REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 163 of 2004

EPHANTUS KIMANI KAIRU ………..…….……………. APPELLANT

VERSUS

REPUBLIC …………………………………………….. RESPONDENT

(From original Judgment and Conviction in the Senior Principal Magistrate's Court at

Murang'a in Criminal Case No. 1497 of 2003 dated 20th May 2004 by Mr. G.K. MWAURA – PM)

J U D G M E N T

Ephantus Kimani Kairu hereinafter referred to as *"the appellant"* was arraigned in court on one count of robbery with violence contrary to *section 296 (2)* of the penal code. The prosecution successfully prosecuted the case against the appellant the resultant end that he was found guilty, convicted and sentenced to death as mandatorily provided for under the Kenyan law.

The appellant was aggrieved by the conviction and sentence, accordingly he lodged the instant appeal through **Messrs Kinuthia Wandaka & Co. Advocates**. In his petition of appeal, the appellant impugns his conviction on six broad grounds to wit: Identification, contradictions and inconsistencies in the prosecution case, shifting of the burden of proof, corroboration and failure by the learned magistrate to consider the sworn defence raised by the appellant.

The prosecution case briefly stated was that on 14th September, 2003 at about 9.30 p.m. the complainant (P.W.1) was on his way home from Murarandia Market. There was moonlight and ahead he saw three men walking towards him from the opposite direction. On meeting one another, one of the three whom he identified as the appellant demanded money from him. When he responded that he had no money, he was suddenly attacked with pangas. He was hit with the blunt side of the pangas. P.W.1 managed though to extricate himself and dash for his dear life. The attackers gave chase and he tripped and fell down. The attackers got up with him and continued assaulting him. Eventually, the appellant according to P.W.1 bit him on his right ear and chin. The attackers then left. He collected himself and went home. P.W.1 had Kshs.850/= in his shirt pocket. He realized that the pocket of shirt was torn off and the money missing. Reaching home, he reported to his wife what had befallen him. His wife (P.W.2) in response told him that earlier on the appellant and two other people had been to their home looking for him whilst armed with pangas. The appellant had then warned P.W.2 and P.W.1's mother (P.W.3) that he would kill P.W.1 that night. That he was spoiling for a fight. PW.1 then reported the matter to Kahuro police station on the same night and proceeded to Muriranja's hospital for treatment. P.W.6, the clinical officer who attended him and later completed the P3 form assessed the injuries sustained by P.W.1 as

harm. P.W.1 claimed that he had been able to identify the appellant among the three attackers courtesy of the moonlight. Having reported the incident to the police and given the name of the appellant, the appellant was subsequently arrested and charged.

Put on his defence, the appellant in his sworn statutory statement stated that on 14th September 2003 he was engaged on the farm the whole day. He had also contracted P.W.1 to split timber for him for an agreed fee of Ksh.3500/=. He paid him Kshs.4000/= for services on the understanding that P.W.1 will later pay back to him the difference of Ksh.500/=. P.W.1 never paid him back Ksh.500/= as agreed and at about 6 p.m. the appellant passed by P.W.1's house to see him. P.W.1 was absent but he met his wife who told him that P.W.1 had brought the machine for splitting and had left. The appellant then left and never saw or met P.W.1 that night. He was later arrested after being summoned by the OCS, Kahuro police station.

In support of the appeal, **Mr. Wandaka** learned counsel for the appellant submitted that the prosecution did not prove the offence charged and the learned magistrate erred in failing to see and appreciate the inconsistencies in the evidence tendered. That the appellant could not have been that foolish to have gone to the home of the complainant on the material night accompanied with other men armed with pangas and threatened to kill P.W.1. It is incredible that the appellant could announce his intention to kill P.W.1 and then commit a robbery on him that very same night. Counsel further submitted that the appellant and P.W.1 were related. In those circumstances it is highly unlikely that the appellant would have robbed P.W.1. Counsel also faulted the medical evidence adduced by the clinical officer. Counsel maintained that the evidence was contradictory as to when P.W.1 was injured and when he was examined. Because of these inconsistencies, counsel opined that the injuries allegedly sustained by P.W.1 during the robbery were not sustained on the night that P.W.1 claimed to have been robbed. On identification, counsel submitted that the circumstances obtaining were not favourable for positive identification. Although P.W.1 claimed that he saw the appellant courtesy of the moonlight the court was not told the intensity of the said light. The witness merely said that there was moonlight. Counsel also submitted that P.W.1 was frightened and in those circumstances he could have been honest in his purported identification of the appellant but mistaken. For this proposition, counsel relied on the case of **Gabriel Kamau Njoroge v/s Republic (1982 – 88) 1 KAR 1128**. Counsel concluded by submitting that the offence was not proved due to inconsistent evidence of the prosecution and urged us to allow the appeal.

Mr. Orinda, learned principal state counsel supported the conviction to the extent that the offence disclosed by evidence was not robbery with violence but assault. Accordingly he conceded that the conviction should have been for the lesser offence of assault. Based on the evidence of P.W.2 and P.W.3 there was no doubt that the person they saw that night was the appellant. That the appellant appeared to them to be worked up and expressed his intention to harm P.W.1. Two hours later P.W.1 when he appeared home injured he mentioned to his wife, the appellant as the culprit. Counsel submitted that the two knots tied together borders on circumstantial evidence that was fortified by evidence of identification by P.W.1. Counsel further submitted that the treatment of identification evidence by the trial court was on the right path of law. The direction of the moon came out in evidence. So considering that this was a case of recognition, since P.W.1 and the appellant were related and the working relationship, then it is not hard to imagine he was recognized. On the alleged contradiction in the evidence of P.W.4 the clinical officer, counsel submitted that P.W.4 dealt with P.W.1 on the basis of a treatment card. The issue of P.W.1 being injured was not in dispute. Accordingly assault was proved. Finally on the issue of sentence, counsel opted to leave the matter to us.

This being a first appeal it is our duty to re-evaluate the evidence and draw our own conclusions. In the now well known case of **<u>Okeno V R (1972) E.A. 32 at page 36</u>**, the predecessor to our current court of appeal stated:

"**An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination <u>(Pandya V. R.(1957 E.A. 336)</u> and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. <u>(Shantilal M. Ruwala V. R. (1957) E.A. 570).</u> It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the**

lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters V Sunday Post, (1958) E.A. 424."

It is pursuant to the foregoing that we have set out the evidence of the prosecution witnesses and what the appellant stated in his defence in his trial before the subordinate court and the submissions of respective counsels in support of and in opposition to the appeal.

Arising from the submissions of **Mr. Wandaka** for the appellant and **Mr. Orinda** for the state we must say at once that the only issue that falls for our consideration in this appeal is the issue of identification, nay, recognition. The incident is said to have occurred at night, 9.30 pm to be precise when the only source of light according to PW1 was moonlight. He testified that with the assistance of the moonlight he was able to recognize the assailants among whom was the appellant. The other witnesses who claimed to have recognized the appellant were P.W.2 and P.W.3, the wife and mother to P.W.1 respectively. They all claimed to have had an encounter with the appellant earlier on during the same right; at about 9.00 p.m. to precise. According to the two, the appellant came to their home spoiling for a fight. The appellant was accompanied by two other men. She recognized all the three courtesy of the moonlight and also her torch. As for P.W.3 she was able to recognize the appellant by voice as he spoke to her from outside her house. She never came out of the house. Both witnesses claimed that the appellant and his accomplices vowed to kill P.W.1 that night before they left. Later at about 11.00 p.m. according to these witnesses P.W.1 arrived home badly injured and told P.W.2 that he had been injured by three men and gave her their names. P.W.2 then confirmed that those were the very same men who earlier on had been at their home.

This was therefore a case of identification (recognition) by witnesses at night. It is recognized that evidence of visual identification in criminal cases can bring about a miscarriage of justice if it is not carefully tested. In ***Kiarie V Republic (1984) K.R 739,*** the court of appeal observed that where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. In the 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. See also the case of **Gabriel Kamau Njoroge (supra)** Lastly, although recognition is more reliable than identification of a stranger, such evidence of recognition should be tested carefully seeing that mistaken recognition of close relatives and friends are sometimes made ***(see Anjononi and others V The Republic (1980) KLR 59 and Wamunga V Republic (1980) KLR 424.***

With these principles in mind, can we really say that the identification, nay, recognition of the appellant was so watertight so as to exclude possibility of mistake? We entertain our own doubts. PW1 stated that he was able to see the appellant with his three accomplices with the assistance of the moonlight. The three were coming from the opposite direction. From the evidence, the moonlight was behind them. If that be the case, it is highly improbable that P.W.1 would have been able to see the faces of his assailants sufficiently to be able to recognize them. More important however is the fact that no enquiries were made by the court to establish the intensity of the light emitted by the moonlight. Was the moon bright for instance or was it covered by clouds. What was its position in relation to the three men and P.W.1. The length of time that PW1 took to observe the appellant so as to recognize him was similarly not inquired into. Lastly the position of the appellant in relation to the moonlight should have come under intense scrutiny as well. As stated in the case of ***Maitanyi V Republic (1986) .R 198*** these are the sought of inquiries that help in testing the evidence of identification with greatest care. Failure to undertake such inquiries is an error of law and such evidence cannot safely support a conviction. It matters not whether it is a case of recognition as opposed to identification. The complainant was unexpectedly confronted by a group of three men. He was innocently walking home in an area according to his own admission infested with thugs. From the evidence on record no sooner had he met the three that they unexpectedly set upon him with pangas. He tried to run but tripped and fell. The gang got up with him and assaulted him senseless and then left. This being the scenario we doubt very much whether, PW1 had really any opportunity to observe the appellant sufficiently as to be able to recognize him. If indeed there was such opportunity then it must have been a fleeting glance which was not sufficient to enable him see the

appellant properly as to be able to recognize him. It is important to note that the position of the appellant in the group of three is not indicated. If he was at the back or in the middle how possible was it for the complainant to see him sufficiently as to be able to recognize him if the thugs ahead of him were tall. It is possible that P.W.1 was attacked by other people and not necessarily the appellant considering his admission that the area where he was attacked is 'infested' with thugs.

At this juncture we wish to recount what was stated by the court of appeal in the case of **Owen Kimotho Kiarie v/s Republic, Cr. Appeal No. 93 of 1983 (unreported)**. In that case the court made this pertinent observation:

"……… **Peter and his wife must have been shocked by the gang. It is not unreasonable to hold that the presence of the robbers generated such fear as could and did interfere with the identification of the appellant. P.W.1 and his wife had the SRM and the judge believe that the members of the gang cared next to nothing about being seen and being observed under electric light within a rather small bedroom for as long as thirty minutes, during the robbery. All these relevant factors should have stirred the SRM to consider if P.W.1 and P.W.2 could have been genuinely mistaken about the identification of the appellant …."**

In the instant case, P.W.2 suddenly bumps into 3 men at night who proceed to unleash terror on him. The moonlight that could have assisted him identify any of them was shining from the back of these men. That the appellant who was alleged to have been among the thugs and who is a relative of the complainant does not take any measures to disguise himself and when he had just been at P.W.1's house breathing fire and brimstone is simply incredible. If what transpired earlier in the home of the complainant was true, it becomes much easier to connect the appellant with the offence although it was possible for the offence to have been committed by other people.

To us there is more to this incident than meets the eye. What incensed the appellant so much that he wanted P.W.1 dead? Courts should always be wary of Machinations by relatives or litigants who are out to use them to settle scores. The court should at least have attempted to find out what was a miss between the two. That would have gone to the credibility of the witnesses considering that they were all from the same family. The possibility of them ganging up and falsely testifying against the appellant over a grudge or for other reason(s) cannot be ruled out absolutely.

As correctly submitted by learned counsel for the appellant it is unbelievable that the appellant would have been foolish enough to go to P.W.1's home and announce his intention to kill P.W.1 and immediately thereafter commit a robbery on him. He would have known that he would be the first suspect. We take the view that much as P.W.1 could have been robbed, it could have been by other people, but he was readily willing to attribute it to the appellant for reasons which are not apparent and which the trial court should have tried to establish. The appellant did admit having gone to the home of P.W.1 looking for his balance of Ksh.500/=. Compared to the testimony of P.W.1, P.W.2 and P.W.3 we find this explanation plausible. We also note that P.W.1 and P.W.2 knew the appellant and the two people he is alleged to have been accompanied with during the two incidents, first when he went to the home of P.W.1 and secondly, when they were assaulting P.W.1. Those names were given to police (P.W.5) immediately. Surprisingly no efforts were made to arrest the appellant and his colleagues until the appellant was arrested on 24th October 2003 over another offence. There is no evidence that the appellant and his colleagues after the commission of the alleged offence went underground. There is no evidence that the police made any efforts to arrest the appellant or his cohorts. Indeed after the arrest of the appellant no further action was taken to arrest the other two suspects whose names and particulars were given. To date they have never been arrested. This adds another feather to our suspicion that the appellant may have just been framed in the case. There can be no other explanation if people who are suspected to have been involved in the offence and are known cannot be arrested and charged alongside the appellant.

The upshot of all that we have said is that we are not completely satisfied with the identification (recognition) of the appellant during the commission of the offence. His appeal therefore has considerable merit. It is allowed, conviction quashed and sentence imposed set aside. The appellant

should be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 4th day of October 2007.

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE