REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 232 of 2005

JAMES MAINA NJUGUNA…….…..... APPELLANT

VERSUS

REPUBLIC…..... RESPONDENT

(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 5127 of 2005 by P.C. TOROREY – Ag. P.M.)

J U D G M E N T

The appellant, James Maina Njuguna was charged with the offence of robbery with violence contrary to *section 296 (2)* of the Penal Code. The brief facts of the case were that on the 1st day of July, 2000, the complainant **Nelson Kingori Gachwiri** (PW1) left his shop at about 5.00 p.m. to drop some animal feed for a customer. He drove his Motor Vehicle Registration No.KAH 797M Mazda, Pick-up. In the driver's cabin he had 2 passengers and 3 of his workers (PW2 & PW3) were at the back of the Pick-up. At Wamutitu centre he stopped the vehicle for a bag of Bran to be off loaded for a customer. Suddenly 6 people approached the vehicle. Three of those people went behind the Pick-up whereas others approached the complainant. They were armed with a pistol which they shot in the air and pointed it at the complainant's head and ordered him to go to the back of the Pick-up. They took Ksh.2,000/= from the complainant and bundled him at the back of the Pick-up. Some of the robbers entered the driver's cabin and others behind the Pick-up and drove off. Members of the public raised alarm and threw stones at the Pick-up. It stalled shortly thereafter and the robbers took to their heels in different directions. Members of the public gave chase. Police from flying squad based at Karatina led by PW5 were alerted and came to the scene. Shortly thereafter they saw members of the public emerging from the bush with one suspect. The complainant identified him as among those who had robbed him. The police conducted a quick search and recovered Ksh.200/= hidden in his underpants. The suspect was brought to the police station and subsequently charged with the offence before court.

In his evidence the complainant stated that the robbery took place at about 5.30 p.m. and the appellant was arrested by members of the public who had given chase at 6.00 p.m. He told the court his memory was still fresh and there was sufficient light for him to identify the appellant as among those who had attacked him.

The appellant denied the charge and alleged that on the material date he locked up his kiosk and went to watch football. After the game he met 3 people and shortly thereafter a 504 Peugeot drove up and stopped as the 3 took to their heels. The occupants of the motor vehicle who happened to be police officers ordered him into the vehicle and took him to the police station. He was subsequently charged with an offence he knew nothing about. The accused told the court that to date he does not know the

complainant.

After careful consideration of the evidence as a whole, the learned Magistrate found for the prosecution, convicted the appellant and sentenced him to death being the only sentence provided for under the law. Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal. He has challenged his conviction on 4 grounds to wit; that the evidence of visual identification was not free from possibility of mistake, that his mode of arrest had no nexus to the crime, that the learned Magistrate failed to resolve procedural irregularities in his favour and finally that the defence advanced by the appellant was not given due consideration.

At the hearing of the appeal, the appellant appeared in person. With the consent of court, he tendered written submissions in support of his appeal. We have carefully read and considered the said written submissions.

Mr. Orinda, learned Principal State Counsel appeared for the state and opposed the appeal. He submitted that this was a case of the appellant being found in the act. That PW5 re-arrested the appellant and saved him from being lynched. There was therefore strong circumstantial evidence. Offence was committed at about 6 p.m. in broad day light.

As a first appellate court we are expected and indeed duty bound to submit the evidence tendered in the trial court to fresh and exhaustive evaluation so as to reach our own decision as to the guilt or otherwise of the appellant. **See Okeno V Republic (1972) E.A. 32.**

The evidence that impressed the learned Magistrate most and which she relied upon to convict the appellant was that of visual identification allegedly made at the locus in quo. However we are of the view that the purported identification was not free from possibility of error or mistake. PW1 narrated to the court how on the fateful evening of 1/7/2000 he was unexpectedly confronted by armed thugs who harassed him and finally stole his motor vehicle and cash. He testified thus;

"…..**As I made to drive off six people emerged and aimed a pistol at my head. They forced me at the back of the pick-up, I found the people I had at the back already lying flat on their stomach. I joined them. The thugs then started driving my vehicle. Members of the public who witnessed the attack started screaming. I had Ksh.2,000/= in my pocket in the Ksh.200/= denominations. They stole this from me. Members of the public gave chase to the vehicle while throwing stones. The vehicle eventually stopped and the thugs took to their heels."**

What can we make out of this evidence of PW1? His narration is that he was attacked at gun point. He had not expected any attack on him. The gang comprised of six people. He was ordered to the back of the Pick-up and he complied. PW1 further told the court that when he was attacked he was in shock. He stated so whilst under cross-examination by the appellant. He stated "…..**I was shocked when the gun was pressed at my head."** It would appear therefore that PW1 had no ample time to register any proper and reliable identification of the culprits under those circumstances that he told the court. PW1 did not tell the court how long he had his assailants under observation before he was ordered to the back of the Pick-up to join his co-victims who were lying flat on their bellies.

PW1 on viewing already drawn pistol and within no time the same was pressed at his head could not have had any chance of observing who had attacked him. If at all he had such an opportunity, he could only have seen the gun. There was no time to register facial features of his attackers. This fact coupled with fear and the fact that he complied with every order made to him, means that PW1 was in panicky state and could not properly identify his attacker. The circumstances PW1 was subjected to were so harsh and could not enable him to make a reliable identification. We would say that under such conditions PW1 could have made a mistaken identity. In the case of **Regina V Turnbull (1976) 3 ALL E.R.549** it was held that,

"**Recognition may be more reliable than identification of a stranger. But even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in**

recognition of close friends and relatives are sometimes made. All these matters go to the quality of identification evidence. If the quality is good and remains good at the close of the accused case the chance of mistaken identification is less erred, but the poor the quality greater the danger."

The purported identification by PW1 was made under difficult circumstances. PW1 could not have made any reliable identification in our view to attract the trial court to accept that he was positive in his identification of the appellant.

Another witness who claimed to have identified the appellant was PW4. He told the court that,

"…..**I saw people offload a sack from the Pick-up when armed robbers came. The robbers came from up the road. They started harassing the driver of the Pick-up."**

He continued to state,

"**The vehicle had stopped 3 metres from where I stood, I had seen people before the robbery. When the motor vehicle of the complainant stopped is when they advanced towards it."**

We doubt whether the witness was truthful and honest in his evidence particularly when one compares his evidence with that of the victims of the robbery. For instance PW2 stated that,

"**As we were going back into the vehicle, some people jumped from the school compound. I heard a gunshot and looked to see about 6 people escorting the complainant from the driver's seat towards the back of the Pick-up."**

On the other hand PW3 had the following to state;

"**We were with a customer who wanted his sack of Bran dropped off by Mutitu Secondary School. We were three of us and the complainant when we offloaded the sack at Mutitu people surfaced for nowhere to attack us."**

It would appear therefore that PW4's evidence that he saw attackers on the road may not be truthful. PW2 and PW3 clearly told court that the attackers appeared suddenly from unknown place. This means that at the place where PW4 was, there was not anybody around so PW4 had not seen any person. The allegations that he saw the thugs approaching has no basis because PW2 told the court that the robbers jumped from over the fence. If indeed PW4 could have been at a distance of 3 metres, and that the robbers struck in his presence, we doubt whether he could not have been attacked as well knowing how a gang of robbers operate. Certainly they would have known that a person had seen them in act who may in future be called upon to testify against them. Nothing would have stopped them from dealing with that person in the best way they know how.

When PW4 was cross-examined by the appellant, he stated that, "……**I had not paid attention to them until the time they started attacking the complainant in his car."** From the foregoing it is apparent that PW4 had not identified any person before the attack was staged. He went on to state that, "….**when we heard the gun shot we took cover but returned and started throwing stones at the vehicle."**

If PW4 had no interest in the strangers he saw at first as he stated in his evidence and who suddenly turned out to be criminals and went ahead to shoot in the air, he must have been petrified to the extent that he took cover, and only returned when the vehicle was moving, how then could he have seen clearly so as to identify the robbers. If he had any chance of seeing them, the same was made under fleeting circumstances that could not favour a positive identification. PW4 could not even tell the person who had the alleged pistol just like PW1. He did not tell the court where the alleged thug he purported to have identified boarded the motor vehicle. Under the circumstances of the attack as described by the victims, none of the witnesses could have made a proper and reliable identification.

The case also turned partly on chase and arrest. It is quite clear from the record that the moor vehicle took off and that after a short distance it stalled and the thugs took to their heels. No witness ever claimed that he gave chase without loosing sight of the attackers, more so the appellant until he was arrested. All they said is that they found the appellant under arrest by members of the public. PW4 testified,

"**One was arrested by the members of the public and escorted back to the crowd. I identified him as having been among the people I had seen. I was able to identify him from appearance and clothing."**

How could PW4 identified any person whom he had no interest in when first seen? The other issue is who pointed out the thug who had run out of the vehicle in order to be arrested by the members of the public? In the instant case this important evidence is lacking. How could the members of public bounce on the right culprit without someone pointing him out to them? The evidence that when the motor vehicle in question stopped and the robbers ran to different direction means a lot. It is possible that in the course of the robbers running in different directions, one or even more could have ran in the direction from which he appellant was arrested.

Any person who was a stranger in the neighbourhood could mistakenly have been bounced upon on assumption that he was a robber, yet not. The evidence of PW5 would seem to support this proposition. He stated that, "……**members of the public sated he was a stranger and did not hail from the area."** The appellant's arrest, it would appear was based on suspicion that he was a stranger and so to the enraged mob, they assumed albeit wrongly that he was a robber.

Secondly it was an error for the learned Magistrate to rely on the evidence of the appellant's mode of arrest to place the appellant at the scene of the robbery. The learned Magistrate failed to observe that there was no sound link connecting the appellant to the crime. As already stated, no person who participated in the chase up to the point, the appellant was arrested ever testified. In the case of **Ali Ramadhan V Republic Criminal Appeal No.79 of 1985** (unreported) it was held that the identification of a person who took part in the scene of crime to the place of his arrest is of course strong evidence of identification and if all the links in the chain are sound, it may safely be relied upon. The first issue is how did the member of public know who to arrest? None of them testified as to the chase and eventual arrest of the appellant. The second question is, was it possible for PW4 to say the appellant was arrested by the police in sugarcane shamba? The third question is how constable **Kioko Kisulu** (PW5) knew whom to arrest. On each of these links there are some doubts in the evidence.

There were no sound links in the chain of events to connect the appellant to the crime in our view. He may have been arrested on mistaken identity and because, he was arrested by people whom he appeared to be stranger in their vicinity they may have wrongly assumed that he had participated in the robbery yet mistaken.

We think we have said enough to show that we are far from being impressed with the appellant's conviction. It was not safe. Accordingly we allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 21st day of October, 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE