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

**Criminal Appeal 575 of 2005**

**SILVESTER OTIENO ALIAS NYAYO…….....APPELLANT**

**VERSUS**

**REPUBLIC……RESPONDENT**

***(From original conviction and sentence in Criminal Case No. 22269 of 2004 of the Chief Magistrate's Court at Makadara – Mrs. Usiu SRM)***

**JUDGMENT**

SILVESTER OTIENO alias NYAYO , 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 9th and 10th November 2004 at Marura Estate Kariobangi North in Nairobi area jointly with others not before court while armed with dangerous weapon namely a panga robbed RAHAB WARUGURU of one car battery, five pieces of cushion covers, one wall clock and cash kshs.900/= all valued Kshs.7100/= and at or immediately before or immediately after such robbery threatened to use actual violence to the said RAHAB WARUGURU. After a full trial, he was convicted of the offence and sentenced to suffer death as provided for by law. He has now appealed to this court, and his amended grounds of appeal are that –

**1. The magistrate erred both in law and fact while convicting him on the basis that he was positively identified and recognized by PW1, PW3 and PW4 without considering that the same was made under hectic prevailing circumstances and neither were his descriptions given to the police as per the OB produced before the court and thus rendered their evidence not substantial basis to link him with the allegations.**

**2. The magistrate erred in both law and fact by convicting him on the charges while the charges were not proved by the evidence which was riddled with doubts inconsistencies and contradictions.**

**3. The magistrate erred in rejecting his defence without giving it due consideration as required under section 169(1) of the Criminal Procedure Code (Cap. 75).**

The appellant also filed written submissions.

Learned State Counsel, Ms. Gateru, opposed the appeal and supported the conviction and sentence. Counsel submitted that the prosecution proved the case beyond any reasonable doubt. PW1 testified as to how she was robbed by three people and her items taken away by robbers. Some of the robbers were

armed with pangas, which they used to threaten the complainant (PW1).

With regard to identification, counsel submitted that the circumstances were favourable for positive identification. There was a chimney lamp in the house which was alight. In fact, the evidence on record was of recognition, which was more reliable than mere identification. Counsel submitted that both PW1, the complainant, and PW3 a sister of PW1 who was also in the same house, knew the appellant before. pw1 clearly testified that the appellant had a panga in his hand which he put on the neck of pw1 and ordered the occupants of the house to leave the house.

Counsel submitted that if there were any contradictions in the prosecution case, then those contradictions were minor and not material as to shake the prosecution case. Counsel lastly contended that the defence of the appellant was considered and found to be incredible.

The facts of the case are as follows: On the night of 9th and 10th November 2004, PW1 RAHAB WANGUI, was in her house at Kariobangi Muruka in Nairobi. She was with her two sisters Sarah Muthoni (PW4) and Emma Wamuyu (PW3). At about 11 pm some people who claimed to be police knocked at the door. The door was not opened, and those people forced the door open. Three men entered the house. There was a chimney lamp, which was alight. One of the intruders was armed with a panga, while another had a knife. These intruders carried away a car battery, 5 table clothes a wall clock, an umbrella and money Kshs.900/=. According to PW1, she recognized the person who was carrying the panga as the appellant, whom she knew by the name "NYAYO". PW1 also stated that the said "NYAYO" led her out of the house towards the main road. In the meantime, PW4 alerted neighbours who screamed and the intruders fled.

The appellant was arrested on 18/11/2005 when he went to report an assault at Kariobangi police post. He was arrested by PC Kalulu (who did not testify in court). He was later charged with the offence.

When the appellant was put on his defence, he elected to give sworn testimony. It was his defence that on 18th (the day he was arrested) at 6 a.m. he met 5 people at the place where he sold meat. One of those people was Wambugu. Those 5 people beat him up with broken battles. As he was proceedings to hospital, he met police officers and informed them what had happened to him. The police arrested Wambugu who was a cousin of the complainant (PW1) Rahab, who was appellant's girlfriend. However, PW1 complained that the appellant had attacked her as a frame up because he became friends with another woman called Eunice. He contended that, if the allegation against him was true then PW1 would have led the police to the place where he lived, as she was his neighbour and also lived near the police station.

Faced with the above evidence, the learned trial magistrate found that the prosecution had proved the case of robbery with violence against the appellant beyond any reasonable doubt, convicted the appellant and sentenced him to suffer death.

This being a first appeal, we are duty bound to re-evaluate the evidence on record a fresh and come to our own conclusions and inferences, taking into account that we did not have an opportunity to see the witnesses testify and to determine their demeanour, and give allowance for that – see OKENO –vs- REPUBLIC [1972] EA 32.

The conviction of the appellant is clearly predicated on the evidence of visual identification or recognition. In RORIA –vs- REPUBLIC [1967] 583, at page 384, Sir Clement De Lestang VP stated –

"**A conviction resting entirely on identify invariably causes a degree of uneasiness and as LORD GARDNER, L.C. said recently in the House of Lords in the course of debate on section 4 of the Criminal Appeal Act 1966 of the of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:**

"**there may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten – it is a question of**

**identity"**

It is clear to us that evidence of visual identification has to be treated with caution, to ensure that no injustice is caused by the conviction of an innocent person due to such evidence. In the recent case of **KARANJA AND ANOTHER –vs- REPUBLIC [2004] 2 KLR 140**, Githinji JA, Onyango Otieno and Deverell Ag JJA held, inter

alia –

**1. Evidence of usual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.**

**2. Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.**

**3. Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.**

**4.** …….

**5.** ……

**6.** ……..

**7.** ……...

We have evaluated the evidence on record. We are convinced that the circumstances of identification were difficult. Not only was the robbery committed at night, the source of light was said to be a chimney lamp, which we take to be an oil lamps. There is no evidence as to where exactly the chimney lamp was placed in that house. There is no evidence as to the intensity of the light. There is also no evidence on how far the source of light (the chimney lamp) was placed with regard to the appellant. Though the complainant (PW1) and PW4 testified that they recognized the appellant as one of the robbers, there is no evidence on record to show that there was any report to the police that these two witnesses knew or recognized the appellant as one of the robbers. There is also no evidence that they informed anybody else that the appellant was one of the robbers.

That is not all. The appellant, who appears to be a neighbour of the complainant, was arrested several days after the incident when he complained to the police that he had been assaulted. The police officer who arrested him was also not called to testify, to state exactly why he arrested him and in what circumstances. Because the appellant was not arrested due to any description given by the complainant, the arresting officer was a crucial witnesses, who should have been called to testify. The failure to call this crucial witness leads us to make an adverse interference that his evidence, if it was tendered in court would be adverse to the prosecution case – see BUKENYA & ANOTHER –vs- UGANDA [1972] EA 547.

Having evaluated the evidence on record, we find that the identification or recognition of the appellant was not positive and free from the possibility of error. It is not safe to sustain a conviction on the evidence of identification or recognition on record. We also find a big gap created by the failure of the prosecution to call a material a witness, the arresting officer. We will allow the appeal on these grounds.

The appellant complains that the evidence of PW3 EMMA WAMUYU (a minor) was wrongly admitted in evidence without ascertaining whether she knew the importance of an oath and the importance of saying the truth. Indeed, it is trite that where the court is to receive the evidence of a child of tender

years, the court has to be satisfied that the child has enough intelligence to justify reception of the evidence, and also that the child understands the difference between what constitutes truth and lies. This is what was amplified in the case of **GABRIEL s/o MAHOLI –vs- REPUBLIC [1960] EA 159** in which the Court of Appeal for Eastern Africa held, inter alia –

**(i)** ……..

**(ii) even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient that a child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between truth and falsehood; however**

**(iii)** …….**.....**

The above requirements, in Kenya are given statutory backing under the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15). The requirement applies only to children of tender years. We are aware that courts have in the past held that a child of tender years is one whose age is less than 14 years. However, section 2 of the Children Act No. 8 of 2001 provides a statutory definition of child of tender years as follows –

"**child of tender years" means a child under the age of ten years"**

In our view therefore, the requirement for ascertaining the intelligence of a child and whether or not that child understands the importance of saying the truth applies only to children who are below ten years of age.

In our present case PW3 was 14 years of age. The learned magistrate actually conducted an examination of the witness, before deciding to allow her to swear and tender her evidence. That ground cannot succeed and we dismiss the same.

The appellant also complains that his defence was not considered by the learned magistrate. With regard to the defence of the appellant, the learned trial magistrate stated in the judgment –

"**I found no evidence to show that accused was the complainant (sic) boyfriend. I find no evidence that he was framed for this offence"**

In our view, the contention of the appellant that his defence was not considered by the learned magistrate is justified. Section 169(1) of the Criminal Procedure Code (Cap. 75) clearly requires that the judgment should contain the point or points for determination, the decision thereon and the reasons for the decision. The learned magistrate should have specifically addressed what the appellant stated in his defence, made a specific or specific decisions on it, and should also have given the reasons for the decision(s). The learned magistrate did not do so, which was a fatal error to the conviction.

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

Date and delivered at Nairobi this 23rd day of October 2007

……..

**J. B. OJWANG**

**JUDGE**

……

**G.A. DULU**

**JUDGE**

**In the presence of –**

Appellant in person.

Ms. Gateru for State

Eric - court clerk