REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 161 OF 2005

LOISE KAGURE NJERU..…….. ACCUSED

VERSUS

REPUBLIC...…… RESPONDENT

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 171 OF 2005

BERNARD WACHIRA NJERU..…….. ACCUSED

VERSUS

REPUBLIC...…….. RESPONDENT

(Being an appeal from the judgment of L. Nyambura,

Senior Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 2472 of 2005 at Kigumo)

JUDGMENT

At the hearing of the appeal of both appellants the court consolidated the appeals making Appeal No. 161 of 2005 the lead file and the appellant therein the first appellant. The appellants were charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. Both appellants were convicted as charged by the Lower Court and were sentenced to death. They were aggrieved by the conviction and sentence and have therefore preferred this appeal before court. This is the first appeal. In deciding this appeal we are guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

"***As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect***

(see Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570)."

In the Lower Court the first appellant was the fourth accused and the 2nd appellant was the 1st accused. PW 1 was driving a taxi. On the 9th August 2003 at a place near Celebration Hotel at Karatina Town a young man came to him and asked him if he could take him to Mathaithi where he was to pick someone else. They negotiated the fare and agreed to a charge of Kshs.100/-. PW 1 said that he had not seen that man before. When they began on their journey the man sat in the front passenger's seat. PW 1 said that he saw him clearly. As they drove about 100 metres away they found a lady near the Co-operative Bank Karatina. The lady entered the vehicle and sat at the back left of the car. The man directed him to drive them to Mathaithi. Near Mathaithi Secondary School the passengers requested PW 1 to stop. When he stopped the lady pointed a gun on his head and ordered him to remove everything he had. The instructions to remove his properties were coming from both passengers. The man in the front seat began to ransack his pockets and removed Kshs.8000/-, his mobile phone and a wallet containing personal documents. As the man did that the lady continued to hold the pistol to his head. The incident took ten minutes. PW 1 had the impression that there were other people outside in the dark because when the two passengers disappeared they seem to be talking to other people. PW 1 because he was threatened by the robbers did not report to the police until the following day. He was later called to the Nyeri Police Station and requested to attend an identification parade. At the identification parade he found people who were over ten in number and he was able to identify both the appellants. On being cross examined PW 1 said that there was light at Celebration Hotel and at a nearby Petrol Station which enabled him to see the second appellant clearly. He described the clothing and stature of the second appellant. In respect of the 1st appellant he said that he saw her clearly and even recalled that she had a scar on her forehead. He remembered the clothing she was wearing and that she had braided her hair. Although he admitted that he previously was a newspaper vendor he denied having met the first appellant during that time.

PW 2 a Police Officer narrated how the parade was conducted. He stated that it was properly conducted and PW 1 was able to identify the appellants. PW 4 was the Arresting Officer. He gave evidence of how he arrested the first appellant but that she later escaped from custody. She was later arrested over a case in Nakuru and this officer had to apply for her production for this case. The appellants were put on their defence. The first appellant stated that at the material time she was at her house. She prepared her child to go to school then spent the day in the market and later went home and after super slept. She faulted the identification parade by saying that at the time she was the only lady on the parade who was six months pregnant. Second appellant also denied being at the scene and instead said that he was at his home. He said that he had previously met the complainant in this matter. The evidence against the appellants is one of identification. The general principles on the standard of evidence required in the case of identification were well set out in the case of *Cleophas Otieno Wamunga vs Republic (1989) KLR 424*, this court stated:

"***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 danger. 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 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."***

In the case of *Kamau v Republic (1975) EA 139 the East African Court of Appeal* had the following to say;-

"***the most honest of witnesses can be mistaken when it comes of identification."***

The taxi driver PW 1 clearly saw the second appellant as they negotiated the taxi fare. During the ride the appellant sat next to him. Similarly he said that he saw the 1st appellant clearly because she stood near a light where they picked her. Additionally, PW 1 was able to pick both appellants at their individual identification parade. We find that the evidence relating to the identification of both appellants was clear and without error. We have warned ourselves as is required but having so warned ourselves we find that the complainant was able to identify both appellants because of the lighting that was emanating from the buildings close by. PW 1 displayed clarity in his description of his contact with the appellants. He was able to describe their clothing, the second appellant's stature and the scar on the 1st appellant. We have considered the alibi defence raised by both appellants. The law does not lay a burden on an accused person to prove the alibi. Having considered the prosecution's evidence in its entirety we find that the evidence of PW 1 is believable and credible. The second appellant in his defence stated that he was kept in the police custody for sixteen days. From the record we are unable to confirm that. The charge sheet both in the original file and in the appeal file does not legibly show the date of arrest of the appellant. There is evidence of the Arresting Officer that the first appellant after the initial arrest on 16th September 2003 she escaped from custody and was traced having been arrested over another case in Nakuru. From the record before us we are unable to know whether the appellant's Constitutional rights were violated since PW 4 the Arresting Officer did not state when he arrested the second appellant. Having considered the Lower Court's evidence we are satisfied that the prosecution met the required criminal standards of proof beyond reasonable doubt. We find that the conviction of the appellants was safe. The appellants' appeal therefore is hereby dismissed.

Dated and delivered at Nyeri this 29th day of May 2008.

MARY KASANGO

JUDGE

M.S.A MAKHANDIA

JUDGE