REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 344 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 6239 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwangi– SPM)

JOSEPH MURAGE MACHARIA……..……..APPELLANT

VERSUS

REPUBLIC…… ……..……..……....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL 345 OF 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 6239 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwangi– SPM)

PETER KIMANI KAGUNYA.....……..……..APPELLANT

VERSUS

REPUBLIC…… ……..……....RESPONDENT

J U D G M E N T

JOSEPH MURAGE MACHARIA, 1st Appellant and **PETER KAGUNYA,** 2nd Appellant were the 2nd and 1st accused persons in the trial before the lower court in which they were jointly charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The 2nd Appellant faced a second count of escape from lawful custody contrary to **Section 123** of the **Penal Code**. After their trial, both were found guilty and convicted for the main count and in addition, the 2nd Appellant was convicted on second count. They were each sentenced to suffer death for the main count and the 2nd Appellant was in addition sentenced to serve 2 years imprisonment on the 2nd count. They lodged their appeals against their convictions having been dissatisfied with the court's finding.

The 1st Appellant challenged the sentence on grounds that he was a minor. He also raised issue with the manner in which the trial court conducted the proceedings terming them unprocedural. Further that the first three prosecution witnesses were minors and that the learned trial magistrate failed to satisfy herself whether or not they understood the meaning of an oath before administering it to them. The 1st

Appellant also raised further grounds that the evidence did not disclose that any robbery took place, that the circumstances of identification were not conducive and finally that his alibi defence was not adequately considered.

The 2nd Appellant in his grounds of appeal challenges the evidence of recognition adduced by PW1 and PW2, the failure to call essential witnesses and the inadequate consideration of his alibi defence.

The brief facts of the prosecution case were as follows. The Complainant **TITO,** who was PW1 was walking home at 9.00 p.m. after escorting visitors and was accompanied by PW2 **OSCAR**, PW3 **JOHN** and another. The four met with a group of people who greeted them before setting upon the Complainant, beating him until he fell unconscious before stealing his mobile phone, cash, shoes, refugees identity card and Burundi Identity Card. The matter was reported to the police the next day. Oscar also arrested the 1st Appellant and took him to the police on the 2nd day after the attack. The 2nd Appellant was eventually arrested.

The Appellants denied the offence in their unsworn statements. According to each, they were nowhere near the scene of attack. They called witnesses who admitted being neighbours to the Complainant and his friends PW2 and PW3.

During the hearing of the appeals, we ordered their consolidation for ease of hearing and as they rose from the same trial in the subordinate court. Both Appellants were unrepresented. **Mrs. Kagiri,** State Counsel represented the State and opposed the appeal.

The first ground raised by the 1st Appellant has to do with his age and the legality of the sentence. In his written submission, the 1st Appellant noted thus: -

"***My Lords, it is trite law that a minor may not be sentenced to death penalty. In his judgment, the learned trial magistrate failed to consider this law. It is my contention that it was the duty of court to order my age to be assessed by a government doctor. This was not done thus I was prejudiced by being imposed a manifestly harsh and excessive sentence."***

The 1st Appellant did not claim that he was a minor during the proceedings before the lower court. He did not also claim so before this court. All the 1st Appellant was saying in his submission was that the trial court ought to have investigated to satisfy itself that it is not dealing with a minor before imposing a capital sentence. However, that obligation should only arise where the accused person's age is disclosed to the court. Where the accused person's actual age is unknown and is undisclosed the court should look at the offender to access his apparent age. Under the interpretation section of the **Children's Act**, Section 2, age is defined as "**where actual age is not known means apparent age**". Our interpretation of that provision is that where an accused person does not disclose his age, the trial court is expected to assess his apparent age. If it is of the view that the offender is below 18 years of age, then it ought to treat him as a child. If in doubt whether he is a child or not, then the court should order for age assessment by the qualified personnel. In the instant case, the 1st Appellant has not disclosed his age nor has he claimed to be below 18 years of age. We had occasion to look at him and are of the overwhelming unanimous view that he is an adult. That ground therefore does not succeed.

The 1st Appellant also challenged the manner in which the evidence of PW1, PW2 and PW3 was recorded claiming that because they said they were students, a *voire dire* examination ought to have been conducted to ascertain whether they understood the meaning of an oath.

The three witnesses, PW1, PW2 and PW3, all said that they were students in Kenya, attending colleges except PW1 who said he was learning English from private tuition. Considering each said that they were living alone, we believe that they were adults and that the court was right to treat them that way. In any event, we find this ground should have been raised earlier during trial and ought not to be allowed at this stage. That ground also fails.

The rest of the grounds of appeal raised by the 1st Appellant were similar to those raised by the 2nd Appellant and therefore we shall consider them together. The condition of lighting at the scene of the alleged attack was put to focus by the Appellants. It was their contention that the evidence of the three key prosecution witnesses on that point was contradictory and unreliable. We have subjected the entire evidence to a fresh analysis and evaluation while bearing in mind that, unlike the trial court, we have had no opportunity to see and hear the witnesses and assess their demeanour. See **OKENO vs. REPUBLIC [1972] EA 32**.

The Appellants' convictions were predicated on the evidence of identification at night. PW3, **John,** was unable to identify any of the attackers. **Tito** the Complainant claimed that he saw and identified the two Appellants out of the crowd, which attacked them and did **Oscar** PW2. Before a court can base a conviction on the evidence of identification made in circumstances that are known to be difficult, such as in this case, the identification at night, such evidence should be watertight. Visual identification should also be treated with the greatest care. See **REPUBLIC vs. ERIA SEBWATO [1960] EA 174 and KIAIRE vs. REPUBLIC [1984] KLR 739**.

In **MURUBE & ANOTHER vs. REPUBLIC [1986] KLR 356** **Nyarangi, Platt** and **Apaloo JJA** held

"***2. in the evaluation of the evidence of the identifying witness the court was to ensure beyond all reasonable doubt that the witness was honest and unmistaken about her identification of the Appellants."***

Tito's evidence was that he was with three of his friends coming from escorting their visitors at 9.00 p.m. when a group of thugs stoned them. **Tito** identified the 1st Appellant as the one who stopped him before he was set upon and beaten by them until he lost consciousness. **Tito** identified the 1st Appellant as the one who was armed with a pistol while the 2nd Appellant had a knife. **Tito** described the scene of attack as being well lit. However, he did not give any description of the light, its brightness or distance from the Appellants. In **PAUL ETOLE vs. REPUBLIC CA No. 24 of 2000** (unreported) **GICHERU, LAKHA & OWUOR JJA** held: -

"***In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part nor did they examine the circumstance in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis-à-vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error."***

In the instant case, the learned trial magistrate made no inquiry as to the nature, size of the light or of the distance of the light from the Appellants. Secondly, the Complainant's evidence was that he was stopped and suddenly set upon and beaten until he lost consciousness. The attack on the Complainant was both unexpected and sudden. We doubt that in the circumstances he was in a position to see and recognize any of his attackers. Given the fact that the condition of lighting at the scene, according to **Tito** was not so clear, the identification by **Tito** needed other evidence whether direct or circumstantial to corroborate it.

PW2's evidence was that the four of them were attacked by the two Appellants who had approached them from behind, had overtaken them, greeted them before attacking them. **Oscar'**s evidence was that it was the 2nd Appellant who was armed with a pistol. **Oscar** also stated that it was the 2nd Appellant who hit the Complainant felling him down. Most unfortunately however was the fact that **Oscar** referred to security lights being on but just like in the case of **Tito**, the learned trial magistrate failed to inquire into the nature, size and strength of the light and its distance from the Appellant.

After a careful analysis of the evidence of recognition by **Tito** and **Oscar**, we find that their evidence

had material inconsistencies regarding exactly which of the Appellant was armed with the pistol and whether the other was armed at all. Other material inconsistencies in the evidence of these two witnesses regarded the number of the attackers with **Tito** saying they were many and **Oscar** saying they were only the two Appellants.

We find and hold that the circumstances of identification by recognition were very poor and were not conducive to positive identification without the possibility of error or mistake. We also find and hold that the evidence of the two identifying witnesses was so full of material contradictions which rendered their evidence unreliable and weak to sustain a conviction. What their evidence needed was corroboration by some other evidence, whether direct or circumstantial implicating the Appellants with the offence. We have sought for such other evidence in this case and have found none. In the circumstances, the conviction entered herein was unsafe and should not be allowed to stand. We find merit in these appeals and do allow them by quashing the convictions and setting aside the sentences of death.

The Appellants should be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 23rd day of January 2007.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mrs. Kagiri for the Respondent

CC: Tabitha

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE