REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 140 OF 2008.

EMMANUEL NYAOSI NYAMWAYA

alias FELIX OTIENO…….……APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

JUDGMENT

(From original conviction and sentence in the Chief Magistrate's court at Kisii Criminal case no.3193 of 2004 by C.G.MBOGO-S.P.M)

Emmanuel Nyaosi Nyamwaya alias **Felix Otieno** hereinafter ***"the appellant"*** was charged before the Chief Magistrate's Court, Kisii with the offence of robbery with violence contrary to section 296(2) of the **Penal Code .** The particulars in support of the offence were that on 23rd October, 2004 at Kisii township in Kisii District of Nyanza Province, the appellant jointly with others not before court while armed with dangerous weapon namely a knife robbed **Wycliffee Momanyi** of one mobile phone and one wrist watch valued at Kshs. 4,300/= and Kshs. 2,500/= in cash . The appellant denied the charge and the case went to trial.

The case for the prosecution was that on the material day at about 9.00 p.m, **Wycliffee Ombati Momanyi** (PW2) who is the complainant arrived in Kisii town from Keroka. While he was walking towards Kanyoni hotel, he saw four people walking behind him. One of the four people walked past him while another one remained behind. The third came and stood to his left while the fourth stood to his right. The four then wrestled him to the ground and showed him a knife, which they threatened to stab him with. They then robbed him of his siemens mobile phone and cash Kshs. 2000/=. The four robbers who according to PW2 included the appellant upon completing their mission ran away as he screamed. Apparently, the appellant ran in an ambush set by police Nos. 73549 PC **David Mogire** (PW1) and 83981 PC **Festus Kiplimo** (PW3) who proceeded to arrest him. The complainant soon thereafter appeared and identified the appellant as having been among those who had robbed him shortly before. The two police officers and the complainant escorted the appellant to Kisii police station where he was charged with this offence. He however denied the offence.

The appellant elected to make a sworn statement when he was placed on his defence as it was his statutory right to do so. He had no witnesses to call but again it should be noted that he was not under a duty to call anyone for the burden of proof in the case lay with the prosecution throughout and the standard being proof beyond all reasonable doubts. He stated that he was arrested near Kobil petrol station in Kisii while he was on his way home. That he was thereafter escorted to Kisii police station

where he was given a name he does not know. He was then charged in court for an offence he knew nothing about and did not commit.

The learned magistrate having reviewed the evidence for both the prosecution as well as the defence was convinced that the appellant had committed the offence charged. Accordingly he convicted him and sentenced him to the mandatory death sentence.

The appellant was aggrieved by the conviction and sentence. He therefore lodged this appeal on the grounds that this conviction was based on an alias name which was not his, the prosecution evidence was full of doubts, crucial prosecution witnesses were not called and finally, that his alibi defence was not given due and adequate consideration.

At the hearing of the appeal on 20th January, 2011, the appellant orally submitted that he is known as **Emmanuel Nyaosi Nyamwaya** only. He has no an alias name going by **Felix Otieno**. When arrested, he was searched and nothing was recovered from him. If indeed he had committed the offence, he should at least have been found in possession of the items stolen. As far as he was concerned the charge was fabricated.

Mr. Mutuku, learned Senior Principal State Counsel opposed the appeal. He submitted that during the incident there was bright electric light. It was near a hotel called Kanyoni. A short distance from the scene, two police officers were on the beat. They lay an ambush and arrested the appellant who was walking away. Shortly thereafter the complainant arrived and identified the appellant as having been among those who robbed him. The appellant was searched but nothing was recovered on him. However according to the complainant, the appellant had given the stolen items to his accomplices who were never arrested. The appellant's case was not one of mistaken identity therefore. It took a very short time after the incident before he was arrested and instantly identified by the complainant. The issue of differences in names did not arise as on 11th may, 2005, the prosecution successfully applied to amend the charge sheet to bring in the proper names of the appellant. The names **Felix Otieno** had been given to the police by the appellant.

It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. It was so stated in the case of **Okeno.v. Republic (1972) E.A.32**.

A total of three witnesses were called by the prosecution, the complainant, P.C. **David Mogire** and P.C. **Festus Kiplimo**. It was the complainant's evidence that on 23rd October, 2004 at about 9 p.m the appellant and his three accomplices robbed him of Kshs. 2000/= and his siemen's phone whilst threatening him with a knife. According to him, there was electric light at the scene of crime and that he was able to observe the appellant and his accomplices for about 2 minutes. When done the robbers ran away not knowing that they were running towards police officers. The complainant screamed drawing the attention of the police officers who proceeded to arrest the appellant as the rest escaped. He was arrested by PW1 and PW3, who were on the beat when they heard his screams. Soon thereafter they saw three young men running towards them. They included the appellant whom they managed to arrest. Immediately thereafter, the appellant was identified by the complainant as being among those who had robbed him.

From the foregoing, it is apparent that the conviction of the appellant turned on the evidence of identification of the appellant at the scene of crime by a single witness, the complainant, in very difficult circumstances; and also in the manner that the appellant was arrested. There is no doubt at all that this was a case of a single identifying witness in an environment which was difficult. It was expected therefore that the learned magistrate would warn himself of the dangers of relying upon the evidence of a single identifying witness to find a conviction especially in the case of such a serious capital charge. He did not do so. It was settled long time ago in the well known case of **Abdalla Bin Wendo & another .v. Republic** (**1953) 20 EACA 166** and followed in **Roria .v. Republic (1967) E.A.583** that ***"….subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness***

respecting identifications, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free form possibility of error…….”

In this case, perhaps the only other evidence that would have pointed to the guilt of the appellant will have been the manner of his arrest. However as we shall endeavour to demonstrate later in this judgment, it was evidence of the weakest kind. The decision must then turn on the need for testing with the greatest care the evidence of this single identifying witness. In doing so, the court must bear in mind the wise counsel by the Court of Appeal in the case of **Maitanyi.v. Republic (1986) KLR 198**. The judges of appeal stated thus:-

“…….It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly indentify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it’s position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves. Otherwise who will be able to test with the “greatest care” the evidence of a single witness?.

There is a second line on inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant’s aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a latter identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters…….”.

In this case, the robbery was committed at night, 9.00 p.m to be precise. It was at night and therefore dark. Yet the complainant claimed to have identified the appellant among the robbers. How? There was, according to the complainant electric light where he was robbed. The said light was near Kanyoni hotel. However, the trial court made no inquiries as to the intensity of the said electric light, its position relative to the appellant and the time taken by the complainant to observe the appellant as to be able to identify him subsequently. From the evidence on record, it is apparent that the electricity light was not directly at the scene of crime. It was near Kanyoni Hotel. No inquiry was made as to the distance between the said Kanyoni hotel and the scene of crime. Again from the evidence on record, the robbery took about two minutes. Yet the complainant was seeing the appellant for the first time. From the way the robbery was executed, we do not think that the complainant was accorded any opportunity to observe the appellant and or his accomplices sufficiently to be able to identify him or them. As the complainant walked on, one person passed him, one remained behind and the two suddenly sandwiched him . Immediately thereafter they all wrestled him to ground, robbed him of the items at knife point and fled within two minutes. That being the scenario, how could the complainant have been able to identify the appellant among the robbers? He did not say whether the appellant was one of the robbers who passed him, remained behind and or sandwithched him. If the robbery took only two minutes and four people were involved, we doubt that the complainant would have had the presence of mind to focus only on the appellant among the robbers as to be able to identify him subsequently. If he saw him at all , it was for fleeting second(s).

Failure by the court to undertake the above inquiries are fatal. Indeed in the case of **Maitanyi** (supra) it was categorically stated that ***“….failure to undertake an inquiry of careful testing is an error of law***

and such evidence cannot safely support a conviction…." Yet this is what happened in the circumstances of this case.

The trial court also based its conviction of the appellant on the circumstances of his arrest. The trial court was of the view that ***"…….the evidence on record clearly shows that he was arrested while he was running away after robbing the complainant. The complainant followed the accused and his colleagues while screaming and he also saw the accused being arrested by P.C. Mogire (PW10 and PC Kiplimo (PW3)……..".***

Of course the evidence of chase and eventual arrest of a suspect is good and credible evidence on which a court can find a conviction provided the chase is continuous, unimpeded and there is no break in the chain of events. However, there is no evidence that the complainant chased the appellant towards where the police were. There is no evidence that even if there was such chase it was unimpended. There is also no evidence to show for how long PW2 chased the appellant if at all. Finally, there is also no evidence to show that during the chase there was light all along. If there was no light on the chase route, is it not possible that PW2 could have lost sight of his attackers and PW1 and PW3 ended up arresting a wrong person?. Is it also not obvious that if somebody is robbed in the circumstances as obtained in this case and he is soon thereafter confronted by police officers with a suspect, he is most likely to claim that the suspect in the police custody was infact one of the robbers?. That possibility exists. The two police officers did not witness the robbery. They only heard screams and soon thereafter saw three lads running towards them. However, PW2 was categorical that he was robbed by four people. What then happened to the 4th member of the squad? Is it possible that these three lads were merely running away fearing for their own safety following the screams and that the real robbers scampered in other directions? That possibility exists. Infact that possibility is reinforced by the evidence of PW3 which is completely at variance with that given by PW1 and yet they were on the beat together at the time. According to PW3, they heard screams coming from Kenya Commercial Bank direction and they started walking in that direction. It was then that they saw a man running towards them. They stopped the person in order to find out what was happening. They walked with him towards Sakagwa where a man identified him as having been amongst those who robbed him. On his part PW1 testified that whilst in Kisii town at about 9.p.m they heard screams. They decided to find out when they saw three young men run towards them. They laid an ambush. They ordered the three men to stop but they scattered. They managed however to arrest the appellant. As they were interrogating him, the complainant came and told them that he had been robbed by a group of people which included the appellant. The two police officers having been together at the material time could not have observed and appreciated the events differently. In the circumstances either both or one of them was not being candid with the court.

We accordingly allow the appeal, quash the conviction and set aside the sentence of death imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, **signed** and **delivered** at Kisii this 15th March, 2010.

ASIKE-MAKHANDIA **RUTH NEKOYE SITATI**
JUDGE **JUDGE**