REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 65 OF 2009

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 62 OF 2009

Lesiit, Kasango J.J.

WILSON THURANIRA M'ITIMI…….....…….
1ST APPELLANT
SILAS KIRIMI M'INANGA…….....
……..2ND APPELLANT
V E R S U S

REPUBLIC…….....…….
…..RESPONDENT

[Being an appeal against the conviction and sentence of the P.M 's Court at NKUBU Hon Mr. S.M. GITHINJI Esq. in Cr. Case No. 2879 of 2005 dated and delivered on 27th March 2009]

JUDGEMENT

The two appellants were charged with one count of Robbery with Violence contrary to section 296(2) of the Penal Code.The 1st appellant faced an alternative count of handling a stolen torch contrary to section 322(2) of the Penal Code.The two appellants were convicted of the main count of robbery with violence and sentenced to death. They filed their appeals which we have consolidated as they arose out of the same trial proceedings.

The appellants raised similar grounds of appeal. Each challenged the prosecution case on grounds the circumstances of identification of the torch, in case of 1st appellant and of facial identification in case of 2nd appellant were not free from the possibility of error or mistake.

The state was represented by Mr. Kimathi learned State Counsel. The appeals by both appellants were conceded. In regard to the 1st appellant Mr. Kimathi submitted that he was charged with the offence on a count of a torch which the complainant identified as one stolen from him. The learned State Counsel submitted that a torch is a common item and that since the 1st appellant claimed it had been planted on him the conviction was not safe. Mr. Kimathi submitted that a dog which is alleged to have led a search party led by P.W. 4 to 1st appellants home lost the scent it had been following according to P.W. 4. The dog handler was also not called as a witness and therefore there was no evidence whether the police dog

was well trained to follow scents.

In regard to the 2nd appellant Mr. Kimathi submitted that the conditions of the light which enabled the complainant to identify the 2nd appellant during the robbery was not disclosed. Mr. Kimathi urged that the identification of the 2nd appellant was not free from error.

We have carefully considered these appeals and have subjected the evidence adduced before the trial court to a fresh analysis and evaluation as we are mandated to do. **See Okeno vrs Republic.**

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

The robbery took place at night. The complainant the sole identification witness did not describe the nature of the light and its intensity at the scene of the robbery.It is however clear that the complainant did not identify the 1st appellant as one of the robbers. Instead the complainant identified the torch found in the 1st appellants possession as one of the items stolen from him during the robbery. The complainant identified the torch by a dent a marking "J.K." on it.

Regarding the means of identifying the torch as the complainant's property, we agree with Mr. Kimathi that a torch is a common item. Not only is it common, the particular torch that the complainant lost was worth 100/- according to her which means it was one which was easily available and cheap to purchase. It is likely that many people own such a torch. A dent and markings are no unique means of identification of the torch. There is a likelihood that many torches have dents and further there is no means of differentiating one dent from another. The letters "J.K." are not exclusive and many people's names may be abbreviated in the same way. It is our view that the convict the 1st appellant on the basis of these two facts is unsafe. What was required was some other evidence which could offer material corroboration to evidence against the 1st appellant. Such evidence was lacking.

In regard to the 2nd appellants the complainant was a single identifying witness. In **GABRIEL KAMAU NJOROGE V. REPUBLIC (1982-88) IKAR 1134**, the court of Appeal held that it is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it is preceded by a properly conducted identification parade. In the instant case no identification parade was conducted. The circumstances of identification were very poor. From the complainant's evidence she saw the 2nd appellant as he allegedly took the torch from her. The complainant said she was able to identify him due to a mark on the face. The alleged mark was neither described nor shown to the trial magistrate. It is difficult to tell whether it was so unique as to be a distinguishing mark which could lead to a correct and safe identification of the 1ns appellant. In addition the strength and nature of the light with which the complainant saw the 2nd appellant was not disclosed.

We find from that from the description given by the complainant she had a fleeting glace at her attackers. The conditions of lighting at the scene and the circumstances of identification were in our view not conducive for a correct identification of the attackers. In the circumstances which was required was other evidence which could offer corroboration to the complainants evidence. We find that there was no material corroboration to the complainant's evidence against the 2nd appellant. The evidence against him was therefore insufficient and the conviction unsafe.

Having carefully considered these appeals we have concluded that the convictions entered against

both appellants should not be allowed to stand. Accordingly we allow the appellants appeal, quash the convictions, set aside the sentences and order that both appellants should be set at liberty unless they are otherwise lawfully held.

Dated and delivered at Meru this28th day ofJan2011

LESIIT, J
JUDGE.

KASANGO, M
JUDGE.