REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 320 of 2004

STANLEY MUKUNDI WAMBUI …… APPELLANT

VERSUS

REPUBLIC ……...…..……. RESPONDENT

(Appeal from original Conviction and Sentence in Criminal Case No. 8 of 2004 of the Principal Magistrate's Court at Kikuyu dated 23rd June 2004 by M. W. Murage – P.M. – Kikuyu)

J U D G M E N T

The Appellant **Stanley Mukundi Wambui** was convicted by the Principal Magistrate, Kikuyu Law Courts of one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and was sentenced to the mandatory death sentence.

Being aggrieved by the conviction and sentence, the Appellant lodged to this court the instant appeal. **Mrs. Muthanje**, learned Counsel who prosecuted the appeal on behalf of the Appellant argued it on three broad grounds to wit: Identification, contradictions in the prosecution case and misdirections in the judgment of the trial court.

The Complainant **George Muchina** was on 3rd March, 2004 walking home when he met two people one of whom hit him on the head and held his neck with a timber. He was relieved of his Kshs.500/= and a Nokia mobile phone valued at Kshs.9000/=. He screamed and a friend of his, P.W.2, with whom he had just parted company a few moments earlier, came to his aid. As he ran towards the Complainant, P.W.2 met two people and when he asked them what was wrong they did not respond. He recognized the two people. One was the Appellant and his colleague known as **Njoroge**. He had known the Appellant for 10 years. The Complainant too had also managed to recognize his assailants. According to him it was the Appellant and one **Njoroge**. He was able to recognize them courtesy of the moonlight. Soon after the incident, P.W.1 and P.W.2 went to the house of the Appellant but could not find him. They then reported the matter to the police who later on through P.W.3 managed to arrest the Appellant. He was then charged.

Put on his defence, the Appellant in unsworn statement of defence raised an alibi defence basically saying that he had nothing to do with the robbery committed on the Complainant.

In support of his grounds of appeal, **Mrs. Muthanje** submitted that although P.W.1 claimed that there was moonlight which enabled him to identify the Appellant and one Njoroge, the intensity of the

moonlight was not indicated. It is not clear whether the moon was full, half moon or whether the night was cloudy. Counsel further submitted that the allegation of there being moonlight was not corroborated by P.W.2.

As regards contradictions in the prosecution case, counsel pointed out various contradictions and inconsistencies in the testimony of P.W.1 and P.W.2 regarding events of the night. To counsel these contradictions were material as they went to the credibility of the two witnesses.

On the misdirections in the judgment of the learned magistrate, Counsel pointed out that the learned magistrate had imported into the judgment matters that were not canvassed before her during the trial.

The State opposed the appeal. **Mrs. Kagiri**, Learned State Counsel, in opposing the appeal submitted that the evidence adduced was sufficient to prove the offence charged. That the evidence of P.W.1 and P.W.2 amounted to identification by recognition. Counsel conceded that P.W.1 did not indicate the time of the offence but hastened to add that P.W.2 stated that the offence was committed at 7.30 p.m. That even though the Witnesses did not go into the intensity of the light available at the scene of crime, that was not fatal to the prosecution case as in the case of **ENOS MBANJA OKURU VS. REPUBLIC C.A. 112 OF 2005** (unreported) the Court of Appeal found that the circumstances of identification were favourable even though the intensity of the light was not described. Finally on this aspect of the matter, Counsel submitted that the Complainant knew the Appellant as a relative as well as a neighbour. Counsel therefore urged us to find that the recognition of the Appellant by P.W.1 and P.W.2 was positive, conclusive and free from error.

As regards the Alibi defence, counsel submitted that the defence did not shake the already consistent prosecution case.

Coming to the contradictions in the prosecution case, counsel submitted that the same were minor and did not affect the prosecution case.

Commenting on the learned magistrate's judgment, Counsel maintained that the judgment was not exaggerated and that all that the magistrate was doing was merely to evaluate and analyse the evidence.

This being a first appeal, it is our duty to reconsider the evidence, evaluate it and draw our own conclusions while giving due allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses which we do not have. **(OKERO VS. REPUBLIC (1972) E.A. 32).**

The conviction of the Appellant was predicated on the evidence of identification through recognition by two witnesses made at night. It is recognized that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In **KIARIE VS. REPUBLIC (1984) KLR 739,** the court of appeal said that where the evidence relied on to implicate an accused person is entirely that of identification that evidence should be watertight to justify a conviction. In the same case, the court stated that it is possible for a witness to be honest but mistaken and a number of witness to be all mistaken.

Lastly, although recognition is more reliable than identification of a stranger, such evidence of recognition should be tested carefully noting that mistaken recognition of close relatives and friends are sometimes made. See **AJONONI AND OTHERS VS REPUBLIC (1980) KLR 59** and **WAMUGI VS REPUBLIC (1989) KLR 424.**

In the instant case though P.W.1 claimed that there was moonlight that enabled him to identify the Appellant, he never suggested how intense the moonlight was. The witness similarly did not mention whether the moon was full or was half moon and whether the sky was clear or clouded. Moreover, P.W.1 was silent about the actual time he was attacked. All he said in his testimony was that he was walking home when he was attacked. Yet P.W.2 talked of the time being 7.30 p.m. However, he was silent about whether or not there was light at the scene of crime. He never mentioned any moonlight. P.W.2 did not also indicate the time span between when he parted company with the Complainant and when he heard the Complainant scream. Assuming that it was at night, it is not clear what kind of light prevailed at the

scene of crime. It would appear in the circumstances that the evidence of identification of the Appellant by these witnesses is doubtful. More so and bearing in mind that P.W.2 did not witness the robbery. He only met two people walking from the direction from which he heard the Complainant scream. It was when he found the Complainant that the Complainant told him that had been robbed by the Appellant and one **Njoroge.** It was expected of the learned magistrate to conduct an inquiry regarding the nature of the light available, what sort of light, its size and its position relative to the suspects. It also behoved the learned magistrate to ascertain for how long the Appellant was kept under observation by the witnesses as to be able to form impressions about him so as to be able positively to state that they had recognized him.

See generally **MAITANYI VS REPUBLIC (1986) KLR 198.** No such inquiry was undertaken in the circumstances of this case. Failure to undertake such an inquiry is an error of law and such evidence cannot be acted upon.

The Complainant was suddenly attacked and held by the neck. It is not clear from the record whether the Complainant ever came face to face with the assailants or whether he had them under any observation. If that be the case, how then could he have been able to see them as to be able to subsequently recognize them. With regard to P.W.2, he merely met the person whom he claimed to be the Appellant in the company of one Njoroge. It would appear that they merely by passed each other and if there was no light at the scene, as he never mentioned that fact in his testimony, how then was he able to see the Appellant sufficiently to be able to recognize him later. We have our own doubts.

Mrs. Kagiri, vehemently submitted that though the witnesses did not go into the details of the moonlight and its intensity, nonetheless that omission was not fatal to the prosecution case. Counsel anchored that submission on the case of **Enos Mbanja Okuru supra.** We have perused the authority and we are certain that it does not support the submission by the learned State Counsel. The case mostly dwells on the credibility of the witnesses. The Court of Appeal stated in the Pertinent paragraph:-

"……. The superior court subjected the evidence to a fresh and exhaustive examination and came to the same conclusion as the trial court that the two witnesses were credible and that they recognized the Appellant as one of the two robbers who entered into the house."

This is not the case here. In that case the attackers had torches with which they had lighted the compound. Other than the torches there was moonlight. The robbers entered the house moving from one room to another with their torches on. In the bedroom of the Complainant, the lamp was on and when one of the robbers noted that he had been recognized by the Complainant, he slapped her telling her not to look at him. He was a former employee of the Complainant. He was soon thereafter arrested as he tried to get into his house after the robbery. From the above facts, it is quite clear that the circumstances obtaining in the case cited by the learned State Counsel are totally different from the instant case. The conviction in the other case turned on the credibility of the two witnesses which is not the case here. The cited authority is therefore irrelevant and of no assistance to the respondent's case.

Taking everything into account, we are not persuaded that the alleged recognition of the Appellant by P.W.1 and P.W.2 was positive and conclusive. The learned State Counsel submitted that P.W.1 had clearly stated that he had no grudge with the Appellant and accordingly could not have framed the Appellant. However it is not lost on us that the Complainant and the Appellant were relatives. In that kind of scenario, anything is possible. The reverse argument is equally plausible. Is it possible that the Appellant knowing that the Complainant was a relative would want to commit a robbery on him knowing very well that he could easily be recognized and take no steps at all to disguise himself? That to us is simply inexplicable. See **ERIA SEBWATO VS. REPUBLIC UGANDA (1960) E.A. 174.**

The Appellant raised alibi defence which in our view was not given proper consideration. In discounting that defence, the learned magistrate stated: -

"…. Accused defence is a mere denial. He does not account for himself on the night the offence occurred….."

When an accused person raises an alibi defence, he does not have to prove it. It is upto the prosecution to investigate and disapprove or discount it. See **WANG'OMBE VS REPUBLIC (1980) KLR 149.** The magistrate in making the comments aforestated, shifted the burden of proving the alibi to the Appellant. This was unfortunate and gross misdirection in law.

There are serious contradictions and inconsistencies in the testimonies of P.W.1 and P.W.2 who were the key witnesses. Contrary to the submissions by the Learned State Counsel that the contradictions were minor and did not go to root of the prosecution case, we find the contradictions to be material. To point out but a few, P.W.1 is on record as saying that P.W.2 informed him that he had seen the Appellant and another person running away from the scene yet P.W.2 in his testimony said that when he met the two people they were neither walking nor running. Further P.W.1 stated that he went to the Appellant's home in the company of P.W.2 on the same night. However P.W.2 said no such thing. Further whereas P.W.1 stated that he reported the incident to the police on the same day, P.W.3 a police officer who received the report stated that he did so on 7th March, 2004, 4 days after the incident. The said witness did not even say from whom he received the report.

Finally we note that the Appellant was arrested 23 days after the alleged offence. This was on 26th March, 2004 as can be gathered from the charge sheet. There are no reasons advanced why it took such a long time to effect the arrest of the Appellant, yet both witnesses knew where the Appellant resided. Indeed the Appellant was even a relative of the Complainant. There is no suggestion that after the incident, the Appellant disappeared from the neighbourhood. We also note that though the Complainant claimed to have been robbed by two people both of whom he knew very well, nothing is known of what became of the Appellant's alleged accomplice. The Complainant never led the police to his house nor did he cause his arrest. There is no reason at all why that other person was never arrested and charged alongside the Appellant if indeed the two were the ones who robbed the Complainant.

In the end then and having held that the evidence of the recognition of Appellant by the two witnesses was not free from any possibility of error, the many material contradictions in the prosecution case and serious misdirection by the learned magistrate in assessing the alibi defence advanced by the Appellant, we are of the considered view that the conviction of the Appellant was far from being safe. Accordingly we allow the appeal, quash the conviction and set aside the sentence imposed. The Appellant is entitled to his liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 8th day of March 2007.

……..

J. W. LESIIT

JUDGE

…….

M. S. A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Muthanje for the Appellant

Mrs. Kagari for the Respondent

CC: Tabitha/Erick

……..

J. W. LESIIT

JUDGE

…….……

M. S. A. MAKHANDIA

JUDGE