

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 152 of 2004

JAMES MAINA WANJIRA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment of J.N. Nyaga, Senior Resident Magistrate in Senior Resident Magistrate's Court Criminal Case No. 2312 of 2004 at Karatina)

JUDGMENT

The appellant was charged with robbery with violence contrary to **Section 296(2)** of the Penal Code and on count two, on attempted robbery with violence contrary to section 297(2) of the penal code. After the trial at the lower court the appellant was on 23rd April 2004 convicted on the 1st count and sentenced to death. He was dissatisfied with his conviction and sentence and has therefore filed the present appeal.

As the first Appellate court, we are expected to submit the whole evidence of the Lower Court to a fresh and exhaustive examination. In so doing we must weigh the conflicting evidence and draw our own conclusion. Further in so doing we should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. See the case of **OKENO vs R [1972] EA 32**.

A group of eight people descended and forced their way into PW 1's house on 21st/22nd March 2003. PW 1 did not recognize any one. PW 2 recognized a person not before court in this appeal. The appellant herein was the 7th accused person in the Lower Court. PW 5 the daughter of the complainants' gave clear evidence of her identification of the appellant. She had had an encounter with the appellant a day prior to the robbery. The day before at 5.20p.m. while she was attending to the cattle in the company of another girl they met the appellant. That same evening they suffered a robbery at her parent's home. That was when the eight people came to their home. PW 2 said that at his home there was electric light both on the outside and the inside of the house. With the aid of that light he was able to identify one of the robbers who is not affected by this appeal. PW 5 said that during the robbery she saw by the aid of an electric light at the window one of the robbers who was standing outside that window and recognized him as the person she had seen when she was attending cattle during the day. She said that the window was made of glass. That the area outside the window was well lit. The person she saw was the appellant. She noted that he was still dressed in the same way he had been in the day. He was wearing a black coat. She noted that he was brown in complexion and had a scar on his face. She recognized him from his physical appearance and his clothing. As he stood by the window he was one metre away from her and during that time he was asking her for money. They were together for ten minutes. On 30th April 2003 PW 5 identified the appellant at an identification parade. On being put to his defence the appellant denied the charge. In his defence however he failed to state where he was on the material day though strictly speaking he is not required to explain his innocence. His evidence related to the date of his arrest and the date he was subjected to an identification parade. The learned magistrate J.N. Nyaga in his judgment had the following to say;

“I have not doubt that the witness PW 5 saw the 7th accused properly. She had seen him earlier in the day. When she saw him outside the window he was dressed the same way he had been dressed during the day. He was not wearing anything on his head. There was electricity light inside and outside the house. I am convinced that the witness saw the 7th accused properly. The circumstances were favourable for positive identification.”

We are in agreement with that finding of the learned magistrate. PW 5 came across as a very forthright, clear and truthful witness. She had seen the appellant earlier in the day. She spent ten minutes with him during the robbery. She observed that he was still dressed in the same way that he had been during their encounter in the day. We are aware that on the evidence of identification by a single witness in difficulty circumstances it is important to warn ourselves of the dangers of relying on that evidence. A case in point is the Court of Appeal **CLEOPHAS OTIENO WAMUNGA vs REPUBLIC CRIMINAL CASE NO. 177 OF 2004**. The court stated as follows:-

“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.”

We have warned ourselves of reliance on that evidence but we find that it is safe to rely on the identification evidence of PW 5. That identification on the night of the robbery was corroborated by the identification of the appellant on the identification parade by PW 5. We cannot, having reconsidered the prosecution’s evidence find a basis for interfering with the lower court finding of guilt of the appellant. We uphold his conviction and sentence. The appeal is hereby dismissed.

Dated and delivered at Nyeri this 15th day of May 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE