REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 393 of 2007

STEPHEN MBACHIA KIHARA……..... APPELLANT

Versus

REPUBLIC…..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No.142 of 2007 by S. NDAMBUKI – Ag.PM)

J U D G M E N T

The appellant, **Stephen Mbachia Kihara,** was convicted of robbery with violence contrary to *Section 296 (2)* of the Penal Code and sentenced to the mandatory death sentence. Aggrieved by the conviction and sentence aforesaid, he lodged the instant appeal in which he faulted the learned magistrate for convicting him on insufficient evidence, evidence that was not corroborated, identification that was doubtful and finally the unfair rejection of his defence by the learned magistrate.

Briefly, the facts were that PW1, the complainant was on 7th January, 2007 at about 8pm walking home from Makuyu when he saw some men at a Mosque near Makuyu. He quickened his pace but the two men pursued him. When he approached the Muslim Cemetery one of them picked from the cemetery fence a panga, rungu, iron bar and a Nylon bag and turned towards PW1 very fast. He also noted that the one left behind him also suddenly had a panga and a rungu. He stood still and asked them what they wanted from him. According to PW1, the person whom he came to identify as the appellant grabbed him by the neck and strangled him and in the process he bit his tongue and injured himself. The other person hit him on the cheek and he fell down. The appellant then stepped on his face and forced him to lie down and warned him not to make a move as his colleague ransacked his pockets and removed his mobile phone make Alcatel 331 and cash Ksh.1200/=. After which the duo went back in the direction they had all come from. PW1 then got up and proceeded to Mjini to a grocery store owned by one **Jemimah Ndunge Mauli** (PW2) whom she informed of the robbery. He decided thereafter to go back and pursue those people who had robbed him. On reaching the Makuyu junction he saw someone coming towards Mjini. He took cover at nearby Mjini primary school. That person turned out to be the appellant. He confronted him and asked him to give him back his mobile phone but the appellant denied having it. He started running away. PW1 ran after him and got held him. They started struggling and members of the public intervened. Together with PW1 they took the appellant to the chief's camp and later to the police station. PW1 was later treated at Murang'a District Hospital. It was the evidence of PW1 that he easily identified the appellant because there was bright moonlight and also because of the flood lights from the nearby shops.

PW2, **Jemimah Ndunge** testified that on 7th January, 2007 at about 8pm whilst in her house, PW1 came and told her that he had been robbed of his mobile phone. He told her he was going to confront the robbers and left. Soon thereafter she saw PW1 struggling with another person and saying he could not

release him unless he gave him back his mobile phone. Other members of the public joined the fray but advised the two to go to the nearby Chief's camp. At 1 a.m PW3 **APC Francis Muge** returned to Mjini chief's camp to find **Sgt Muteti** at the camp with the appellant and PW1. He was briefed by **Sgt. Muteti** about what had transpired. PW1 infact narrated to him personally as to how he had been robbed by the appellant. He had some injuries and was referred to hospital. He confirmed that PW1 had identified the appellant from the T-shirt he had been wearing and from his physical features.

PW4 **Mohammed Hassan** from Murang'a police station testified as to how he re-arrested the appellant having been brought to the station by two administration police officers from mjini chief's camp. He booked the report and referred PW1 to Murang'a District Hospital. Later he charged the appellant with the offence. He stated that his investigations showed that PW1 was able to identify the appellant positively by what he was wearing and physical appearance.

The P3 form in respect of the injuries suffered by the complainant during the robbery was produced by a clinical officer, **John Maina Kabiru,** PW5. He assessed the degree of injury as harm

In his sworn defence, the appellant stated that on 7th January, 2007 at about 6.30 pm he went to Furugu bar and drank alcohol. On his way home at about 8.45 p.m he was hit by someone who approached him from behind and he fell down. While they were struggling, members of the public came and took them to the chief's camp and thereafter to the police station where PW1 was released. He denied having been involved in the commission of the alleged offence.

The learned magistrate considered the prosecution case vis a vis the defence put forward by the appellant and came to the conclusion that there was sufficient evidence of identification on which to convict the appellant.

When the appeal came up for hearing before us on 6th October, 2009, learned counsel for the appellant, **Mr Jengo** commenced his submissions by stating that the entire appeal turned on the question of identification. He contended that the identification evidence relied on by the trial court was not free from possibility of error as it was evidence of a single witness. The incident took place at night. The appellant was unknown to PW1. Though PW1 had said that he was able to identify the appellant on the basis of light emanating from a bulb, there was no identification parade conducted. The appellant was not identified at the scene. It was thus difficult for PW1 to identify the appellant as having been part of the gang that robbed him. PW1 never informed any member of the public who came to the scene about the robbery. Counsel further submitted that PW4, the investigating officer did not record the appellant's version of events and exhibited open bias against him. Counsel further submitted that the court had failed to consider the sworn defence of the appellant. The appellant had explained where he was during the attack. He was confronted by PW1 for no apparent reason and wrestled to the ground. He was not cross-examined on the defence. Therefore the defence carried a lot of weight considering that PW1's evidence was not corroborated. Finally, counsel submitted that the trial magistrate shifted the burden of proof to the appellant.

In support of all these submissions, counsel relied on the following authorities:-

(i) Ahmed Dima Huka & others V Republic C.A. CR. APP. NO.117 of 2003 (UR).

(ii) William M'Aringo V republic C.A. CR. APP. NO.18 OF 2001 (UR)

Mr. Makura, learned Senor State Counsel on behalf of the state opposed the appeal. He submitted that there was evidence that the appellant and another robbed PW1. There was bright moonlight and floodlights from nearby shops that enabled PW1 to identify the appellant. There was no need for identification parade as the appellant was arrested at the scene. The appellant's defence was duly

considered by the trial magistrate and rejected, rightly so according to the learned state counsel. On corroboration, counsel submitted that the evidence of PW1 taken together with that of PW2 and 3 amounted to corroboration.

It is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witness and to make due allowance in this respect. **(See Pandya V R. (1957) EA 336, Ruwalla V R. (1957) EA 570 and Okeno V R. 91972) EA 32.)**

We have anxiously considered this appeal. There can be no dispute that PW1 was attacked and robbed of the items set out in the charge sheet. There is no doubt that PW1 was assaulted and injured as it always happens in such incidents. It is also common ground that the incident took place at night. According to PW1 it was about 8 pm. It also common ground that the appellant was wrestled to the round by PW1 not far from the scene of crime, moments after the commission of the offence. The appellant was however not found in possession of any of the property stolen during the robbery. Hence his conviction was based on evidence of identification by a single witness in difficult circumstances.

In **Roria V R (1967) EA 583**, the court of appeal stated:

"**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:**

'***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.'***

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

We fully adopt the foregoing as we consider this appeal. We would also refer to the celebrated English case of **R V Turnbull (1976) 3 ALL E.R. 459** in which the Lord chief justice gave the following directions:-

"**First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.**

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

Finally we would refer to the case of **Cleophas Otieno Wamunga V R** quoted in the case of **Ahmed Dima Huka** (*supra*) in which the court of appeal stated as follows:-

"**We now turn to the more troublesome part of this appeal namely the appellant's conviction on counts 1 & 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW.13). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them…What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. 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 anger. 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 lord Widgery, C.J. in the well known case of R Vs Turnbull (1976) 3 All ER 549 at page 552 where he said:**

'***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."***

We think that we have sufficiently set out the law on identification by a single witness in difficult circumstances. How do these principles replicate in the circumstances obtaining in this case? There is evidence that there was bright moonlight as well as flood lights at the scene of the crime. Accordingly the two sets of light enabled PW1 to see the appellant clearly as to be able to subsequently identify him. The presence of the bright moonlight as well as the floodlights from the nearby shops has not been discounted by any other evidence. Apparently the robbers had pursued PW1 for a while. PW1 first saw them at a maize plantation just next to the mosque as they appeared from his left side. As he walked along he kept looking at them as he suspected that they were upto no good. On reaching Muslim cemetery there were flood light from some nearby shops. It is here that PW1 saw the robbers faces clearly. Infact he was even able to tell what the two robbers were each wearing. According to PW1 he noted that the appellant was wearing a blue striped short sleeved t-shirt and was shorter of the two. Minutes after the robbery when PW1 confronted the appellant and wrestled him to the ground and caused his arrest he was still in the same T-shirt. That T-shirt was tendered in evidence. The appellant did not seriously challenge this evidence either in cross-examination of PW1 and or in his defence. The assumption then must be that indeed that T-shirt belonged to him. Again it would appear that PW1 had the appellant in focus for considerable period of time from first when he saw him at the mosque through the Muslim cemetery and up to Sagana – Makuyu junction. If indeed as PW1 stated that there was bright moonlight and flood lights, which fact has not been discounted and or disputed then he could not have failed to see what the robbers were wearing. Indeed it would appear from his detailed recorded evidence that PW1 was a keen observer of events. It is for that reason that we are satisfied that he was in a position to positively identify the appellant even by the clothes he was wearing. He was even able to tell the movements of the appellant all through the episode. The appellant at some point ran past his accomplice and upto the cemetery fence where he picked a panga, rungu, iron bar and a nylon bag. It is also recorded that at some point, PW1 became over whelmed by the antics of the appellant and his accomplice and he stopped and confronted them by asking them what they wanted of him. This encounter must have been at an arms length and or in close proximity with appellant. With the sought of light available as alluded to by PW1, there is no way he could have failed to identify the appellant if not by face, then at least by the clothes he was wearing. It is his case that he identified the appellant both visually as well as by the clothes he was wearing. The evidence on record does not show that the appellant and his accomplice were in anyway disguised as would have made their identification difficult. PW1 claimed in his evidence that it was the appellant who grabbed his neck and strangled him. If he did so from the front then of course, the encounter was so close that PW1 could easily have seen him before he was strangled. We have no reason to think otherwise.

Soon after the robbery, PW1 saw the appellant and accomplice head back from where they had come from, that is, towards Makuyu direction. This is the same direction that PW1 later headed after notifying PW2 of the robbery. Shortly after this witness saw PW1 struggling with the appellant and saying that he would not release him until he had given him back his mobile phone. It is the evidence of PW1 that as he went to pursue the robbers, he saw the appellant and wrestled him on the ground. The appellant was the only person on the road at the time. To our mind, the image appearance of the appellant was still imprinted in the mind of PW1 when this was happening. After all he had just been robbed moments. According to Mr. Makura, this was 30 minutes after the robbery. However this assertion is not supported by the evidence on record. It could have been much shorter. Afterall, after the attack PW1 merely walked to PW2's grocery about 200 – 300 metres away, informed her of the robbery and went to pursue the robbers. The time which elapsed between the robbery and when the appellant was spotted and arrested was so short that PW1 could not have mistaken him for any other person. We are convinced that the appearance of the appellant and what he was dressed in was still fresh and imprinted in the mind of PW1 at the time such that he could not have possibly made a mistake in identifying and apprehending him at the time. And having been so arrested a police identification parade would have been worthless.

We have endeavoured to appreciate the evidence of identification as aforesaid out of realization that the learned magistrate had not subjected the evidence of the light available at the scene of crime to the inquiries alluded to in the authorities cited elsewhere in this judgment and also the fact that she did not warn herself of the dangers of relying on the evidence of a single witness on matters of identification in difficult circumstances. As a first appellate court we are however entitled to review the entire evidence tendered during the trial and reach our own conclusion. Accordingly, the failure to make inquiries by the learned magistrate notwithstanding we are on the recorded evidence satisfied that the circumstances obtaining during the robbery were conductive for positive identification of the appellant by PW1. Of course we have on our part warned ourselves of the dangers of relying on the evidence of PW1 to convict the appellant. However we are persuade that the circumstances obtaining made for easy identification of the appellant. Afterall the appellant was arrested at the scene. The only question is whether the appellant was the person who together with another had earlier robbed PW1. We are convinced that PW1 could not have fingered the appellant by mistake. They had been together in close proximity for a while. There was light provided by moonlight which according to PW1 was bright as well as floodlights. Floodlights by their very nature can never be dim and that is infact why they are referred to as floodlights. They are normally very bright. The appellant having not disguised himself, there was no impediment on the part of PW1 in seeing and eventually identifying him. From the detailed recorded evidence of PW1, we are satisfied that he was a keen observer of events and that was why he was able to describe what the appellant did during the robbery and his style and manner of dressing.

The appellant claims that PW1 did not tell any member of the public who came to the scene that he had been a victim of a robbery. That cannot possibly be correct. PW2 was a member of the public and PW1 told her that he had been robbed. Furthermore members of public escorted the appellant and PW1 to the AP Chief's camp. They could not have done so if they were not aware from PW1 what the appellant had allegedly done to him. At both the AP camp as well as the police station PW1 repeated that the appellant had robbed him.

The appellant too submits that there was no corroboration. However, he needs to be reminded that not every evidence in a criminal case require corroboration. There are however few cases where corroboration is certainly mandatory. However this was not such case. In any event if the evidence of PW1 is taken hand in hand with that of PW2 and PW3, corroboration is attained.

The appellant has also raised the issue of bias by the investigating officer in favour of PW1. However that allegation is not born out by the record. In any event, the investigating officer was not the trial magistrate. We do not see therefore how the alleged bias impacted on the learned magistrate during the trial.

The appellant too alleges that his defence was not considered. That too cannot possibly be correct. The appellant gave a sworn statement of defence that was duly considered by the magistrate and found wanting. It is true he was not subjected to cross-examination by the prosecutor on that defence. However

that does not mean that what he said was necessarily true. That defence was tested against the prosecution evidence and was found not to add up.

Finally, the appellant has raised the issue of the magistrate shifting the burden of proof to him. Learned counsel did not point out to us where in the judgment the learned magistrate had done so. On our part we have perused the judgment and we cannot find anywhere in that judgment where the magistrate has shifted the burden proof to the appellant as claimed.

In the result, we find no merit in the appeal which is dismissed.

Dated and delivered at Nyeri this 19th day of November, 2009.

J.K. SERGON

JUDGE

M.S.A. MAKHANDIA

JUDGE