REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & OMONDI, JJ.)

CRIMINAL APPEAL NO. 494 OF 2006

-BETWEEN-

JACKSON MAINA HUNJA.....…….....APPELLANT

-AND-

REPUBLIC…….……..…….…….…….RESPONDENT

(An appeal from the Judgement of Principal Magistrate Mrs. M.W. Murage dated 27th July, 2006 in Criminal Case No.5 of 2006 at Kikuyu Law Courts)

JUDGEMENT

The appellant was tried for attempted robbery contrary to s.297(2) of the Penal Code, the charge carrying the particulars that he, on 14th January, 2006 at Sigona Village, Kikuyu Division in Kiambu District, within Central Province, jointly with others not before the Court, attempted to rob one ***John Njunge Ngugi*** of household goods, and at or immediately before or immediately after the time of such attempt, threatened to use actual violence against the said ***John Njunge Ngugi.***

The prosecution case was that on the night of 13th – 14th January, 2006 the complainant was at his home, at about 1.00 a.m. when his daughter called and informed him that somebody was hitting the windows from outside. The complainant called Pada Security personnel, who came to the scene immediately, though not finding the intruders who had fled.

The complainant did not see the intruders; but his sons (PW2 and PW3) said they had recognized one of them. This information was passed on to the Police, and the appellant herein was later arrested. The appellant was subsequently identified at an identification parade, and was then charged with the offence of attempted robbery.

The appellant, in a sworn defence, denied the charge, and said PW2 and PW3 had implicated him due to an old grudge. The appellant had objected to the identification parade, saying both PW2 and PW3 were known to him.

The learned Magistrate's finding was set out as follows:

"Having considered the evidence before the Court, I find that [the] accused was positively identified by PW2 and PW3. There was full moonlight and the incident took about 15 minutes. [The] accused even talked to PW3. I find that the circumstances were conducive to proper identification. The defence offered by [the] accused lacks supportive evidence and is unconvincing. I dismiss it as a lie. I find [the] accused guilty as charged under section 297(2) [of the Penal Code] and convict him under section 215 of the Criminal Procedure Code".

In the amended petition of appeal filed on 17th May, 2008 it was contended as follows:

(i) that the required standard of identification was not met;

(ii) that circumstantial evidence was admitted which fell short of the required standards;

(iii) that the conviction was based on mere suspicion;

(iv) that the Subordinate Court erred in law and fact, by disregarding the appellant's alibi defence;

(v) that the trial Court had shifted the burden of proof onto the appellant;

(vi) that the recognition evidence of PW3 and PW5 had been admitted, to the prejudice of the Appellant;

(vii) that the trial Court applied wrong legal principles;

(viii) that the trial Court failed to record the appellant's submissions;

(ix) that the trial Court overlooked the appellant's plausible defence;

(x) that proof beyond reasonable doubt had not been achieved;

(xi) that the trial Court failed to note that the appellant had not been described in the first report;

(xii) that the trial Court's judgment did not comply with s.169 of the Criminal Procedure Code.

Learned counsel ***Mr. Ondieki*** took issue with the kind of identification parade which the learned Magistrate had relied on as evidence against the appellant; the Magistrate said:

"[The] accused has denied the offence. He told the Court, he objected to [the] identification [parade] because the two witnesses were known to him. There is nothing legally wrong [with] the identification parade if witnesses know the suspect. [The] objection he raised, therefore, does not invalidate the identification parade".

Such a statement by the Court, learned counsel urged, contradicted the principles applicable to identification parades. Since PW2 said he very well knew the appellant, it was submitted, his purported identification of the appellant at the parade "was highly prejudicial" to the appellant. Counsel urged that the appeal should succeed, on this ground.

Counsel urged that the prosecution's evidence of *recognition* should not, in any case, be taken at face value. For the Court of Appeal had held in ***Wanjohi & 2 Others v. Republic*** [1989] KLR 45 that even though recognition tends to give more certain evidence than ordinary identification, still, "an honest recognition may yet be mistaken" (p.416). The Court specifically stated (p.418):

"[Identification]….is the vital question. It is the vital question which has to be answered beyond reasonable doubt. Was the appellant recognized beyond reasonable doubt? Whether the error caused a failure of justice is the next step".

Learned counsel submitted that in the instant case, the learned Magistrate had erred by assuming that "recognition" satisfied the tests of identification. In ***Wamunga v. Republic*** [1989] KLR 424 the Court of Appeal had held that (p.424) –

> ***"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from [the] possibility of error before it can safely make it a basis of a conviction".***

The recognition, in the instant case, was said to have taken place at about 2.30 a.m. in the night; and counsel urged that "the recognition was not secure". Counsel restated the now recognized principle in relation to visual identification, from the Court of Appeal decision in ***Karanja & Another v. Republic*** [2004] 2 KLR 140:

> ***"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***".

The Court, in that case, stated the need for a trial Court to *warn itself* of the danger attendant on visual identification, in a proper case. (p.140):

> ***"Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification".***

Learned counsel ***Mr. Ondieki*** submitted that the trial Magistrate, in the instant case, had made no effort to warn herself of the danger attendant on convicting, on the basis of the evidence of visual identification. Counsel relied on the Court of Appeal's holding in ***Kiarie v. Republic*** [1984] KLR 739, that (p.740) –

> ***"Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction".***

Counsel urged that it was a mistake on the part of the trial Court to confound *identification* with *recognition,* because the two "never meet at any point", "in recognition cases, identification parades do not apply at all". In ***Charles Njagi v. Republic*** Criminal Appeal No. 26 of 2002 the Court of Appeal drew a clear distinction between the two concepts:

> **"*Charles Njagi* and *Jackson Nyaga* were well known to the complainant so that the superior court was right in stating that this was a case of recognition and not identification".**

Mr. Ondieki urged that the learned Magistrate had fallen into error when she concluded that it was not wrong to hold an identification parade where *witnesses already knew the suspect*.

Counsel submitted that the trial Court had erred, by stating that –

> "The defence offered by the accused lacks supportive evidence and is unconvincing".

For the burden of proof rested on the prosecution, and not on the appellant herein.

After learned Counsel ***Mr. Ondieki*** canvassed the appellant's other grounds of appeal, learned respondent's counsel, ***Mr. Makura*** indicated that the State would not contest the appeal; as there was no evidence of assault accompanying the incident complained of, nor of the intention to steal from the complainant. Counsel submitted that the only ascertained evidence was that some people had intruded into the complainant's compound, and had banged the windows; the electric lights were not working and the complainant did not see the attackers. The intruders ran away without evincing any intention to steal. Counsel urged that the charge of attempted robbery with violence had not been proved.

It is clear to us that, at the time of night when the incident happened, there was no possibility of indubitable recognition, or of unmistaken identification of the intruders; and in these circumstances the trial Court should have taken caution, before convicting. We agree with learned counsel that this was a case of *recognition*, and not ordinary *identification*: and so the evidence of the identification parade which the learned Magistrate relied on, was inappropriate.

More fundamentally, there had been no assault upon the complainant; it was not alleged that the intruders were armed; there was no focused evidence on the number of the intruders, and so it remains *unclear whether there was one or more intruders; and the intention to steal* was not proved. We are in agreement with the defence counsel that the trial Court's judgement fell into error, by tending to shift the burden of proof on to the appellant.

We are clear in our minds that there are decisive grounds fully justifying acquittal of the appellant, and we shall order as follows:

1. **This appeal is allowed.**

2. **The conviction and sentence are hereby set aside.**

3. **The appellant shall forthwith be released, unless otherwise lawfully held.**

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 24th day of October, 2008.

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

JUDGE **JUDGE**

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Ondieki

For the Respondent: Mr. Makura