REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 582 of 2004

EVANS GITAU NJOROGE……..……APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

(From the original conviction and sentence in Criminal case No. 7877 of 2004 of the Chief Magistrate's Court Thika – Boaz Olao - C.M)

JUDGMENT

EVANSON GITAU NJOROGE the appellant was charged before the subordinate court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that –

"**On the night of 26th and 27th August 2004 at about 12.00 a.m. at Ngurweini village in Maragua district of the Central Province, jointly with others not before court while armed with a knife robbed one GABRIEL MACHARIA MIRINGO of cash Kshs.600/=, one pair of shoes, a coat, head cap and a wrist watch all valued at Kshs.1,950/= at the time of robbery used actual violence to the said GABRIEL MACHARIA MIRINGO"**

After a full trial, he was convicted of the offence and sentenced to suffer death. Being aggrieved by the decision of the learned trial magistrate, he has appealed to this court. The grounds of appeal can be summarized as follows –

1. **The learned trial magistrate erred in convicting him on the evidence of identification and recognition without considering that the circumstances were not conducive to positive identification.**

2. **The charge preferred was defective.**

3. **There were material contradictions in the evidence.**

4. **The learned trial magistrate rejected his defence, without considering that the appellant was a victim of circumstances.**

The appellant also filed written submissions.

Learned State Counsel, Mrs. Kagiri opposed the appeal and supported both the conviction and sentence. It was counsel's contention that the prosecution had proved its case beyond any reasonable doubt. PW1 and PW2 were together when PW1 was robbed. Though the offence was committed at midnight, there was moonlight which enabled the recognition and identification of the appellant as one of the two people who robbed Pw1. The said PW1 infact had previously worked with the appellant. The appellant also conversed with PW1 and PW2 before the robbery. It was counsel's contention that the conversation provided the time and opportunity for PW1 and PW2 to recognize the appellant. The appellant also stood very close to PW2.

Counsel submitted that there were no material contradictions. If there were any contradictions they must be minor and did not go to the core of the prosecution case.

Counsel also submitted that the defence of the appellant was considered and properly rejected by the learned trial magistrate. There was no evidence to show any grudge or indicate that the appellant might have been framed by PW1 and PW2.

In response, the appellant asked us to re-evaluate the evidence on record.

The facts of the prosecution case are as follows. On the night of 27th/28th August 2004 at about midnight PW1 GABRIEL MACHARIA MIRINGO and PW2 FRANCIS NDUNGU, who were brothers, were walking home at Nguruweini village, Maragua district. There was moonlight. On the way they met two people who greeted them and asked for Kshs.20/-. They responded that they did not have the money. Then the people asked for Kshs.10/=. They told them that they did not have the money. The two people then asked for cigarettes and they still said they did not have the cigarettes. They then told them to sit down. According to PW2, one of those two people had panga and one had a stick. It was his evidence that the appellant had a panga and that he knew the appellant before as GITAU, as he used to see him before that day at Ngurweini. It was PW1's evidence that the one who had a stick hit him. Then the two robbed him of his watch, cap, shoes and other documents. PW1 then ran towards where he and his brother(PW2) had come from and screamed causing the robbers to ran away. Later, as PW1 and PW2 were going home, they met the appellant. Together with the members of the public, they arrested him and then reported to the police.

According to PW1, when they refused to give in to the demands of the two people, they beat them up, threw them on the ground, ransacked their pockets and removed his cash Kshs.600/=, shoes, coat, head cap and a wrist watch. One of those robbers had a sword. He knew him before as GITAU, as they used to work together. After the robbery, they initially went and reported to the headman called JOHN, then to the police on the same night. They met the appellant on the way and arrested him and took him to the police. According to this witness, the scene of arrest was about 1 kilometer from the scene of crime. The arrest occurred about 1 hour and 40 minutes after the incident. PW3 PC **VINCENT MALOBA** was a police officer from Gaichanjiru Police Base. He charged the appellant with the offence. According to him, PW1 and PW2 made a report to him on 27.8.2004 that they had been robbed the previous night. At that time, the appellant was already in custody. This witness did minimal investigations in the case, as the appellant had already been arrested and was already in custody.

The appellant gave an unsworn defence. It was his evidence that on 26.8.2004 he had gone to visit a neighbour. On the way he heard people who knew him calling him. They said that they had been robbed. They then said that he was the robber. They took him to the police station for no reason as they had found nothing in his house.

Faced with this evidence, the learned trial magistrate held thus in the judgment –

"The circumstances of this case indicate clearly that the complainant and PW2 had sufficient time to see their attackers and it is clear that the circumstances were favourable to positive identification. Besides, this is a case of recognition and not mere identification. The accused says he knows nothing about this robbery but the complainant and his witness gave cogent and reliable evidence and I have no reason to doubt their credibility".

We have evaluated the evidence as we are required to do in a first appeal – see **OKENO – vs – REPUBLIC [1972] EA 32**.

The conviction of the appellant herein was based on identification or recognition. In **PAUL ETOLE & ANOTHER – vs – REPUBLIC** – Criminal Appeal No. 24 of 2000 (unreported) while emphasizing the need to examine with greatest care the evidence adduced in court in proof of identification, the Court of Appeal stated –

"The appeal of second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. …….

It is true that recognition may be more reliable than identification of a stranger, but even when a witness is purporting to recognize someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made".

In our present case it is not in dispute that the robbery occurred at night. It was after midnight. There is no evidence describing the scene whether it was an open place or not. The evidence of PW1 and PW2 is that there was moonlight. However, there was no attempt by the prosecution to describe the intensity of that moonlight. In our view, the circumstances of the identification or recognition were difficult. It was important for the prosecution to have adduced evidence to describe the scene as well as the intensity of the moonlight. Though the two witnesses PW1 and PW2 stated that they recognized the appellant as a person they knew before, they did not say that they recognized him by voice. Instead they recognized him by the moonlight. There is no evidence from any of the two witnesses that they identified the second robber who was with the appellant. In our view, in the circumstances of this case, if the moonlight was indeed bright enough to enable the two witnesses to recognize the appellant, it would also have been bright enough to enable them to identify the other robber. We find that the identification or recognition of the appellant at the scene, cannot be said to be free from error. Therefore, it would not be safe to sustain a conviction on the evidence of recognition or identification in this case.

That is not all. PW1 and PW2 stated that they made areport of the robbery to the headman and that the arrest of the appellant was done with help of members of the public. Important and crucial witnesses were not called to testify. These were the headman to whom the first report was made, as well as the members of the public who assisted in arresting the appellant, and the police officer to whom the first report was made that night. In **BUKENYA – vs – REPUBLIC [1972] EA 549 Lutta Ag. V – P** held –

"**(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.**

(iv) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution".

We have already pointed out the inadequacy of the evidence of identification and recognition of the appellant. The appellant stated in his defence that he was arrested as he was going home. The headmen, the members of the public who helped arrest the appellant, and the police officer to whom the first report was made would have given evidence on the nature and content of the initial report made by PW1 and PW2. As it is, we do not know the contents of the first reports of the robbery. We do not have

independent evidence as to why and how the appellant was arrested. The prosecution did not give any reasons why they did not call these crucial witnesses. In the circumstances of this case, we make the adverse inference that if the evidence of the above important and crucial witnesses was called, it would have been adverse to the prosecution case. We give the benefit of the adverse inference to the appellant.

For the above reasons, we allow the appeal, quash the conviction and set aside the sentence imposed by the learned trial magistrate. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Nairobi this 19th June 2007.

……

OJWANG

JUDGE

……

DULU

JUDGE

In the presence of –

Appellant

Mrs. Gakobo for State

Eric – Court Clerk

……

OJWANG

JUDGE

……

DULU

JUDGE