. WAKIAGA
JUDGE