



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Criminal Appeal 265 of 2008**

**DAVID WAIREGI NGANGA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original Conviction and Sentence in Senior Resident Magistrate's Court at Kigumo in*

*Criminal Case No. 3184 of 2007 dated 15<sup>th</sup> September 2008 by M. W. Mutuku – S.R.M.)*

**J U D G M E N T**

The appellant, **David Wairegi Nganga** was charged with one count of Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence are that on 16<sup>th</sup> October 2007 at Kangari Market in Murang'a South District within Central Province, he with others not before court while armed with dangerous weapons namely a sword and a whip robbed **Nelson Chege** of a mobile phone Nokia and cash Kshs.28,000/= all valued at Kshs.58,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Nelson Chege**. The appellant pleaded not guilty to the charge and he was tried. The prosecution lined up a total of 7 witnesses who gave testimony in support of the charge. The facts accepted by the trial court in respect of that count were as follows:-

On the 6<sup>th</sup> October 2007 at about 11.45 p.m. **David Wairegi Nganga** (PW1) was at his business premises known as Hunters Bar based at Kangari shopping centre. He asked the watchman **Joseph Kimemia Nguta** (PW2) to ensure that entry to the bar was closed. According to his testimony, the watchman had instructions to open for patrons past the drinking hours so long as they were known to the management. That night though past drinking hours the watchman nonetheless opened for a customer who PW1 described as brown in complexion. Immediately that patron gained entry, he ordered everyone in the bar to lie down. He was holding a pistol. Soon thereafter another person, presumably a colleague followed. He was armed with a sword and whip. He ordered the watchman to lie down. The two threatened to shoot at whoever did not comply with their instructions. The one with the sword attacked and cut one of the patrons. One of the two then ordered PW1 to surrender his mobile and money. The robbers took the mobile and Kshs.30,000/= from the drawer. He was also robbed of Kshs.28,000/= from his pockets. After a short while, the attackers left. PW1 immediately contacted Kangari AP Post and upon reporting the incident to AP **Sergeant Jamlick Mwaniki** (PW7) the sergeant proceeded in the company of two other officers to the home of the appellant and arrested him. PW1 had identified him as the one who had the sword and whip and who robbed him the items stated in the charge sheet. He further

told the court that the appellant had earlier been in the bar hence he recognised him.

PW2, a watchman at Hunters bar Kangari testified that on 6<sup>th</sup> October 2007 he opened the bar after hours to people he thought were customers. They were however armed with a pistol, a sword and whip. They ordered him to shut up. He confirmed that electric lights were on. After the attackers accomplished their mission, they left and locked the bar from outside. He was however unable to recognise and or identify any of them.

**Virginia Wambui Muhoho** (PW3) testified that on 6<sup>th</sup> May 2007 she was a bar maid in the bar. At about 11.00 p.m. the watchman walked into the bar being led by someone who was armed with a pistol. Lights were on at that time. They were ordered to lie down. It was her evidence that one of the attackers went to the counter and took money from the drawer. She too was unable to recognise or identify any of the robbers. **Mercy Njeri Njoroge** (PW4) too was a bar maid at the same bar. Her testimony was along the same lines as PW3. She too was unable to recognise any of the attackers.

**P.C. Dennis Odhiambo** (PW5) was a police officer based at Kigumo police station. He testified that on 7<sup>th</sup> October 2007 PW1 informed him regarding a robbery. He went to the scene on the very day. He was informed by PW1 that his attackers took Kshs.28,000/= from him and Kshs.30,000/= from the counter and a mobile. He further told the court that PW1 identified the appellant and led to his arrest.

**David Gathu** (PW6) an administration police officer testified that on 7<sup>th</sup> October 2007 he was at Kangari AP post when PW1 reported a robbery at his place of business. PW1 was able to identify one of the attackers. They immediately proceeded to the appellant's residence. He carried out a search by made no recovery.

The appellant was then put on his defence. He elected to give an unsworn statement of defence and called no witnesses. He testified that on 7<sup>th</sup> October 2007 he was sleeping in his house when police officers came calling and arrested him for no apparent reason. Later he was taken to Kigumo Police Station and charged. He stated that the case was a frame up.

The trial magistrate evaluated the evidence and made a finding that the robbery was committed on PW1 on the material night and that PW1 had recognised one of the robber who turned out to be the appellant. Accordingly he convicted him and sentenced him to the mandatory death sentence. The appellant was aggrieved by the conviction and sentence, hence this appeal.

The Petition of appeal filed by the appellant shows that he has raised three issues namely, the evidence of identification was not satisfactory, such evidence was inconsistent, contradictory and not corroborated. Finally, that the trial court rejected and or dismissed his defence without any good reasons.

At the hearing of the appeal, the appellant tendered written submissions which we have carefully read and considered.

**Ms Ngalyuka**, learned Senior State Counsel however conceded to the appeal. In doing so she submitted that the evidence tendered was not sufficient to sustain a conviction. PW1 was only the identifying witness. He had not known the appellant before. The circumstances of identification were not favourable for positive identification. There were contradictions as to how the appellant was arrested. PW1 stated that it was the PW5 who led to the arrest of the appellant whereas PW5 testified that it was in fact PW1 who led to such arrest.

The conviction of the appellant was entirely based on the evidence of identification of the appellant by a single witness "*A conviction resting on identity invariably causes a degree of uneasiness*". In the case of **Roria v/s Republic (1967) E.A. 583** by **Sir Clement De Lestang V.P quoting Lord Gardner, L.C.** 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 was designed to widen the power of the court to interfere with verdict said:-

“There may be a case in which identity is in question and if any innocent people are convicted to day 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 could 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. In **Abdalla bin Wendo and Another v/s Republic 20 EACA 168** the court of appeal reversed the finding of the trial judge on a question of identification and said “**Subject to certain well known exceptions it is trite law that an act 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 identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is evidence whether it be 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 acceptable as free from the possibility of error**”.

The Prosecutor in this case called seven witnesses, PW5 and PW7 being the police officers who either re-arrested and arrested the appellant, respectively, while PW1, 2, 3, 4 and 6 were witnesses who lived to tell the going on, on that fateful night but only PW1, was categorical that he identified the attacker.

In convicting the appellant the trial court held “*Considering the evidence herein as a whole, it is clear that there was no grudge or any reason which could have prompted the complainant to frame up the accused. I find the evidence of the complainant to be straight forward. At the same (sic) PW1 is a credible witness who gave evidence which I find to be consistent. I do not believe the defence put forth by the accused. What he said herein does not water down the prosecution evidence*”.

It has been held severally that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken – **Kiarie v/s Republic (1984) KLR 739**. The big question which ought to have been asked and answered by the trial court is, “*was there any remote possibility that the appellant could have been victim of mistaken identity or recognition?*”

PW1 stated that the 2<sup>nd</sup> attacker was armed with a sword, and came in holding the watchman (PW2) ordered him to lie down. He also ordered 1<sup>st</sup> attacker to fire at whoever defied their orders. This 2<sup>nd</sup> person was less than a metre from where PW1 was. PW1 stated that he did not comply with the order immediately but took time to comply and went under the seat and slept looking upwards. PW1 stated that it was the 2<sup>nd</sup> person who took his phone and ransacked his pocket going away with money Kshs.28,000/=.

The way to approach evidence of visual identification was succinctly stated by **Lord Widgery C.J.** in the well known English case of **Republic v/s Turnbull (1976) 3 ALL E.R. 549 at page 552**. No evidence was led to how long PW1, kept the 2<sup>nd</sup> man purported to be appellant under observation. It is possible that PW1 could only have had a fleeting glance on the 2<sup>nd</sup> man who was in there to rob, and who had given shooting orders for those who defied his orders. PW1 was the last to comply and “*went under the seat and slept looking upwards*”. There is evidence as to the action taken by the 1<sup>st</sup> or 2<sup>nd</sup> man following PW1’s refusal to comply immediately to their order. We are not persuaded at all that, that PW1 defied the thugs order as he wanted the trial court to believe. We are satisfied that PW1 must have panicked like everyone else in the bar and went under the table to avoid being shot at. He must have been shocked and fear on seeing the pistol. That shock was accompanied by confusion. That being the scenario accompanied by failure by the magistrate to make inquiry as to length of time the witness had assailant under observation, there is a remote possibility that the appellant may have been a victim of mistaken identity or recognition.

PW1 further stated that the appellant mistakenly had been in the bar earlier in the day. However PW1 did not explain whether the appellant was a stranger or was a person known to him. PW1, didn’t even state what the appellant had gone in the bar to do and how long the appellant stayed in the said bar, and whether, they engaged or held any discussion with him. In the circumstances we are of considered view

that though the bar was lit with electricity, however the circumstances obtaining were not conducive for a free and positive identification, a recognition of the appellant.

It is also in evidence by PW1 that, when he reported the incident to an AP camp he mentioned the appellant. However PW1 does not explain how the appellant was known to him was it by the name, place of stay, or place of work and the like. Secondly he did not tell them that he was familiar with him and or gave the description of the appellant or even clothes he had worn to have enabled those APs to know or identify the appellant.

PW7, the arresting officer, AP from Kangari Chief's camp, received a report from PW1 on 7<sup>th</sup> October 2007, day after the robbery. He stated "that he was able to identify one of the attackers. PW5 called two officers and proceeded to where the suspect was staying. However PW1's evidence is that, the administration police knew where the appellant could be found. Now who described the appellant to those Administration police – PW7. However PW5 stated that they were led to the arrest of the appellant by PW1. This is a major contradiction and goes to the root of the prosecution case. It would appear from the evidence that the Administration police somehow knew where the appellant could be found. It is suggestive that PW1 himself, did not lead to appellant's arrest. Where description of the person or a suspect has not been given out in detail, Either physically or by name, the subsequent arrest of the suspect may have been based on speculation, and the accuracy to positive identification is in question.

There is no reasonable suggestion to conclude that it was either PW1 or PW5, lead to where the appellant was found sleeping. No recovery was made found in the appellant's house but PW5 said he found appellant asleep and the door was opened by appellant's wife. PW1 admitted that the appellant was drunk. He also stated that day had rained. However it is worthy to note that, no exhibit of assorted wet and muddy articles i.e. clothes or shoes were noted and seized by the search party. And this fact would have acted as a circumstantial evidence, linking the appellant to the crime. And strengthen the doubt, of appellant participation to the crime, a reasonable doubt to have find the appellant's contention in defence that, reason of his arrest wasn't spelt out or was only known to AP's who arrested him. For all these reasons this appeal ought to succeed in totality. Accordingly we allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered at Nyeri this 4<sup>th</sup> December 2009*

**J. K. SERGON**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**