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

**Criminal Appeal 1086 of 2003**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 1833 of 2003 of the Senior Principal Magistrate's Court at Kiambu (Mrs. Wachira – SRM)**

**GEORGE KAMAU KINYUA.……..…….....…….……APPELLANT**

**VERSUS**

**REPUBLIC…….....……...RESPONDENT**

**J U D G M E N T**

**GEORGE KAMAU KINYA** was convicted of one count of **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code. He had been charged jointly with another person. The charge alleged that on 2nd August 2003 at Riabai village in Kiambu, the Appellant and his co-accused jointly using iron bars and knives robbed the Complainant Kshs.2,300 and used personal violence on him. The Appellant was sentenced to death as prescribed under the law. Being aggrieved with the conviction, he lodged this appeal. In his petition of appeal, the Appellant has raised the following grounds: -

One that circumstances prevailing at the scene were not favourable for positive identification.

Two that evidence adduced was by a single identifying witnesses which was insufficient.

Three vital witnesses were not called by the prosecution.

Four that the Appellant's alibi defence was not considered adequately in contravention to Section 169(1) of the Criminal Procedure Code.

**MRS. GAKOBO** learned counsel for the State conceded to the appeal on grounds that the only evidence against the Appellant was that of PW1 who said he had known the Appellant since birth. Counsel submitted that the learned trial magistrate did not warn herself of the danger of relying on the evidence of a single witness especially considering the prevailing cirucsmtances at the time the offence was committed.

We have re-analyzed and re-evaluated the evidence adduced before the trial court while bearing in mind that we neither saw nor heard the witnesses and giving it due allowance. Looking at the evidence before court and the learned trial magistrate's judgment, the Appellant was convicted on account of the evidence of identification given by PW1, the complainant herein. After summarizing the evidence adduced before her, the legend trial magistrate found as follows: -

*"I am satisfied that the 1st accused is positively identified by PW1 herein. The 1st accused does not dispute the identity. The injuries inflicted on PW1 are serious injuries. The 1st Accused is guilty and convicted accordingly as charged."*

There was no analysis of the evidence and the Appellant's complaint that **Section 169(1)** of the **Criminal Procedure Code** was not complied with was not without merit. A capital charge brought under **Section 296(2)** of the **Penal Code** is a very serious charge as upon conviction, the accused person faces a death penalty. The trial court therefore must carefully consider all the evidence adduced before it before deciding to convict or acquit.

Where the only evidence of identification an accused person is that of a single witness, the court should scrutinize the evidence under two tests. See **OLWENO vs. REPUBLIC (1990) KLR 509**.

The first test should be whether the conditions under which the single witness claims to have identified the accused person were such that there was positive identification.

The second test to which the evidence of a single witness should be subjected to is whether it could be relied upon without any other evidence, to sustain a conviction.

These tests should be applied, in our view, even where the single identifying witness claims to have known the accused person prior to the incident. The circumstances under which the Complainant saw the Appellant are clearly alluded to in evidence. It was at night and that is why the Complainant had to flash a torchlight before he could see the people he met inside his compound.

According to the Complainant, no sooner had he flashed his torch than he was hit on the mouth and he fell down unconscious. The incident took a very short time. We find that the Complainant had a fleeting glance at the intruders and therefore the evidence of identification was shaky.

Subjecting this evidence to the two tests, we spoke about earlier, we find that the conditions under which the Complainant identified his assailant were not conducive for positive identification. Consequently the evidence of identification by the Complainant could not be relied upon to sustain a conviction standing on their own.

There was no other evidence which confirms the Appellant's complaint in that regard. The Complainant claims he fell unconscious, who found him in his compound and who took him to hospital? Could they have witnessed something? All these questions could have been answered had the police bothered to carry out proper investigations and call the necessary witnesses.

What disturbs us though is the total lack of evidence of theft. Whereas the Complainant clearly states that the Appellant assaulted him, the Complainant could not tell who took his money from his pocket or at what point. After being hit, he fell down unconscious. He later woke up in hospital. Even if we were to find that the Appellant assaulted the Complainant, that finding would not justify a conviction for the offence charged.

We find that that Appellant's appeal has merit.

We shall allow it quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 25th day of May 2006.

…….**…**

**LESIIT, J.**

**JUDGE**

……

**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellants

Mrs. Gakobo for State

CC: Erick/Ann

……**...…**

**LESIIT, J.**

**JUDGE**

……

**M.S.A. MAKHANDIA**

**JUDGE**