



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

**Criminal Appeal 55 of 2005**

**KENNEDY MAINA MACHARIA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the judgment of J.N. Nyaga, Ag. Principal Magistrate in Senior Resident Magistrate's Court Criminal Case No. 1197 of 2004 at Karatina)***

**JUDGMENT**

The appellant herein was charged with robbery with violence contrary to section 296(2) of the Penal Code. In the Lower Court he was charged with another person but after trial the Lower Court acquitted the other accused but convicted the appellant herein as charged. The appellant was sentenced to suffer death as per law provided. He was aggrieved by the conviction and sentence and has 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*.)”***

PW 1 a businessman who sells mobile telephones on 10<sup>th</sup> July 2004 closed his shop at about 7.30p.m. He went home and later went to Star Back hotel in Karatina Town and started drinking. He started drinking at 8p.m. and left the hotel at 3a.m. As he left the hotel he was in the company of a lady. They proceeded towards Celebration hotel with a view to getting a taxi. On reaching the cooperative bank he saw one man with a stick. He was walking with that stick. This person placed that stick on his neck. Another one held him by his legs. The third one searched his pockets where he removed a mobile phone and Kshs.19,000/-. At that scene he said that there was electric light which was coming from the cooperative bank. He was able to clearly see his attackers because of that light. The person who was holding on his legs is the appellant herein. The complainant held on to the appellant. At that time the person holding his neck released and produced a knife. Because of this the complainant released the appellant. A police vehicle came in his direction and the complainant told the police that the robbers had run in the direction of Celebration Hotel. They all went towards that direction where they found the appellant behind the celebration hotel in some garage where it was dark. They caught him. On being

cross examined by the appellant he confirmed that he directed the police towards the corridor between the celebration hotel and another building where they arrested the appellant. The complainant said that at that hour there were not many people in town. He identified the appellant from the clothes he was wearing and from his face. The court put a question to the complainant and he repeated that there were lights at the co-operative bank. That the lights were about 4 metres from the road. That he struggled with the robbers for about 5 - 6 minutes. During the robbery he was able to clearly see the faces of the robbers.

PW 2 and 4 were the police officers who were on mobile patrol duties that night. They said that it was at 3a.m. when they reached the main market they heard voices. They went towards the complainant who was in the company of a female. He complained of having been robbed of Kshs.18,000/-. He said that the robbers had ran away and had entered a corridor. The officers went to that corridor and found the appellant hiding in darkness. The complainant identified him as one of the robbers. PW 3 was the clinical officer at Karatina district hospital. He examined the complainant on 12<sup>th</sup> July 2004. The noted that he had an inflamed right eye. The chest and the back were tender. The complainant had a bite on the right thumb. He assessed the degree of injury as harm. He signed the P3 form which was exhibited in court. The Lower Court found the accused had a case to answer. The appellant chose to give sworn evidence. He stated that on the 10<sup>th</sup> July 2004 he left his house to go to work. He said that he worked as a cabbage agent. That day was market day. He normally went to work early to await the vehicles bringing cabbages.

He said that he reached Blue Star Hotel at 4a.m. It was at that point that the police arrived and arrested him. He denied knowledge of the offence.

The evidence against the appellant is one of identification. The law relating to identification was set out in the case of *Cleophas Otieno Wamunga vs Republic (1989) KLR 424*, by the Court of Appeal which states in thus:

***“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 are aware that in the case where identification is under unfavourable circumstances there is need before we can rely on such evidence to treat it with great care. Such evidence should absolutely water tight. See the cases of *Kamau v Republic (1975) EA 139* and *Kiarie v Republic (1984) KLR 739*. In our case the prosecution led the complainant to give evidence in respect of the circumstances surrounding his identification of the appellant. The complainant described the scene as having light which was coming from the co-operative bank. It was sufficient light to enable him to clearly see the faces of the robbers. The complainant was also involved in close combat with the appellant. As a result of that he was able to see his face clearly and his clothing. The moment the appellant was apprehended the complainant identified him as one of the robbers. In making that finding that the appellant was well identified by the complainant we are aware of the case of *Ali Ramadhani vs Republic, Criminal Appeal No. 79 of 1988 (unreported)* where the court of appeal stated,

***“..... the identification of a person who took part in the alleged offence and was chased from the scene of crime to the place where he was arrested is of course strong evidence of identification and if all links in the chain are sound, it may be safely relied upon.....”***

We are cautious of the finding in the court of appeal case *Paul Mwaniki Kitilu vs Republic, Criminal*

appeal No. 270 of 2002 (unreported) as follows;

**“..... it is very likely and very natural that if a police confront complainant with an individual arrested soon after a robbery on them the witnesses would say the person so arrested was among those who robbed them.....”**

Bearing in mind that caution, we are of the view that the complainant's evidence is credible and reliable in respect of the identification of the appellant. Our reliance on that evidence is not reduced by the fact that the prosecution did not call the female companion of the complainant. We in any case note that the complainant stated that on him being attacked the female companion ran away screaming. It is therefore possible that her evidence would not have assisted prosecution. We have considered the appellant's written submission and we find that we cannot fault the learned magistrate's rejection of the appellant's defence. The appellant on being arrested near Celebration Hotel he did not state that he was on his way to work. Even during cross examination he did not put questions to the complainant or the arresting police in this regard. We are therefore in agreement with the Lower Court in respect of the appellant's defence. In conclusion we make a finding that the appellant's conviction in view of the evidence tendered by the prosecution was safe. That means that the appellant's appeal is hereby dismissed.

***Dated and delivered at Nyeri this 7<sup>th</sup> day of May 2008.***

**MARY KASANGO**

**JUDGE**

**M.S.A. MAKHANDIA**

**JUDGE**