



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

**Criminal Appeal 21 of 2006**

**JOSEPH MWANGI KAMAU .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From original conviction and sentence in Criminal Case No. 01 OF 2003 the Chief Magistrate's Court at Makadara – Ms. Karani SRM)***

**JUDGMENT**

JOSEPH MWANGI KAMAU the appellant was charged before subordinate court jointly with two others, with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. After a full trial, the other two were acquitted, and the appellant was convicted of the offence of simple robbery contrary to section 296(1) of the Penal Code. He was sentenced to serve 10 years imprisonment.

Being dissatisfied with the decision of the learned magistrate, the appellant appealed to this court, mainly on the identification which he contended was not positive and without possibility of error.

At the hearing of the appeal, learned State Counsel, Ms. Gateru, conceded to the appeal. It was counsel's contention that identification was by a single identifying witness. The learned magistrate did not warn herself of the danger of convicting on such evidence. It was counsel's contention that the complainant (PW1) testified that the place of robbery was a place where people freely passed. The said witnesses did not give any details as to how he identified the appellant as one of the robbers. In counsel's view there was the real possibility of mistaken identity.

This being a first appeal, I have re-evaluated the evidence on record and come to my own conclusions and inferences. Indeed, the conviction of the appellant is predicated on one evidence of identification by a single witness PW1, the complainant. He was the only one who testified to the occurrence of the robbery.

In **PAUL ETOLE & ANOTHER –vs- REPUBLIC CA NO.24 of 2000** (unreported) the Court of Appeal, while emphasizing the need to examine with greatest care the evidence adduced in court in proof of identifying before a court of law stated –

**“The appeal of the 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 person 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 finally, it should remind itself of any specific weakness which had appeared in the identification evidence. 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”**

The present case is not based on evidence of recognition. However, it is based on evidence of identification of the appellant as one of the robbers, by the complainant, (PW1) DICKSON JABUYA. The time of the incident was during the day at around 9.30 a.m. However, the complainant was attacked by several people. It was his evidence that the place of attack was a place where other people were passing by. He went and reported the incident to some security personnel nearby. He did not describe the appearance or that clothes that any of the robbers wore. The appellant was arrested merely because, the security officials, on receiving the report of robbery, saw the appellant crossing or having crossed the nearby Nairobi river. There is no evidence that the complainant never lost sight of the appellant, or that he pointed the appellant to the security officials before arrest.

In my view, there was the possibility of mistaken identity. The magistrate should have warned herself of the dangers of convicting on the evidence of a single identifying witness and should have evaluated the evidence and circumstances of identification. I am of the view that had the learned magistrate warned herself and analyzed the circumstances of identification and arrest of the appellant, he would not have come to the conclusion he came to. In my view, there is the possibility of error in the identification of the appellant and therefore it is unsafe to sustain a conviction on the same. Learned State Counsel has correctly conceded to the appeal. The appeal will therefore succeed on that ground.

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

Date and delivered at Nairobi this 9<sup>th</sup> day of July 2007.

**George Dulu**

**Judge**

**In the presence of –**

**Appellant**

**Ms. Gateru**

**Eric - Court clerk**