



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 482 of 2004**

**STEPHEN KIHUNGI NJERI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(CORAM: LESIIT, MAKHANDIA, JJ)**

*(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Kibera in Criminal Case No. 176 of 2004 dated 14<sup>th</sup> September 2004 by Ms Mwangi – S.P.M. – Kibera)*

**J U D G M E N T**

The Appellant **STEPHEN KIHUNGI NJERI** was convicted by the Senior Resident Magistrate, Kibera of two counts of robbery with violence contrary to **Dection 296(2)** of the Penal Code.

Being aggrieved by the conviction and sentence, he instantly preferred this appeal. In his "**Amended Memorandum of appeal**" the Appellant faults the learned magistrate for convicting on the following grounds:-

- (1) Refusing the Complainants' to withdraw the case under Section 204 of the Criminal Procedure Code.**
- (2) Relying on identification evidence made in a poorly lit scene of crime.**
- (3) Failing to Summon essential witnesses from Muthangari Police Station to verify the alleged recognition evidence if the OB from Muthangari police station was anything to go by.**
- (4) Acting on inconsistent and contradicting evidence to base the conviction.**
- (5) Failing to adhere to Section 85(2) and 88(1) of the criminal Procedure Code.**
- (6) Failing to comply with section 169(1) of the criminal Procedure Code while discounting his Alibi.**

The Complainants **Nicholas Munyoki**, P.W.1 and **Patrick Ngula Musyoka**, P.W.2 on 30<sup>th</sup> December 2003 at about 9.00 p.m. left Matopeni bar in Kawangware for home. When they reached their house, at the corridor, they saw two people. Another person welding what appeared like a pistol came from behind and ordered them to sit down and raise their hands. The two in the process were able to recognize the

man as the Appellant as they had known him for a longtime. The other two people, the Complainants noticed, had pangas. However, they did not know them before hand. They were then robbed of the items particularized in the charge sheet. The Complainants stated that the incident took about 7 minutes. The group then ran across the road and disappeared. They were able to recognize the Appellant as there was electricity light in the corridor though it was not very strong. Subsequent thereto they reported the incident to the police and told them that they knew one of the men physically and could identify him. They did not know where he stayed though. A few days later P.W.1 saw the Appellant and alerted the police and the Appellant was then arrested. Subsequent thereto he was charged.

Put on his defence, the Appellant in an unsworn evidence stated that, he was arrested at home by police officers on 2<sup>nd</sup> January, 2004 without being told what he had done. He denied any involvement in the robbery. He said that on the material day, he was just went about his normal duties and later returned home.

The trial magistrate recognized that the prosecution case was dependant on the identification of the Appellant by the Complainants P.W.1 and P.W.2. After evaluating the evidence, the trial magistrate was satisfied that the prevailing circumstances at the material time were conducive to a proper identification and that the two witnesses in fact identified the Appellants, she disbelieved the Appellant. The trial magistrate said in part:

*“... P.W.1 and P.W.2’s evidence is that they were able to see the accused person physically. They identified him by his face. They said that there was light at the corridor but it was weak light. Both witnesses however said that the accused was not a stranger there. They recognized him and indeed even reported to the police that they could be able to identify or they recognized one of the robbers. Indeed it is the P.W.1 who later saw the accused person and promptly called the police. P.W.2 said that he had known the accused for about 4 years. It was thus not just a matter of identifying the accused but also recognizing the accused. Thus even if the light was not strong, given that robbers went too close to the victims as they robbed them, and an accused held the pistol which he placed on P.W.1’s neck (and which means he must have been really close, as a pistol is small). I am of the view that the accused was indeed positively identified by these two P.W.1 and 2 as having been one of the robbers.....”*

In his written submissions, which we have carefully read and considered, the Appellant has gone to great lengths to punch holes in these findings by the learned magistrate as we shall demonstrate.

**Miss Gateru**, learned State Counsel opposed the appeal on behalf of the state. Counsel submitted that whether or not to allow the withdrawal of the case under section 204 of the Criminal Procedure Code was discretionary and the magistrate’s refusal could not be impugned as the offence was serious. With regard to identification, Counsel submitted that even though the offence was committed at 9.00 p.m., the Appellant was properly identified by P.W.1 and P.W.2 as they knew him previously. In recognizing the Appellant, the two witnesses were assisted by the electricity light in the corridor.

Concerning contradictions, Counsel submitted that there were none and even if there were, she urged us to find that they were minor and incapable of shaking the prosecution case. On the issue of non compliance with **sections 85(2) and 88** of the Criminal Procedure Code, Counsel submitted that the entire prosecution of the case in the Subordinate Court was undertaken by I.P. Kanyai and I.P. Oyoo who were all qualified to prosecute the case.

It is now well settled that a trial court has the duty to carefully examine and analyse the evidence adduced before it before coming to a conclusion only based on the evidence and as analysed. In the same way, the first appellate court also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same while always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same. See **OKENO VS REPUBLIC (1972) E.A. 32.**

No doubt from the passage that we have extracted from the learned magistrate’s judgment hereinabove, the conviction of the Appellant was dependent on the evidence of identification albeit 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 the case of **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 same case, the court stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken. Lastly, the Court observed, 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 **ANJONONI AND OTHERS VS THE REPUBLIC (1980) KLR 59** and **WAMUGI VS REPUBLIC (1989) KLR 424**.)

The issue of the magistrate failing to accede to the request by the Complainants to withdraw the case against the Appellant can easily be disposed off. As correctly argued by the learned State Counsel **section 204** of the **Criminal Procedure Code** gives the trial court discretion to allow or decline such request. As long as such discretion is exercised judicially and not capriciously, the decision cannot be impugned. No doubt the offence committed was serious and in rejecting the request the learned magistrate gave her reasons which we find reasonable. Further we note that only one Complainant intimated his desire to withdraw the complaint. So that even if the request had been granted in respect of this Complainant, the other count would still have proceeded to hearing in any event. To have granted the request therefore, would have been an exercise in futility. We may add that it may not be possible to withdraw a case of robbery with violence for the reasons advanced by the Complainant under the section cited. Criminal cases like robbery with violence are actions not against the Complainant alone but the society and the State. A Complainant cannot just withdraw such an offence. In our view therefore the learned magistrate was right in declining to allow the application.

The other issue that can be easily disposed off is with regard to the provisions of **section 85(2)** and **88** of the **Criminal Procedure Code**. The Appellant claims that on 25<sup>th</sup> May, 2004 when the case came up for further hearing the rank of the prosecutor is not indicated. The prosecutor is merely shown as “**prosecutor – Kanyai**” in the Coram. The Appellant submitted that:

***“In the light of the recent court of appeal decision in the case of Benard Lolimo Ekimat v/s Republic C.A. No. 154 of 2004, where it was held that where the rank of a police officer prosecuting a case is not indicated, it is difficult for the court to determine whether or not the said prosecutor was qualified to conduct the prosecution of the case in terms of section 85(2) as read together with section 88(1) CPC and that in effect renders the entire trial a nullity. This is not a matter to be assumed ..... In that context, it cannot be assumed what rank Kanyai was or who he was.....”***

In our view this submission is without merit. We have no doubt at all that the case was prosecuted by a qualified prosecutor in terms of the sections of the Criminal Procedure Code cited by the Appellant. The original record which we have perused clearly shows the said Kanyai was indicated in the Court Coram as “**I.P. Kanyai.**” He was an inspector of police and therefore a competent prosecutor. It was a typographical error in the typed proceedings to have shown **I.P. Kanyai** as mere “**Kanyai.**”

We now turn to consider the more troublesome issue of identification of the Appellant. The offence was alleged to have been committed at a corridor at night. In those circumstances, it becomes imperative to examine by what means P.W.1 and P.W.2 were able to recognize the Appellant. Both witnesses claimed to have recognized the Appellant courtesy of the electricity light in the corridor. However, we note that the issue of the electricity light only arose when both witnesses were under cross-examination by the Appellant’s Counsel and not in their evidence in chief. Suffice to say that the quality of the light and its distance from the scene of crime was not disclosed. This failure casts grave doubts on the veracity of the evidence of these two witnesses. Under cross-examination P.W.1 testified on the issue as follows:-

***“... There is an electricity light at the corridor but it is a bit far and the light is not strong...”***

As for P.W.2, he testified on the same issue as follows: -

***“.....There was light and I could identify a person, from here to the door of the court.....”***

***About 8 metres away.....”***

These extracts speak for themselves with regard to the light available at the scene at the distance between the attackers and the victim. It behoved the learned magistrate to evaluate this evidence carefully before arriving at the conviction of the Appellant. It is admitted that the light was dim and far. The Appellant is alleged to have approached the Complainants from behind. How then could they have been able to recognize the Appellant? Further, during the attack, the Complainants were ordered to lie down. It is not clear from the record whether the Complainants lay on their stomachs or on their backs. If they lay on their stomachs, we doubt whether they could have been able to recognize anybody as their faces would have been facing the ground. It is also not lost on us that throughout the incident P.W.1 had a gun placed on his neck whereas P.W.2 had pangas placed on his head. It must have been very traumatic and stressful experience for the two witnesses. In those circumstances we doubt very much whether they could have had the presence of mind to observe any of the attackers as to be able to recognize them.

It would appear also that the Appellants had been on a drinking spree. In the words of P.W.1: -

***“...It is true I have indicated in my statement that we had been on a beer spree ...”***

As for P.W.2 he stated: -

***“...We were taking beer at Matopeni bar both of us. We stayed in the bar for about 2 hours. We went to the bar at 8.00 pm....”***

If the Complainants were on a drinking spree, could this act alone not have clouded and or compromised their ability to see, observe and identify the Appellant. Isn't there a possibility that they may have been drunk and incapable of identifying anyone? The possibility cannot be ruled out.

There is another issue which has caused us considerable anxiety. Was an identification parade conducted in respect of the Appellant? According to P.W.1, it would appear that there was indeed an identification parade. He stated under cross-examination by Counsel for the Appellant: -

***“...I went to a parade at Kilimani twice but I was not able to identify the others.....”***

As for P.W.2 he stated:

***“.....I was called to Police Station thereafter at an identification parade. It is not true that I was not able to identify the accused...”***

Yet the investigating officer – P.W.4 testified: -

***“...I did not conduct any identification parade at all. I found no need to do an identification parade...”***

If an identification parade was conducted and it does appear it was, why should the investigating officer claim that it was not conducted. We think that there is something fishy here. Is it possible that the results of the identification parade were adverse to the prosecution case and that is why the investigating officer found it necessary to hide that evidence? The learned magistrate ought to have been alive to this possibility. Further, we take the view that the doubt created as to whether or not the identification parade had been conducted in respect of the Appellant should have been resolved in favour of the Appellant.

Coming to the alleged recognition, we note that though the Complainants' alleged to have known the Appellant prior to the incident, when they reported the incident if at all they did, as the O.B. from Muthangari Police Station for 31<sup>st</sup> December 2003 has no such report, they never mentioned the Appellant. We have perused the O.B. entries for 31<sup>st</sup> December 2003 and noted as the Appellant claimed that there was no report by the Complainants concerning this case. Indeed P.W.3 who arrested the Appellant, in his evidence, did not say he had received any such report. One then wonders on what basis

was the Appellant was arrested.

The sum total of all that we have pointed out is that the scene of crime was not well lit, hence making it difficult for proper identification. The assailants were 5 metres or so away from their hapless victims in a narrow and poorly lit corridor and one of whom approached them from behind. The attack was sudden, with a gun and pangas being placed on the victims. Finally it is possible that the Complainants were inebriated. All these taken together makes the possibility of mistaken identification or recognition more certain.

With regard to inconsistencies and contradictions in the prosecution case we are unable to agree with the learned State Counsel that they were minor and did not shake the prosecution case. Considering the defence put forth by the Appellant, that the case was a frame up, we think that the contradictions were material. For instance P.W.1 testified that they were attacked from behind, while P.W.2 stated that they walked towards their attackers. On the issue of alcohol, whereas P.W.1 insisted that he had been drinking sodas, P.W.2 refuted this by categorically stating “**We were taking beer at Matopeni Bar, both of us.**” Regarding the circumstances prevailing at the scene of crime P.W.2 stated “**We lay down**” whereas P.W.1 stated “**.....I didn’t lie down, I just made as if to lie down....**” Whereas both P.W.1 and P.W.2 claimed to have attended identification parades, P.W.4 was categorical that no such identification parades were conducted.

In our view, the two Complainants were not credible witnesses and their evidence ought to have been considered with a lot of caution. This, the learned magistrate failed to do.

The Appellant advanced an *alibi* defence. He stated that on 30<sup>th</sup> December 2003, the day of the incident, he was at home and not at the scene of crime. He raised the defence with the investigating officer long before he was charged. The alibi was never investigated. See **WANG’OMBE VS REPUBLIC [1980] KLR 149**. The learned magistrate fell into error when in the course of discounting the defence stated that the **Appellant “ought to have availed some witnesses to account for that particular hour.”** An accused person never assumes any burden to prove the *Alibi*. All that is required of him is to raise it and create reasonable doubt. It is up to the prosecution to investigate and discount it. In requiring the Appellant to prove his alibi, the learned magistrate fell in to error. Considering the *Alibi* defence as against the disjointed prosecution case, we are of the view that the defence was plausible and ought to have been accepted in the Appellants favour.

In the end then, we hold that the Appellant’s conviction was not safe and ought to be disturbed. Accordingly, we allow the appeal, quash the conviction and set aside the sentence. The Appellant is entitled to his liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 8<sup>th</sup> day of March 2007.

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Miss Gateru for the Respondent

CC: Tabitha/Erick

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**