

The complainant managed to escape after sustaining injuries to the arms, elbows and knees. As he escaped, he screamed thereby attracting members of the public. With help at hand, the complainant went back to the scene and found the appellant having been arrested by members of the public. He allegedly identified him because of his **“conspicuous red jacket”**. According to the complainant, the scene was well lit by security lights from nearby shops.

P.W.2 who had been left behind by the complainant as he escaped purportedly witnessed the arrest of the appellant by members of the public who then handed him over to a police officer who was also attracted by their screams.

The complainant was later examined and treated at Uasin Gishu District Hospital by **Tom Kipkosigei Kilel**, (P.W.3) who assessed his injuries as harm in a P.3 form he produced at the trial.

At the close of the prosecution case, the learned Chief Magistrate found the appellant with a case to answer and placed him on his defence. The appellant gave an unsworn statement in which he denied committing the offence. He testified, *inter alia*, that on the material date, he was hired to ferry mangoes and after doing so, his customer refused to pay him the agreed hire charges. As he complained, some watchmen nearby (Kogo Plaza) arrested him and took him to the police station where he was locked up and charged with an offence he knew nothing about.

After analyzing the evidence adduced by the prosecution, the learned Chief Magistrate found that the prosecution had proved its case to the required standard and convicted the appellant of the offence of robbery with violence contrary to section 296(2) of the Penal Code. After considering the appellant's mitigation, the learned Chief Magistrate sentenced the appellant to death in accordance with the law. The appellant was not satisfied with his conviction and sentence and has therefore lodged this appeal.

The appellant was represented at the hearing of this appeal by **Mr. Nabasenge**, learned Advocate, who filed written submissions which he highlighted before us on 12th May, 2011. Counsel submitted, in the main, that the identification of the appellant was not positive; that the appellant's defence was not considered; and that the learned Chief Magistrate convicted the appellant on evidence which was unreliable.

Mr. Oluoch, the learned Senior Deputy Prosecution Counsel, opposed the appeal contending that the appellant was convicted on sound evidence, and at the scene of the robbery. Learned counsel further submitted that whereas it would have been prudent to call the watchman who arrested the appellant, the omission to call him was not fatal as the complainant's testimony was corroborated by that of his sister, (P.W.2).

Having carefully analyzed, re-evaluated and re-considered the evidence which was adduced before the Learned Chief Magistrate as we were duty bound to do, (**See Okeno -VS- R (1972) EA 32**), we have made the following observations. The Learned Chief Magistrate in convicting the appellant, relied heavily upon the identification of the appellant by the complainant and PW2. In her own words:-

“The identification of the accused by PW2 and PW1 at the scene is quite satisfactory in that, both said that the scene was lighted (sic) by security lights from the nearby shops. They were able to see the accused well. PW1 said accused wore a red (sic) jacket which was quite conspicuous.....”

It is significant however, that PW2, who actually purportedly witnessed the appellant's arrest did not mention a red jacket. In her own words:-

“I saw the accused as he held my brother by the collar and snatched the bag. He remained at the scene after my brother ran away. He watched as the other three men were slapping me. The accused wore a jacket and a red T-Shirt.....”

So, according to PW2, the person who robbed them wore a jacket and a red T-Shirt. It would appear

therefore that there was nothing distinctive about the jacket which the assailant wore during the robbery. It could therefore not be “**conspicuous**” as described by the complainant. That, in our view suggests that identification by the red jacket, which the Learned Chief Magistrate accepted, may not have been all that positive or satisfactory as the Learned Chief Magistrate held. We are also puzzled that the colour of the jacket was considered by the prosecution as demonstrating the appellant’s identification at the scene of the robbery, yet the prosecution did not produce the same at the trial. Why did they not do so, yet the appellant is alleged to have been arrested at the scene, in the “**red**” jacket. In our view, therefore the identification evidence does not pass muster, given that the complainant and PW2 did not know the appellant prior to the attack.

We have also observed that none of the members of the public who arrested the appellant, allegedly at the scene, was called as witness. His testimony would probably have removed the doubt we now entertain regarding the identification of the appellant. Besides, according to the complainant and PW2, a part from members of the public, there was a police officer at the scene, to whom the appellant was handed over. That police officer was also not called as a witness. The two witnesses, in our view, were essential witnesses and could have, if called, buttressed the evidence of identification.

Having found that the appellant’s identification was not free from the possibility of error, we do not have to consider the other complaints made by the appellant.

On the whole, however, we find that the conviction of the appellant was not based on sound evidence. We cannot therefore uphold his conviction. The appeal succeeds. The appellant’s conviction is quashed and the sentence of death imposed upon him is hereby set aside. The appellant is set free forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF JUNE, 2011.

F. AZANGALALA
JUDGE

J.R. KARANJA
JUDGE

Read in the presence of:-

- (1) **Mr. Oluoch**, Senior Deputy Prosecution Counsel, for the State and
- (2) **Hillary Benson Lankui**, the appellant

F. AZANGALALA
JUDGE