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

Criminal Appeal 1038, 1039, 1040, 1041 & 1042 of 2003

(From the Original Conviction and Sentence in Criminal Case No. 1916 of 2003 of the Chief Magistrate's Court at Kibera – Ms Mwangi, SPM)

PAUL MBETI…….....……..…….. APPELLANT

VERSUS

REPUBLIC ……..…….....…….RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1039 OF 2003

SAMUEL KARIUKI …..……..…….....…….APPELLANT

VERSUS

REPUBLIC…….....……..……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1040 OF 2003

JAMES NGUGI KINUTHIA ……..…….....…….APPELLANT

VERSUS

REPUBLIC.....
.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1041 OF 2003

JAMES NGUGI KINUTHIA ……..….....….....…….APPELLANT

VERSUS

REPUBLIC…….....……..……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1042 OF 2003

BENSON GITHIA MWANGI ……..…….....…….APPELLANT

VERSUS

REPUBLIC…….....……..RESPONDENT

JUDGEMENT

PAUL MBETI, SAMUEL KARIUKI, JAMES NGUGI KINUTHIA, JAMES WAINAINA THIONGO and ***BENSON GITHIA MWANGI*** were jointly charged and convicted of one count of robbery with violence contrary to Section 296 (2) of the Penal Code. Upon conviction they were each sentenced to death as provided for under the law. Being dissatisfied with conviction and sentence the Appellants individually and separately lodged these Appeal. At the hearing of the Appeals, we opted to consolidate them for ease of hearing and as they arose from the same Criminal case in the subordinate Court.

In brief, the facts of the Prosecution case were that on 29. 9. 2003 at 1 a. m. PW1 was asleep in his house when he heard his cell phone ring. It was his son (PW2) calling him. Apparently the two had an understanding that in the event that there were intruders in the compound they would alert each other by use of the cell phone. PW1's house constructed with iron sheets only was then cut and some iron sheets removed. A group of thugs gained entry. They cut up pw1 and thereafter stole his T.V. Iron box, gas cooker (Meko), a bible with Kshs1, 700/= inside and another Kshs 850/= from his wallet. Pw1 was with his wife (PW3) but she was not harassed. When the thugs left, PW1's two sons PW2 and PW4 took him to Kenyatta National Hospital where he was admitted for 5 days. Upon being discharged he went to the Police Station and was issued with a P3 which was duly completed by Dr. Zephania Kamau, (PW6) who classified the injuries sustained by PW1 in the incident as grievous harm. Neither PW1 nor PW3 was able to identify any of the thugs. However the alleged robbers were identified by PW2 and PW4. a according to PW2, the robbers numbered 11 using the security light and moonlight pw2 managed to identify the 2nd and 5th Appellant as they passed near where he was hiding with some of the items stolen from his father's house. According to PW2, he was only 3 meters away from where the thugs passed. He was hiding behind a Bougainvillea fence. As for PW4 he testified that on 22. 2. 2003 at 1 a.m. he was sleeping in his house when he heard dogs barking loudly. He got via the back door and immediately heard his mother scream. He proceeded to his father's compound and with the assistance of the security lights in the compound, he saw some people standing outside. He was able to identify all the Appellants save the 5h Appellant. Once the robbers left, PW4 proceeded take PW1 to hospital using his car. He then proceeded to record a statement with Police and stated that he had recognized some of the robbers. Using a list of the alleged robbers drawn by one Jim, the Police were able to arrest the Appellants herein and had them charged accordingly.

In their defences, both denied their involvement in the crime and claimed that they were victims of mistaken identity. As for the 2nd Appellant, he claimed that PW4 framed him in the case because of personal vendetta. He also claimed that PW4 was a drug peddler with whom they had disagreed in the past and they had an on going Criminal case.

The Appellants were represented at the hearing of the Appeal by Mr. Githinji, Learned Counsel. He argued the Appeal on three grounds:-

(i). **THAT** the prosecution did not prove its case beyond reasonable doubts.

(ii). **THAT** the trial Magistrate shifted burden of proof to the defence.

(iii). **THAT** there was no corroboration of the evidence of PW2 and PW4.

In support of the grounds one of the Appeal aforesaid, Counsel submitted that the evidence of the Appellants' defences were not analyst at all. That after discounting the defence case without by serious analysis, the learned trial Magistrate concluded that she believed that the Appellants were identified but the basis of that belief is lacking. Counsel further submitted that the evidence of a single witness can be relied onto find a conviction. However such evidence has to be tested carefully. Counsel submitted that conditions favouring positive identification were ideal. According to Counsel Failure by PW2 to identify any one and PW4 being able to identify some of the robbers and yet they were in the same place are matters which the trial Magistrate should have analysed. PW2 and PW4 took their father, the Complainant to hospital yet they never mentioned to him and or their mother that they had recognised some of the robbers. To Counsel therefore the purported identification was an afterthought.

Counsel further submitted that PW6 had admitted that, PW4 was a known drug peddler. That the 3rd Appellant raised the issue of a grudge in his defence. PW4 admitted in essence that the parents of 3rd Appellant had differed with him. And that PW4 had admitted having taken 3rd Appellant to Police because of differences with his wife. According to Counsel the trial Magistrate ought to have considered these issues carefully. Counsel further pointed out that he saw the 4th Appellant within their compound at the time he was taking his pw1 to Hospital but he never said that he was among the robbers. Finally Counsel submitted that no attempts were made at recovery of weapons used in the robbery nor items stolen.

Mrs. Obuo, Learned State Consul appeared for the state and opposed the Appeal. Counsel submitted that there was no legal requirement that an arresting officer must have a list of names of suspects before arresting them. On PW4 being a drug dealer, Counsel submitted that, that alone could not stop him from being a witness. In any event Counsel submitted, PW4's credibility was not impeached. Counsel submitted that PW2 and PW4 properly recognized the Appellants. Although both PW2 pw4 said they were 3 meters from the scene, Counsel submitted that each one of them identified different people as they were at different locations. As to whether or not the trial Magistrate shifted the burden of proof counsel submitted the learned magistrate did no d such thing. Counsel submitted that even if this Court was to find that the trial Magistrate did shift the burden then this Court as the first Appellate Court is required to re-evaluate the evidence tendered afresh. According to Counsel Conditions of identification were favourable and that the evidence linking the Appellants to the commission of the offence was overwhelming. On investigating officer not testifying, Counsel submitted that there was sufficient evidence on record and the prosecution case was not prejudiced in any way.

We have carefully subjected the evidence adduced before the Lower Court to a fresh evaluation bearing in mind that we neither saw nor heard the witness and giving due allowance. See ***OKENO VS REPUBLIC (1972) EA 32.***

We must at once say that we are dissatisfied with the manner in which the judgment of the Lower Court was crafted. It was perfunctory to say the least. The offence facing the Appellants is serious. It carries with it a death penalty in the event of a conviction. It is therefore a matter deserving careful analysis, evaluation and well though out decision. What do we have there? We have a five page Judgment. Pages 1 to 4 are dedicated to summarizing both the prosecution and defence case. Then in one paragraph the trial Magistrate reaches he r conclusion thus:-

"……***I do believe the accused persons were identified by both PW2 and PW4 properly and that they are the ones who robbed PW1 and on the process injured him. I thus find the offence as proved beyond any reasonable doubt and I convict each of them accordingly…."***

It is obvious to us that this Judgment was written in contravention of the express provisions of Section 169 of the Criminal Procedure Code. The Learned trial Magistrate did not as much as attempt to draw issues for determination, her decision thereto and the reasons for the decision. To our mind this was a serious dereliction of duty that culminated in miscarriage of justice. This failure by the Magistrate to write the Judgement in the manner set out by Section in 169 criminal procedure code would have been

sufficient to dispose off this Appeal. However, as a first Appellate Court we are expected to transform ourselves into the trial Court and subject the evidence tendered to fresh evaluation without ofcourse the benefit of hearing and seeing the witness as they testify. This is what we intend to do hereinafter. Otherwise we think that the Appellants' Complaint on this aspect of the matter is not without merit.

With regard to the 1st, 2nd, 3rd and 4th Appellants, it was the evidence of PW4 that the identified them by recognition. However our perusal of the record reveals that when the robbers struck pw4 got out of his house and stood beside a flower fence near a small gate. It is from here that he saw the aforesaid Appellants as they left his father's house carrying various items in the charge sheet. However we note that the distance from where PW4 was hiding and the path taken by the robbers was not disclosed. We are aware that the incident occurred at night. However apart form saying that there was security light form his father's house that enabled PW4 to identify the Appellants, it is not clear from the record how intense the light was, its source in relation to the Appellants as well as PW4. It would appear that PW4 was actually hiding from the robbers otherwise he would have been seen by them if we were to go by his evidence that he was within a yard of the robbers. Indeed in his own evidence he stated under cross-examination by the 3rd Appellant:-

"…….***..Where I stood is a fence covering bee's house and our father's ……"***

Now if the Bourgenvellia fence was covering his father's house, how could he have managed to see and recognize the Appellants? It is possible that whatever barred the robbers from seeing PW4 could as well have impeded PW4's purported identification of the Appellants. Even if we were to grant that perhaps PW4 could have seen the Appellants, he was also hiding fearing for his own life. In those circumstances, his purported identification would be under stressful and fearful circumstances making it hard to register a positive identification. Not to be left out is the fact that the said robbers were many and were in motion. In which case PW4 could have only had a fleeting glance of them.

In the case ***of PATRICK NABISWA VS REPUBLIC , CRIMINAL APP. NO. 80 OF 1987,*** the Court of Appeal dealing with reliability of visual identification had this to say:-

"…..***This case reveals the problems posed by visual identification which is unreliable for the following reasons which are disclosed in Black stones Criminal Practice 1977 Section F8….***

(i). Some persons may have difficulties in distinguishing between different person of only moderately similar appearance and may witnesses to crimes are able to see perpetrators only fleetingly often in stressful circumstances.

(ii). Visual memory may fade with passage of time.

(iii). as in the process of unconscious transference, a witness may confuse a face he recognised from the scene of crime (it may be an innocent person) with that of the offenders……."

In the circumstances, we do not think that the identification by PW4 of the Appellant's could be said to be free from possibility of error or mistake contrary to the submissions of Learned State Counsel.

Further although PW4 claimed to have positively identified, nay, recognised the Appellants he did not disclose that fact either to the Complainant, his brother (PW2) or his mother (PW3). The Appellants were people well known to both witnesses. The fact that he did not mention the Appellants at the first instance to pw1 pw2 and pw3 raises suspicion regarding his alleged recognition of the Appellants.

We also note that whoever had written the list of names of the alleged robbers and which PW5 used to arrest the Appellants; one Jim was no called to testify. Considering that nothing incriminating was recovered from any of the appellants, it was necessary for this Jim to testify and elaborate the basis of his list.

In our view PW4's alleged identification of the Appellants was by single identifying witnesses. In the

case of ***GIKONYO KARINA VS REPUBLIC (1980) KLR 23*** it was held:-

"…..***Where a conviction depends upon the identification of the defendant by a single witnesses, the evidence of that witness must always be tested with greatest case and on a first Appeal in such case, the Court must satisfy itself that it was safe to act upon that evidence…..***"

In the light of what we have already stated herein above, it is quite clear that the said evidence was not safe to act upon. The mere fact that he Court is impressed by the demeanour of a witness or thinks that he/she is a honest witness is not enough to justify the departure from the cardial rule that the evidence of a single identifying witness should be carefully be tested particularly if it is known that the condition prevailing at the time of the alleged identification were difficult as in the instant case. In such case particulars of a 1st report by the victims and or witnesses is of critical importance. A witness may be honest yet mistaken and make erroneous assumptions particularly, if she or he believes that what he thinks is likely to be true, must be true. The Court therefore must be convinced that there was time, light as well as opportunity at the scene of crime for a witness to observe the robbers so as to exclude an error being made in identification of the robbers.

As for PW2, he claims to have identified by recognition as well the 2nd and 5th Appellants. Whatever we have said with regard to identification by recognition of the 1st, 2nd, 3rd and 4th Appellants by PW4 applies with equal force to the alleged identification of the 2nd and 5th Appellants by PW2. Suffice to say that when the robbers struck, PW2 hid by the fence and was not seen by the them. He was 3 to 4 metres away from the robbers behind Bougainville fence. There is the possibility that whatever impeded the said robbers from seeing PW2 at short distance of 3 to 4 meters must also have interfered with PW2's view.

PW5 in his evidence stated that the 5th Appellant was arrested on the basis of information gathered from an informer. It is in evidence that PW2 knew the 5th Appellant very well including his residence. If this is the case, then why did PW2 not provide the information to the police regarding the whereabouts of the Appellant so that they could effect his arrest immediately if he was certain that the was a member of the gang of robbers that raided his father's house? Faced with a similar scenario justices Mbaluto and Oguk commented in the case of ***MUSIKA KETA VS REPUBLIC HCCR APP NO. 446 OF 1990*** as follows:-

"…….***The complainant said he knew the Appellant. This is a fact. This is confirmed by the Appellant. In his evidence he also knew his home and place of work and yet he did not offer to take the Police to those places when he recovered form his injuries…. It is not clear to us why it took him 32 days to allege the arrest of the Appellant and also why it was affected by youth winger, was there more to his matter than came out in evidence….***"

We could not agree more with observation in the circumstances of this case.

It is also not lost on us that the Appellant and PW1, PW2 PW3 and PW4 were relatives as well neighbours. This being the case, could the Appellants have committed the crime without as much as disguising themselves and knowing very well that they could easily be recognized by their victims?

The answer to this question was provided in the case of ***REPUBLIC VS ERIA SEBWATO (1960) EA 174,*** wherein it was stated:-

"……***That the accused, well known to the Complainant, should go with seven other men to commit an organized robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognised, and that, in my view, casts doubt on the evidence of the Complainant and his wife….***"

We are of the same view with respect to his matter. The Learned trial Magistrate it would appear was not alive to this aspect of the matter. Had she been we are certain that she could have come to another conclusion other than that the Appellants were guilty of the offence.

The Appellant gave various defences. These defences ought t have been considered carefully by the trial Magistrate bearing in mind the Appellants were relatives and neighbours of some of the witnesses. Indeed PW4 did agree that all was not well between him and the 3rd Appellant. The two had cases in Court and they bore a grudge towards each other. PW4 too was a self declared drug peddler. Hs evidence therefore ought to have been considered with a lot of caution. We think that the defences raised by the Appellants were plausible and ought to have received more attention.

In the end then, we agree with the Learned Counsel for the Appellants that the convictions of the Appellants were not safe and cannot be sustained. We therefore allow the Appeals, quash the convictions and set aside the sentences of death imposed on each one of them. The appellants and each one of them should therefore be set at liberty forthwith unless they are otherwise lawfully held.

Dated at Nairobi this 23rd day of May, 2006.

LESIIT

JUDGE

MAKHANDIA

JUDGE