REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 464 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 1273 of

2004 of the Senior Principal Magistrate's Court at Kiambu (M.W. Wachira (Mrs.)– SPM)

FRANCIS NJAU MUTURA……..……...…..…..……..APPELLANT

VERSUS

REPUBLIC…….……..……....RESPONDENT

J U D G M E N T

FRANCIS NJAU MUTURA was convicted in one out of the five counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code.** The learned trial magistrate sentenced the Appellant to death for the conviction in the single count. It is out of that conviction that the Appellant lodged his Appeal before this court. The Appellant filed his appeal in person and cites five grounds of appeal summarized as follows: -

(1) That the evidence of identification by PW1 was not supported by the first report and so was unreliable.

(2) The Appellant's arrest was not related to the instant case.

(3) That the learned trial magistrate erred in rejecting the Appellant's defence.

(4) The learned trial magistrate erred in law and fact in failing to consider the circumstances of identification as given by other witnesses.

The brief facts of the case were that on the night of 15th and 16th June 2004, at about 11.00 p.m. three bar customers who had been at the Sweet Waters Bar in Banana and who had been served with drinks all of a sudden ordered everyone to lie down. One had a pistol and the other had a panga. They robbed the cashier and other customers at the bar of various properties before fleeing the scene. During the robbery, a watchman was shot and later died on the way to hospital. Eventually the Appellant was arrested and charged for the offences. The Appellant opted to remain silent in his defence.

Mr. Githinji represented the Appellant during this appeal while **Miss Nyamosi** appeared for the State and opposed the appeal.

We have analyzed and evaluated afresh the entire evidence adduced before the lower court as expected

of a first appellate court while bearing in mind that we cannot comment the demeanour of witnesses as we neither saw nor heard them.

Mr. Githinji for the Appellant submitted that the trial magistrate failed to appreciate that the Appellant was known to the Complainant and the witnesses. Counsel submitted that the only witness who claims to have identified the Appellant was PW2, the Complainant in Count 3 and the Salesman at the bar in question. That the rest of the witnesses present at the bar at the time who knew the Appellant before the incident and who testified in court, PW5, PW6, PW1 and PW3 did not identify the Appellant as one of the robbers. Counsel submitted that if the said witnesses who knew the Appellant well said they did not see him at the bar on the date in question, then the evidence of PW2 should not be believed.

Miss Nyamosi for the State submitted that PW2's evidence was sufficient to sustain a conviction as he remained standing when others lay down and because the Appellant ordered him to go to the cash counter therefore enabling him to see and recognize the Appellant.

It is true that the conviction against the Appellant was predicated upon the evidence of visual identification by a single witness made under difficult circumstances. The principle applicable to such evidence before it can be used to convict was well set out in the case of **REPUBLIC vs. ERIA SEBWATO [1969] EA 174** thus; -

"***When the evidence alleged to implicate an accused person is entirely one of identification, that evidence must be absolutely watertight to justify a conviction."***

In the case of **KAVETE & OTHERS VS. REPUBLIC 63 OF 1986** (unreported) the court of appeal similarly stated: -

"***Where the evidence is based on identification, the court should closely examine the circumstances in which the identification by each witness came to be made…"***

The identifying witness in the instant case according to the trial was only one, PW2. He was a Salesman on duty at the bar at the time. PW2 said that two men had entered the bar at 9.00 or 10.30 p.m. that evening and had sat at one table and ordered sodas. PW2 said he saw another man who also entered at the same time as the two. He sat alone and ordered beer. PW2 was categorical that he did not see the man who ordered the beer at any time communicating with the other two. After sitting at one table for sometime, the two men jumped on top of the table one holding a pistol and the other a panga and ordered everyone to lie down. That the Appellant then went to the counter. PW2 said that the Appellant was not armed. PW2 said that one of the two went to him, (PW2) at the counter and ordered him to open up which he promptly did. The man then entered the counter area, opened the cashbox and stole Kshs.7,300/-. PW2 said that it was the Appellant who directed the man with the gun to shoot the watchman who had defied an order to lie down. PW2 also said in closing that it was the Appellant who had demanded the money from him. It does not take much scrutiny of PW2's evidence to realize that he did not come out clearly as concerns the Appellant's role during the robbery. Initially, PW2 said it was one of the two men who drunk soda who demanded that he opens up the counter before the man entered and took the money himself. If the man came to demand he opens the counter, and PW2 said he opened promptly, at what stage then did the Appellant, whom he claims was all along seated drinking alone join the robbers. PW2's evidence is therefore not very clear whether more than one person demanded money from him and whether the Appellant was one of them.

We have also noted from PW2's evidence that he had not known the Appellant before the incident and further that PW2 had worked at the bar for only 2 weeks. It was very important therefore that PW2's evidence of visual identification be scrutinized with the greatest care to ascertain whether his identification of the Appellant was reliable.

Since PW2 did not know the Appellant before, and the incident having occurred at night and therefore in difficult circumstances, an identification parade should have been held. We noted further that this witness saw the Appellant at the Police Station counter where he had gone for an identification parade.

The identification parade was not conducted. However, the fact that the Appellant was exposed to PW2 before an identification parade could be held reduced considerably the quality of PW2's evidence of visual identification. The evidence of identification by PW2 was strictly speaking, dock identification which, it is well known is of little evidential value particularly where the person identified was a total stranger to the identifying witness.

We also examined the evidence of the other witnesses. PW1 was the bar manager and was present at the time of the robbery. He was categorical that he did not know the Appellant before and that he never saw him at the bar that night.

The other person present at the bar at the time was PW3. He was a patron at the bar and he did not know the Appellant before. He said he did not see the Appellant at the bar that night.

The other person at the bar was PW4, who was also working there. It was her clear evidence that the robbery was committed by three men, two had been taking soda and one who had been taking beer. PW4 stated that she knew the Appellant before as a customer at the same bar and categorically stated that he was not at the bar on the night of the robbery and was definitely not one of the robbers.

PW5, another waiter at the same bar and who had left the bar and was outside when the deceased watchman told her that a robbery was in progress, said that the Appellant was not at the bar that night. PW5 knew the Appellant before the incident. Same evidence as PW4 and PW5 was reported by PW6, another waiter at the same bar and who was present at the bar. PW6 said that the Appellant, who was their regular customer, was not at the bar on the night of the robbery.

We have carefully examined the evidence of identification by PW2 as required. In **WAMUNGA VS. REPUBLIC [1969] KLR 424**, where it was held: -

"***1. 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 possibility of error before it can safely make it the basis of a conviction."***

Taking all the evidence with circumspection, we have the evidence of three witnesses who knew the Appellant quite well before the incident, PW4, PW5 and PW6 all saying that the Appellant did not patronize the bar that night and neither was he one of the robbers. As against the evidence of PW4 who was even more specific that she saw the three men who ended up robbing them and served the two who drank soda. She knew the Appellant before and said he was not one of the 3 robbers. All these evidence taken against that of Pw2, who did not know the Appellant before that date and who insisted that the man who drank beer of the three robbers was the Appellant could not have had greater weight. The quality of PW2's evidence was very poor. It was dock identification of visual identification or a stranger made at night in circumstances that were known to be difficult. That evidence could not have out weighed the evidence of PW4, PW5 and PW6 who knew the Appellant before and who declared he was not at the bar at the time.

The learned trial magistrate did not evaluate the evidence adduced before her as required nor did she give it due weight. Had she done so, we are convinced that she would have arrived at a different conclusion. The direct evidence of a person capable of recognizing a person cannot be disregarded in favour of evidence of visual identification of a stranger made under difficult circumstances. We think that the learned trial magistrate's conclusion that the evidence of PW2 alone, in the light of clear evidence from three other prosecution witnesses to the contrary, could sustain a conviction, in the circumstances of this case was a serious misdirection. The misdirection resulted in a serious miscarriage of justice. We agree with **Mr. Githinji's** submission that the conviction entered in this case was a travesty of justice. We say no more.

Before we end we must comment on a non-direction we noted in the learned trial magistrate's judgment. The learned trial magistrate acquitted the Appellant for counts 1, 2 and 4 on the grounds that

the Appellant was not identified by the Complainant PW1 and PW6. Since all the five offences charged were committed during the same transaction, the mere fact that a Complainant did not identify a robber identified by the others who witnessed the robbery is not a basis to acquit such an accused person from the offence charged. As long as the prosecution can prove that the accused person acted in concert with others during the commission of the offence and that they had the same common intention, if there was good evidence he participated in the offence for whatever role, then he should be convicted for being a principle offender. See **Sections 20** and **21** of the **Penal Code**.

Finally, we find that the Appellant's appeal has merit. That the conviction entered in this case was unsafe and should not be allowed to stand. Accordingly, we allow the appeal and quash the conviction and set aside the sentence. We order that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 8th day of February 2007.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Githinji for the Appellant

Miss Nyamosi for the Respondent

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE