REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 2 of 2006

JULIUS NJOROGE KISELE……..APPELLANT

VERSUS

REPUBLIC ……....……RESPONDENT

(From original conviction and sentence in Criminal Case No. 1356 of 2005 of the

***Chief Magistrate's Court at Kibera - Mrs. H. Wasilwa PM*)**

J U D G M E N T

JULIUS NJOROGE KISELE, the appellant, was charged before the subordinate court with the offence of robbery with violence contrary to section 296(2) of Penal Code. The particulars of the charge were that on 14th February 2005 along Kahuho road in Riruta within Nairobi area Province jointly with another not before court, being armed with dangerous or offensive weapons namely a pistol and crude weapon robbed **MILKA WAIRIMU** of cash Kshs.300/= and immediately after the time of such robbery used or threatened to use actual violence to the said **MILKA WAIRIMU**. After a full trial, he was convicted and sentenced to suffer death by hanging. Being dissatisfied with the decision of the trial magistrate, he has appealed to this court. His amended grounds of appeal are 4, and can be summarized as follows:-

1. The magistrate erred in convicting him on evidence of identification or recognition in unfavourable circumstances and in a situation where the complainants did not give a description of the robbers to the police when they first reported the robbery.

2. The learned magistrate erred when she convicted him without considering that the evidence was contradictory and insufficient.

3. The learned magistrate erred when she rejected his defence without giving proper reasons for its rejection contrary to section 169(1) of the Criminal Procedure Code (Cap.75).

4. The learned magistrate erred when she found that the prosecution had proved its case beyond all shadows of doubt.

The appellant also filed written submissions to support his grounds of appeal.

The learned State Counsel, Ms. Gateru, opposed the appeal and supported both the conviction and sentence. Counsel contended that the prosecution proved the case beyond reasonable doubt. Counsel submitted that PW1 adduced evidence in court of how she was accosted by two people, one armed with a gun, who attacked her. The one with the gun pointed the gun at her, ransacked her trouser pockets and took her Kshs.300/=. Though the incident occurred at 9.30 p.m. there was moonlight at the scene, and the

complainant, PW1, recognized the appellant as one of the robbers since she had known him before. PW4 who was also present saw and recognized the appellant. PW4 also knew the appellant before, therefore the evidence of this witness was also evidence of recognition. Counsel contended that the magistrate relied on direct evidence.

Counsel submitted that there were no inconsistencies and contradictions in the evidence as alleged. However, in case there were any inconsistencies, the same were minor and did not shake the prosecution case.

On the appellant's defence, the learned State Counsel submitted that the same was considered and rejected by the learned magistrate, as it had no merits.

We have considered the evidence on record. We have also perused the judgment. The conviction of the appellant is clearly predicated on evidence of visual identification or recognition. In **PAUL ETOLE & ANOTHER –VS- REPUBLIC Criminal Appeal No. 24 of 2000**, 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 needs 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 view, the conditions for identification or recognition were not favourable as the time of occurrence of the incident was at night, the source of light was moonlight and the complainant PW1 and her mother PW4, both of whom testified that they recognized the appellant must have been scared by the threat of a pointed gun.

In our view, the recognition was not without possibility by error. It was for the prosecution to have established that the circumstances of the recognition were such that it was certain that it was the appellant who committed the offence. Since the recognition was by way of visual sight, it was incumbent on the prosecution to have adduced evidence that the lighting and circumstances at the scene established that the appellant was clearly recognised as one of the two robbers. On the lighting at the scene **PW1 MILKA WAIRIMU JORAM**, the complainant, started in evidence –

"**It was not very dark, there was moonlight. He said we raise up our hands. He ransacked my pockets, removed money from my trouser pockets Kshs.300/=. The other one held my mother by the colour, he wore a scarf and white cap. He was carrying a big stone with one hand, so I did not see his face. The one with a pistol wore nothing on his head or face. I recognized him from his face."**

The evidence of PW4, the mother of PW1, on the other hand was as follows-

"**On the way back, we met two men. The accused, the other one I did not know him. The 2 pointed PW1 with a gun and demanded money. He turned on me and pushed me. I fell down. It was a small gun. It was night but there was moonlight one could see a distance. Accused was next to me. I saw accused's face well in the moonlight. I saw the gun. He ransacked PW1's pockets."**

It is instructive to note from the above evidence that the intensity of the moonlight was not given in evidence by any of the two witnesses. The witnesses certainly did not say that they recognized the voice of the appellant as a person they knew before by voice. Though the evidence of PW1 was that PW4 was held by the other robber, PW4 stated that it was the appellant who pushed her to the ground. That was a contradiction in the evidence which was not resolved. Therefore we cannot say whether what PW1 stated

in evidence was the truth or what PW4 stated. There is therefore a big doubt on the evidence and circumstances of identification. The learned magistrate should have considered the evidence on the intensity of light and the contradictions in the of the two witnesses before coming the conclusion that the recognition was positive. She did not analyse the evidence on lighting and the contradiction. We hold that there is a real possibility of an error in the purported recognition of the appellant, from the evidence on record. On that ground, we will allow the appeal.

The appellant claims that his defence was not considered contrary to the provisions of section 196(1) of the Criminal Procedure Code (Cap. 75). That is not true. The magistrate did consider the appellant's defence and found it not to be true in light of the overwhelming prosecution evidence. It only happens that one page of the judgment was not typed, or did not come out in the typed script. We dismiss that ground of appeal.

However, as we have found that the evidence of identification or recognition was not without possibility of error, we will allow the appeal.

Consequently, we allow the appeal quash the conviction of the subordinate court and set aside the sentence. We order that the appellant be set at liberty unless he is otherwise unlawfully held.

Dated and delivered at Nairobi this 25th October 2007.

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J.B. OJWANG

JUDGE

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G. A. DULU

JUDGE

In the presence of –

Appellant in person

Ms. Gateru for State

Eric – court clerk