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

Criminal Appeal 1077 & 1078 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 2213 of 2002 of the Chief Magistrate's Court at Nairobi (Mrs. M. A. Mlanga – SRM)

MANAMBA LEBILAL SAITABU……..…….…….....……..……APPELLANT

VERSUS

REPUBLIC…….....…….…….....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1078 OF 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 2213 of 2002 of the Chief Magistrate's Court at Nairobi (Mrs. M. A. Mlanga – SRM)

JOELN LEMAMA KINUTHIA……..…….……..……APPELLANT

VERSUS

REPUBLIC…… ……..……...RESPONDENT

J U D G M E N T

MANAMBA LEBILAL SAITABU and **JOEL LEMAMA KINUTHIA** were both convicted of one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and sentenced to death as by law prescribed.

The charge against them alleged that on 10th August 2002 at Kirinyaga Road, jointly with others and while armed with dangerous weapons namely rungu, robbed the Complainant of his mobile phone, sweater and cash Kshs. 7500/-.

The facts of the case were that the Complainant in the company of his friend **ISAACK KAMAU** PW2, parked his car outside a bar along Kirinyaga Road. It was 4.00 a.m. on 10th August 2002. The Complainant then came out of the vehicle but was called by name before being hit by rungus and robbed

of his property. PW2 managed to escape but by the time he came back, the thugs had escaped. The Appellants were arrested later on 13th August 2003 by PW3 when the Complainant identified both to him. In their defences both Appellants denied the offences. According to their defences, they were not arrested together.

We have consolidated these two appeals because they arose out of the same trial.

The Appellants have raised similar grounds of appeal which we shall consider together.

They challenge their convictions on grounds that the charge sheet was defective, that the evidence of identification was insufficient to sustain a conviction and that their defences were not given due consideration.

MRS. GAKOBO, learned counsel for the State conceded to the 1st Appellant's appeal on grounds that the learned trial magistrate shifted the burden of proof against him and that as a result the prosecution case was fatally affected. Learned counsel however opposed the 2nd Appellant's appeal. Learned counsel submitted that the evidence of identification by PW1 and PW2 was strong enough to sustain a conviction because there was sufficient lighting where the incident occurred. That since the Complainant led to the Appellants arrest, then that was sufficient proof that he had identified the Appellants during the robbery.

We have carefully considered this appeal; submissions made by both Appellants and learned counsel for the State. We have also subjected the evidence adduced before the trial court to a fresh analysis and evaluation as required of a first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32** and **GABRIEL KAMAU NJOROGE vs. REPUBLIC (1982-88)** 1AR.

The Appellants were convicted on the basis of visual identification and recognition given by the Complainant and his friend Isaac PW2. The circumstances under which the Appellants were identified, is critical since the offence took place at 4.00 a.m. In the case of **MOHAMED ALFANI & 20 OTHERS vs. REPUBLIC CA No. 223 of 2002**, it was held: -

"***Where the evidence relied on to implicate an accused person is entirely that of identification, the evidence should be watertight to justify a conviction."***

The Court of Appeal cited earlier cases from the same court with approval i.e. **REPUBLIC VS. ERIA SEBWATO 1960 EA 172** and **KIARIE vs. REPUBLIC 1984 KLR 739** at page 744. The Complainant's evidence clearly shows that he parked his vehicle outside a building along Kirinyaga Road and went out of the vehicle. As he walked into some building, the Complainant claims a person called him by name. On turning he saw it was the 1st Appellant. He was then assaulted and robbed. The Complainant however did not give evidence as to the nature or intensity of lighting, if any, at the place where the incident occurred. He merely said that he recognized the 1st Appellant as he had known him for 8 months. He said he had also been seeing the 2nd Appellant.

PW2 was the only one who spoke about lights. In his evidence, PW2 said that after the Complainant stopped the vehicle he, PW2, closed the window. Then he noticed six men approach. He then went out of the vehicle and escaped to call for help. PW2 varies the Complainant's evidence because he seems to say that no sooner had they stopped the car than six men attacked the Complainant. The Complainant had not walked out as the Complainant claimed in evidence.

Coming to the issue of lighting, PW2 said: -

"***On arrival we parked. I noticed six people among them were the two accused before court who started beating him. They was electricity one (sic) …. I decided to run away."***

The electricity light alleged to light the scene by PW2 was never described neither were any distances

given from the position of the light in reference to the attackers and the witnesses. The evidence of identification by both witnesses needed scrutiny and before it could be relied upon to convict the Appellants it ought to have been found to be watertight. In the learned trial magistrate's judgment she made the following observations: -

*"**PW1 and PW2 had known both accused for several months as they usually go to drink changaa around Matumbo Bar. They were in a position to positively identify the two accused persons with the help of security light from Gikumbura lodging…"***

With due respect to the learned trial magistrate, she did not subject the evidence of the Complainant and PW2 to scrutiny in order to establish whether the condition under which each claim to have seen the Appellants and to have identified them were favourable for positive identification. From the learned trial magistrate's judgment, she seemed to have been impressed by the fact that the two witnesses said that they knew both Appellants before. That may be so, however on their ability to see, identify and recognize them, the court should have been satisfied that it was possible in the circumstances. As we have already stated, only PW2 tried to describe the light under which he saw the assailants, the Complainant did not.

Nonetheless, there was no description given to enable the court to make a finding whether the conditions of lighting prevailing at the scene were such as to would have led to a positive identification of the Appellants free from error or mistake. In absence of that evidence, the Appellants ought to have been given the benefit of doubt.

On this ground alone, we believe that the appeal can be disposed of. The Appellants were not positively identified at the scene of this incident. There subsequent arrest does not serve as corroboration to the already faulty identification by both PW1 and PW2. In the circumstances we shall allow these appeals, quash the convictions and set aside the sentences. The Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 25th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mrs. Gakobo for State

CC: Erick/Ann

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE