REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 397 of 2005

JAMES NGUGI KAGWI……..……..……..APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(From the original conviction and sentence in Criminal Case No. 3 of 2005 of the

Principal Magistrate's Court at Kikuyu by M.W. Murage – P.M)

J U D G M E N T

The appellant **JAMES NGUGI KAGWI** was charged with the offence of robbery with violence contrary to section 296(2) Penal Code, that on 3rd day of January, 2005 at Nyathuna Shopping Centre in Kiambu District jointly with others not before the court, robbed **JAMES KIARIE NJUGUNA** of cash Kshs 2,850/- and a bicycle make Phonex valued at Kshs 3,000/- all totaling Kshs 5,850/- and at or immediately before or immediately after the time of such robbery, used actual violence to the said James Kiarie Njuguna. He denied the charge and upon conclusion of the case, he was sentenced to death. He now appeals against both that conviction and sentence.

The case presented to the trial court through the evidence of James Kiarie Njuguna(PW1) was that on 3rd January, 2007 at about 7.00p.m. he was on his way from Nyathuna Shopping Centre – he had a bicycle and on the way he met the appellant who was accompanied by Daniel and Muniu. Daniel held PW1's bicycle and PW1 fell. PW1 asked the appellant what they wanted – whereupon Muniu took stones and hit PW1 on the head and he lost consciousness. When PW1 woke up, the bicycle and Kshs 2,000/- was gone as had the appellant's group. PW2 APC Francis Ngugi is attached to Gikuai AP camp and he received a report about the incident from PW1. On 18th January, 2005 he arrested appellant and took him to Kikuyu police station and handed him over to PW3 Nicholas Kakula who then charged appellant. No recoveries were made.

The complainant was then medically examined by PW3(James K. Kamuwa), a Clinical Officer who found that he had a deep cut on the forehead probably caused by a sharp weapon. He filled the P3 form produced as exhibit 1.

On being put to his defence, the appellant gave unsworn testimony saying he is a peasant farmer. On 10th he went to work as he did on 17th too. He met police who stopped stopped and took him to his home, searched asked him for a bicycle. Then later he saw PW1 who told him to pay his debt with interest - it all steemed from ill will due to friendship of complainant with a girl whom appellant claimed to be his girlfriend appellant and appellant says that is why he was arrested.

Upon considering all the evidence tendered before her, the learned trial magistrate noted that complainant told the court that he was able to identify the people who attacked him by their names and that he narrated in detail how the three attacked him before taking away his property. He knew appellant well as they were from the same village. The learned trial magistrate in considering appellant's defence noted that he raised an issue which never featured in cross examination and found that defence to be an afterthought.

Her conclusion was this:-

"***I have weighed the evidence before court. I find that accused was positively identified by the complainant as having been among the attackers who assaulted, injured and robbed complainant. His defence is an afterthought and does not challenge prosecution case."***

In his petition of appeal, it was the appellant's contention that the learned trial magistrate erred by:-

1. ***Relying on identification evidence of a single witness and not warning herself of the inherent dangers involved.***

2. ***Convicting him on recognition matters not considering:-***

a. The circumstances surrounding the purported identification were not favourable for a positive identification.

b. Light used was not enough for positive identification.

c. The time the incident took was not revealed (an abrupt attack and disappearing which was fleeting).

3. That apart from the names there were no description of the assailants and that people alleged to have pointed him out to police did not testify and no identification parade was carried out.

4. The evidence was uncorroborated, contradictory and inconsistent.

Appellant filed supplementary grounds of appeal which still dwelt on the circumstances leading to his identification and that the defence was not displaced by the prosecution case.

In his submission, the appellant pointed out that his conviction was based on the evidence of a single identifying witness at the locus in quo and argues that there was no source of light revealed to enable the court determine how he was able to identify his attackers and argues that it is due to this lack of adequate lighting conditions, that the complainant was not able to give a description of the clothes his attackers wore on their physical appearances. Appellant seeks to rely on the decision of ***Juma Ndondia versus Republic Criminal Application 136 of 1983(Nairobi)*** which held that:-

"***Identification of the suspect was unsatisfactory because the witness were not asked to describe the assailant's features, clothings or anything else that could enable them to recognize their assailants later."***

It is the appellant's contention that there is a possibility of PW1 having made a mistake on recognition. Appellant submits that there are so many Ngugi's in that village so that identification by name only was not enough.

Appellant also draws to this court's attention the fact that he was arrested 15 days after the incident and says there is no evidence to suggest that he had gone underground and wonders why PW1 did not give leads to arrest Muniu and Daniel and that it is not claimed anywhere in the evidence that they had gone underground.

The learned State Counsel Miss Gateru opposed the appeal both on conviction and sentence insisting that appellant was positively identified by PW1 since appellant was someone previously known to him prior to the incident and that identification by recognition is much more reliable than identification by a total stranger. She further argues that during cross examination PW1 indicated that it was not so dark and he was able to see the appellants. As regards the appellant's defence Miss Gateru submits that it was considered by the trial magistrate and dismissed. Basically the appeal revolves around the question of identification by a single witnesses and the circumstances surrounding that identification. PW1 in his evidence in chief stated at 7.00p.m. he was going to the shopping centre – meaning by the time he did and completed his errands it was some minutes after 7.00p.m. 7.00p.m. would fall into what is described as hours of darkness, so how was PW1 able to identify the appellant? On cross examination PW1 says "***It was not so dark, I identified you."***

But what light was there so as to make it **NOT SO DARK**? Were there still some sun rays peeping in the horizon, moonlight, a lantern, electricity lights? This is not disclosed from PW1's evidence.

We indeed do find that at the hours that the attack took place, the visual identification of the attackers without any disclosed light aiding the identification becomes problematic . It is possible that the witnesss may have made an honest mistake. This is purely on the basis that there is no evidence disclosing just how PW1 was able to distinguish in the dark, the identity of his attackers.

Under the prevailing circumstances, then we do consider that it was dangerous to rely on the evidence of PW1(a sole identifying witness) and that the conviction was unsafe.

Consequently we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 27th May, 2008 at Nairobi.

J.B. OJWANG **H.A. OMONDI**

JUDGE. **JUDGE.**