REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 5 of 2006

CHARLES NJOROGE NDURA……...…..…APPELLANT

-AND-

REPUBLIC…….…... RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Ms. Lucy Mutai dated 6th

January, 2006 in Criminal Case No. 1091 of 2004 at Githunguri Law Courts)

JUDGEMENT OF THE COURT

The main charge brought against the appellant herein was robbery with violence contrary to s.296 (2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, jointly with others not before the Court, were on 4th June, 2004 armed with dangerous or offensive weapons namely *pangas* and iron bars, as they robbed *Richard Njihia Kibunja* of his pair of leather shoes valued at Kshs.750/= and cash in the sum of Kshs.140/=, and at, or immediately before, or immediately after such robbery they applied actual violence upon the said *Richard Njihia Kibunja*.

The appellant faced a second charge in count 2, that of being in possession of bhang, contrary to s.3(1) and (2) of the Narcotic Drugs and Psychotropic Substances (Control) Act (Act No.4 0f 1994). The particulars were that the appellant was, on 23rd July, 2004 at Kiriko Village in Kiambu District, within Central Province, found being in possession of 40 rolls of bhang in contravention of the said Act.

The appellant was charged in count 3, with the offence of resisting arrest contrary to s.253(b) of the Penal Code (Cap.63). The particulars were that, on 23rd July, 2004 at Kiriko Village in Kiambu District, he resisted Police Force No. 45451 ***Sgt. Fred Muganda,*** Police Force No. 66421 ***P.C. David Njiraini,*** Police Force No. 68936 ***P.C. Edin Adi***, Police Force No. 71442 ***P.C. Kenneth Mwenge,*** all Police officers who at the material time were acting in the due execution of their duties.

After six prosecution and two defence witnesses gave testimony, the trial Court gave judgement carrying a mandatory death sentence on the first count, and a three-year term of imprisonment on the 2nd count. The Court acquitted the appellant of the charge in the 3rd count.

The appellant in his petition of appeal contended that:

(i) the trial Court had erred in law and in fact by convicting on the basis of uncorroborated evidence of recognition;

(ii) the evidence of PW1 and PW3 bore contradictions, and lacked documentary authentication;

(iii) the first report of crime relied on by the Court was not produced at the hearing;

(iv) there was an error of fact and law, in convicting on the 2nd count, as the offending narcotic drug was not found in appellant's possession;

(v) the trial Court erred in fact and in law, by rejecting the defence evidence;

(vi) PW6 at some stages gave testimony without being sworn;

(vii) there was inadequate record on language used in Court, on some occasions.

Apart from his written submissions which he availed to this Court, the appellant made oral submissions in which he challenged the testimony of PW1 as not being truthful. He contended that the complainant (PW1) who is his cousin had, following the robbery attack, gone to PW3 (another cousin of the appellant) but had failed to tell PW3 about the said attack. He said it was significant that following the robbery attack, it took more than a month before he was arrested, and he attributed the arrest to grudges between his mother and the complainant (PW1).

Learned State Counsel ***Mr. Makura*** opposed the appeal, and supported both conviction and sentence. He noted that PW1's testimony showed how he had been attacked and robbed at 1.30 a.m. on the material night, and the fact that there were security lights at the *locus in quo*, at the time, enabling PW1 to identify the appellant. As PW1 well knew the appellant as his cousin, counsel urged that the identification mode applicable was that of *recognition*. PW1, who had relied on both electrical and moon-radiated illumination to see the appellant, had reported the matter to the Police, giving the name of the appellant.

Learned counsel noted that the appellant had been arrested immediately after the commission of the offence, and following the making of a report at Githunguri Police Station.

Counsel submitted that a narcotic drug (*bhang*) had been recovered from the appellant by PW4 in the presence of PW5; and PW5 had taken the drug for testing at the Government Chemist, where it was confirmed that it was a narcotic drug.

Counsel urged that there was firm and sufficient evidence supporting the 1st and 2nd counts of the charges, and fully justifying the conviction thereon. He submitted that the evidence tendered by witnesses was credible, and well corroborated.

Mr. Makura submitted that the trial Court had carefully considered the defence testimonies, and found the same not at all to discredit the overwhelming evidence of the prosecution witnesses.

Counsel contested the appellant's claim, that PW6 had at any stage given testimony unsworn; this was not the position as shown on the record. Counsel also contested the claim that the language used in Court had at any stage, been improperly recorded; on 30th July, 2004 when plea had been taken, it was shown that translation had been made, from English to Kiswahili to Kikuyu. Such was also the case on 21st January, 2005; and thereafter the appellant had instructed an advocate who appeared throughout, and who cross-examined every prosecution witness ? so that, throughout the proceedings, no prejudice had been caused to the appellant.

Mr. Makura urged that the appeal lacked merit and should be dismissed.

In the evidence, PW1, ***Richard Njihia*** testified that he is a businessman at Githunguri township. On 4th June, 2004 at 1.30 a.m. he was walking from the town to his home, when he was confronted by three men, just as he made for the gate into his home. The attackers cut PW1 on the head with a sharp object; and as he endeavoured to open his gate, they hit him with a metal bar on the mouth, knocking off one of

his teeth. After he fell down, PW1's pockets were searched, and his money, Kshs.140/=, grabbed by the attackers. They took his wallet, his keys, and the shoes he was wearing. As they expressed mockery of PW1 for failing to carry significant sums of money on him, they stabbed him below and above the right eye, before taking off.

It was PW1's testimony that he did identify one of his attackers, and this was the appellant herein. There were security lights at the *locus in quo***,** and this enabled him to see the appellant who was known to him, being a cousin of his. When he saw the appellant, the appellant was wearing a jacket (but he did not ascertain its colour), and wielding a *panga* (metal cutter, or cleaver). It was PW1's testimony that the appellant had cut him on the head. He said the other two attackers were not masked, and if he saw them he would be able to identify them.

PW1, after remaining at the *locus in quo* for a while , was able to open the gate and to access his mother's house. He was then taken to Kiambu District Hospital, where he was held as an in-patient for two weeks. He made a statement to the police giving the name of the appellant herein, during the period when he was hospitalized. PW1 said he had had no disagreements with the appellant prior to the night-attack. He did not know how the appellant was traced and arrested by the Police.

On cross-examination, PW1 said those who had attached him came from behind stacks of firewood intended for sale; two of the attackers were short, but one was taller; there was nobody else at the scene, and nobody had been behind him as he walked towards his gate; it was a moon-lit night; the attackers were wearing jackets; they did not talk to PW1 as they launched their attack from the front; there were security lights from a firewood-selling kiosk nearby.

PW2 ***Dr. Samson Gitonga*** of Kiambu District Hospital testified that PW1 had been examined at that hospital in June, 2004; he had been discharged on 11th June, 2004 and had had a history of assault on 4th June, 2004 by three men who were known and one of whom had been identified.

PW2 testified that the complainant had a deep-cut wound on top of the head, 4 inches long; and scars on the frontal region of the head which were not associated with the history; he had one tooth missing. Examination had taken place one hour after the injury, and it was believed that a sharp and a blunt object would have been used to cause the injuries. PW2 assessed the degree of injury as grievous.

PW4, Police Force No. 66421 ***P.C. David Njiraini*** of Githunguri Police Station was on duty on 23rd July, 2004 at 3.00 p.m. when he was asked to join one ***Sgt. Muganda*** on a trip to Kiriko Village to arrest the appellant herein. It had been reported that the appellant had on 4th June, 2004, at about 1.00 a.m. robbed the complainant of certain items, and that the appellant had at the material time been in the company of others.

PW4 and his fellow officers had found it difficult to arrest the appellant; the trial Court record states: "He [appellant herein] turned violent, took a *rungu* [club] and [staged] a struggle, declining to be handcuffed. He threatened us with the *rungu.* We disarmed him……."

PW4 testified that he and his fellow officers conducted a search in the appellant's house; they turned the mattress on which they had found the appellant lying, and there they found a polythene bag, black in colour; in this bag they found 40 rolls of *bhang*. They arrested the appellant and escorted him to the Police Station where charges were later laid against him. The appellant's brother had already shown the appellant to the Police officers, and they had received an indication of the location of his home, earlier.

PW5, Police Force No. 71442 ***P.C. Kenneth Mwenge*** of Kiambu C.I.D office, who at the material time was serving at Githunguri Police Station, corroborated PW4's testimony in material particulars: he had been part of the Police team which, on 23rd July, 2004 went out to arrest the appellant herein. The appellant who was found lying on his bed, attempted an attack on the Police officers, but he was overpowered and arrested; and 40 rolls of *bhang* were found in the appellant's house.

PW6, Police Force No. 45451 ***Sgt. Fred Muganda*** testified that on 4th June, 2004 at 1.30 a.m. he had received a robbery report, made by one ***Anthony Njuguna***, brother to the complainant. He later visited the complainant in hospital, and took his statement from the hospital-bed. The complainant had said that he was attacked by three men armed with iron bars, *pangas* and *rungus*, and that the material night was moon-lit, and was also illuminated by security electrical lights in the neighbourhood of the *locus in quo*. The complainant had indicated to PW6 that he had identified one of the attackers.

On the basis of information given by the complainant, PW6 and fellow-officers, on 23rd July, 2004 at about 1.00 p.m. traced the appellant's house. PW6 and his fellow-officers found the appellant in bed, and the appellant then attempted an attack on them; they struggled with him for some 30 minutes before disarming, handcuffing, and escorting him to the Police station to be detained and charged. Before leaving the appellant's home, the Police officers conducted a search, and recovered 40 rolls of *bhang*, from under his mattress which was laid on the only bed in the room.

On cross examination PW6 said that he had not, at the beginning, received the appellant's name as the suspect, but the appellant's name was given to him when he visited the hospital for the purpose of taking the complainant's statement. The Police officers visiting the appellant's house had established that the house in which he was arrested, was indeed his, and it was not known if he was sharing its occupancy with anyone else.

After learned counsel ***Mr. Mbugua*** made preliminary submissions on behalf of the appellant, the learned Magistrate ruled that a *prima facie* case had been established, whereupon the appellant elected to give sworn evidence and to call one witness.

The appellant testified that he had not attacked the complainant as alleged, on the material night; he had been at his home the whole night, and did not know when the complainant would have been attacked.

The appellant denied ever seeing the 40 rolls of bhang mentioned in the 2nd count of the charge, until the time he was brought before the Court. He said he does not use bhang nor sell bhang.

On cross-examination, the appellant said he had not been arrested inside his house; and that the arresting officer was one ***P.C. Edwin,*** who had not been called as a witness.

DW2, ***Tabitha Wambui Ndura,*** the mother to the appellant, testified that there had been a dispute between the complainant and the appellant over a farm of Napier-grass. She testified that on the occasion of arresting the appellant on 23rd July, 2004 the Police had not had to enter any house in the compound, and that the appellant made no threats against the arresting officers. She testified that *bhang* had not been recovered from the appellant's house, and that the Police officers took nothing from the home other than the appellant himself. DW2 said she knew nothing about the robbery for which the appellant was being charged.

In the submissions, learned counsel ***Mr. Ndung'u*** urged that the prosecution had not proved their case beyond reasonable doubt. It was submitted that whereas the robbery which is the basis of the charge, took place after mid-night, there had been no eye witness to the incident, and none of the items robbed had been recovered from the appellant; and so, there was nothing to connect the appellant to the robbery; and even the weapons allegedly used by the robbers were not recovered with the appellant. The brother of the appellant (PW3) who first reported the robbery incident, had not given the name of the suspect to the Police, and the name of the appellant herein came only later, from the complainant himself. Counsel urged that the Court should not accept the uncorroborated evidence of identification by the complainant at night.

With regard to the 2nd count, counsel urged that there was no evidence to show that narcotic drugs had been found in the appellant's pockets or, indeed, in his possession. It was contended that no evidence had been adduced as to who owned the house in question, or the bed under which the bhang was found. Counsel urged that physical control and custody of the house in question had not been established to have

rested with the appellant herein.

We have paid special attention to the mode of proof of the first charge, which would lead to the mandatory death penalty if proved. On this charge the learned Magistrate remarked:

"**On the 1st count I found the prosecution evidence very overwhelming, which evidence was not challenged or discredited by the defence. I convict the accused as charged on the 1st count……..**"

Although we grant that the trial Court's perception as expressed in the foregoing passage would have been judicially entertained in that Court, we believe a substantive explanation of that perception was required by law. The law on the formulation of a judgment, and which we hold to be mandatory especially where the consequence of a "guilty" verdict is fatal, is stated in s.169 (1) of the Criminal Procedure Code (Cap.75, Laws of Kenya), which thus reads:

"**Every such judgment …..shall contain the point or points for determination, the decision thereon and the reasons for the decision……..**"

The required ***reasoning*** for such a decision, to be given by the trial Court, must, we would hold, touch on the fundamental point of *linkage* of the accused to the offence charged, and thus, must deal, in a proper case, with a key nexus-issue which may be relevant, such as ***identification***.

It was the contention of the appellant that, in the night, and in the manner in which the robbery attack had been unleashed upon the complainant, it would not have been possible for him to so clearly identify the appellant as the suspect. It has been urged, and we think, with justification, that corroboration was necessary for the complainant's identification-testimony – and this, even more so given the fact that the name of the appellant had not at all been given to the Police during first reporting. The appellant's name only came up much later, after the complainant had remained confined to a hospital bed for a relatively long period of time.

We must be circumspect, on the question of visual identification at night, and we will not readily adopt the position that the appellant was positively identified at the time, in the absence of corroboration or other evidence which removes doubts as to identification. In an earlier decision, ***Evans Kamau Wangari & Another v. Republic,*** High Court Criminal Appeal Nos. 206 of 2005 and 208 of 2005 (consolidated), we have remarked in circumstances akin to the instant ones, that:

"**It is an established principle of law that certain safety measures have to be taken to ensure reliability and safety of evidence, as a basis for conviction, where *visual identification* is concerned".**

We derived that position from a careful reading of the law, and in particular from a detailed reference to ***Blackstone's Criminal Practice 2002*** (12th ed., ***by Peter Murphy and Eric Stockdale***) (Oxford: OUP, 2002), p.2304, para. F 18.2 where the following passage appears:

"***The visual identification of suspects or defendants by witnesses has for many years been recognized as problematic and potentially unreliable. It is easy for an honest witness to make a confident, but false, identification of a subject, even in some cases where the subject is well known to him. There are several possible reasons for errors of this kind. Some persons may have difficulty in distinguishing between different subjects of only moderately similar appearance, and many witnesses to crime are able to see the perpetrators only fleetingly, often in stressful circumstances. Visual memory may fade with the passage of time and may become confused or distorted by suggestive influences from photographs or other sources of contamination. There is evidence that false identification can sometimes be caused by a process known as unconscious transference, in which the witness confuses a face he recognizes from the scene of the crime (perhaps that of an innocent bystander) with that of the offender. Such problems may then be compounded by the understandable, but often misguided, eagerness of many witnesses to help the Police by making positive identification.***"

The considerations embodied in the foregoing passage lead this Court to the perception that it will not be

safe and *secure* to find the appellant guilty on the first count, and we will, therefore, acquit him on that score.

We are not of the same view, however, as regards the second count, of being found in possession of narcotic drugs contrary to s.3(1) and (2) of the Narcotic Drugs and Psychotropic Substances (Control) Act.

PW4 was quite specific in his testimony, on the fact that the house wherein the offending narcotic drugs were found, was that of the appellant; in that house there was one bed and one mattress, under which the drugs were found even as the appellant lay atop; and the appellant when confronted by the Police, showed hostility and aggressiveness. This is an account confirmed and corroborated by PW5 and PW6. Of the testimonies of these several witnesses, the learned Senior Resident Magistrate who observed demeanour in Court, thus recorded:

On the 2nd count I ….found the prosecution evidence very tangible and very consistent and convincing…….I had no reason to doubt the same. The prosecution's evidence on the second count was not shaken by the defence……"

We in this Court had no opportunity to observe the demeanour of the three witnesses, and, in line with established principles of law (***The Glannibanta*** (1876), 1 P.D. 283, at p.287 ***(James, Baggallay, L.JJ. & Lush, J):*** "[The appellate Court] should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect"), we acknowledge as being truthful the testimonies of PW4, PW5 and PW6 in respect of the second charge.

We ***allow*** the appellant's appeal in respect of the ***1st count,*** and set aside the conviction and sentence in this regard. We ***dismiss*** the appeal in respect of the ***2nd count***, uphold the conviction, and affirm the three-year term of imprisonment imposed by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 12th day of February, 2008.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu JJ

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Mr. Makura

Appellant in person