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

Criminal Appeal 1013 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 10761 of 2002 of the Chief Magistrate's Court at Makadara (Mrs. R.M. Kimingi – PM)

KASSIM HASSAN……...…….....…..……..APPELLANT

VERSUS

REPUBLIC…….....……..…....RESPONDENT

J U D G M E N T

The Appellant **KASSIM HASSAN** was convicted of violently robbing the Complainant in this case, **MARY OBISA OJIAMBO** of Kshs.300/- cash a handbag and mobile phone make Nokia valued at Kshs.7500/- while armed with offensive weapons namely a pistol and sword. He was sentenced to death. It is against the conviction and sentence that he now lodges his appeal. The Appellant has raised five grounds in his petition of appeal as follows: -

One that the trial magistrate erred in law and facts in basing the conviction on visual identification without support of identification parades.

Two that crucial witnesses were not called especially one Waithera and one Oscar.

Three that the learned trial magistrate misdirected herself as to the totality of the evidence adduced by the prosecution and failed to observe the need for corroboration and presence of contradictions.

Four that the trial magistrate erroneously rejected his defence without giving reasons.

The facts of the case were that as the Complainant, PW1, walked to work along a side path, she met face to face with the Appellant. The Appellant stopped suddenly and looked at her, causing her to also stop and look back at him. The Complainant decided to continue walking. Other people came along and walked with her briefly before they branched off to other routes. Then she met a man who removed a pistol like object and told her to surrender her bag. She resisted and as she tried to wad him off, she looked back and saw the Appellant. The Appellant jumped on her and hit her on her leg. The Complainant released the other man's pistol like object which she had held on to. The Appellant hit her again this time breaking her leg. The Appellant then robbed her of her bag. He had a long Somali sword and as he ran with PW2 in hot pursuit and as others went to Complainant's aid, the Appellant managed to escape completely. Same day, PW2 and one WAITHERA led police to the Appellant where he was arrested. Nothing was recovered. The Appellant in his defence narrated how two police officers arrested him but he denied any involvement with the offence.

The appeal was opposed.

We have carefully considered the submissions by both the Appellant and the prosecution and the grounds of appeal raised. We have also evaluated and analyzed the evidence afresh bearing in mind that we neither saw nor heard the witnesses and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**.

It is true that the Appellant was convicted on the basis of visual identification of two witnesses, PW1 and PW2. There was a third person, one **WAITHERA**, who took the arresting officers, PW3 and another to Kiamaiko and identified the Appellant. This person was not called as a witness. The Appellant contends that the Complainant said that the incident took 2 minutes and that since no identification parade was conducted, that period of time was insufficient for the Complainant to identify the assailants. The Appellant submitted that the description the Complainant gave to the police of an injury on the fore-head which was not healed was a common description which could not suffice.

MRS. GAKOBO, learned counsel for the State submitted that the evidence of the prosecution was sufficient to sustain a conviction. Counsel submitted that the identification of the Appellant by the Complainant was watertight. That the circumstances of identification were good being day time and that the Complainant had seen the Appellant for a span of 10 minutes which was long enough to make a proper identification of the Appellant. Learned counsel also submitted that PW2, who chased the Appellant for a distance and also challenged him to surrender the Complainant's bag also noted his clothing and his wound and the same day he identified him to the police who arrested him.

The evidence of PW1 demonstrates clearly that she saw the Appellant twice that day. The first time is when she met face to face with him along a path after a barber's shop. The Appellant stopped suddenly as if he was looking for something and that drew the Complainant's attention towards him. She also stopped and looked at him before continuing with her walk. She saw him again at the place of robbery where after she resisted a man totting a gun like object, the Appellant who had followed her from behind sprung on her before hitting her leg twice and completely breaking her bone and eventually taking her hand bag. The Complainant noted a stitched healed wound on the Appellant's forehead and that was one of the description she gave to the police, PW3, the same day. PW2 also noted the same wound as he chased the Appellant soon after the attack on the Complainant and he confirmed the Appellant's identification when he was arrested by PW3 after one **WAITHERA** led the 2 of them to where the Appellant could be found. Prior to the arrest, PW2 on his part had chased the Appellant for a distance until he jumped over a fence and stood to observe him for a time as he checked inside the Complainant's bag. PW2 had challenged the Appellant to stop and he said in his evidence that the Appellant looked at him defiantly after he jumped over a fence which PW2 could not do due to his heavy weight. It was also at that point that the Appellant searched through the Complainant's bag as PW2 both watched and shouted at him.

Even though no identification parades were conducted for the Complainant to identify the Appellant after her discharge from hospital, the evidence of identification by PW2 both before and after the Appellant's arrest was strong enough to supply corroboration to the Complainant's evidence. The Complainant had seen the Appellant twice the same morning, before and later during the attack. The time of the attack was estimated as 2 minutes. However, before the attack and in circumstances that were relaxed and without any haste the Complainant saw the Appellant at close quarters. The Complainant's evidence still needed corroboration because it was after four days that she saw him again. However, the description she gave to PW3 of the Appellant of having a stitched healing wound on the forehead was confirmed both by PW3 and also PW2. PW2 had seen the Appellant for a long enough time in circumstances that were conducive for positive identification and on the same day, when his memory was still fresh, together with one **WAITHERA** who identified the Appellant for purposes of arrest. PW2 had described the Appellant to PW3 as one with a stitched wound on forehead with a Muslim cap. PW2 said he wore some clothes at the time of arrest as he had during the chase he gave to him. We find that the identification of PW2 was in broad daylight and was long enough to rule out any possibility of mistake or error. That evidence taken together with the Complainant's evidence was in our view safe and strong to sustain a conviction.

The Appellant complained that crucial witnesses were not called. He named two of them as one **WAITHERA** and one **OSCAR**. **OSCAR** in our view was not necessary to be called since he had not witnessed the robbery. He only drove the Complainant to hospital. As for **WAITHERA**, she witnessed the incident and also led PW2 and PW3 where the Appellant was arrested. **WAITHERA** was an important witness. However failure to call her does not adversely affect the prosecution case since PW2, who also witnessed the incident and also saw the Appellant identified him to PW3 at the time of arrest. An adverse inference that the evidence not called by the prosecution may not have favoured the prosecution case can only be drawn where the evidence adduced by the prosecution was barely adequate. See **BUKENYA & OTHERS vs. UGANDA 1972 EA 549**. That inference cannot be made in this case because we are satisfied that the evidence adduced by the prosecution was adequate for the just conclusion of the case.

The Appellant also challenged the learned trial magistrate's final conclusions. He submitted that in fact there was misdirection and failure to observe the need for corroboration and the presence of contradictions. He highlighted the contradictions in the prosecution case as variance in the Complainant's evidence at one time saying she does not work and later saying she was going to work. Secondly that while the Complainant said the Appellant had high heeled shoes; PW2 said he had flat form shoes which had mud. Thirdly that the Complainant said she was in hospital for 4 days and PW4; a police officer said she stayed in hospital for one month.

On the issue of shoes worn by the Appellant, we think there was a topographical error in the record. PW2 said that the Appellant had platform shoes but in typed proceedings, it was typed as flat form. The description 'platform' connotes high heeled shoes and is the opposite of what appears in the typed copy of the proceedings (flat form). The error is topographical and is of no consequence.

On Complainant's evidence concerning her job, from the record, on the date she gave her evidence, 4/2/03, eight months after the attack she stated as follows: -

"***I reside at Huruma. I do not work. I was previously working at Aprotech as office orderly in May 2002…"***

it is clear what the Complainant said was that at of date of giving evidence in court she had stopped working but that at the time of the robbery she was working at Aprotech and was on her way to work on the material morning. There was therefore no contradiction in the Complainant's evidence.

As of the period of time the Complainant was admitted in evidence, the Complainant said that she had been admitted for 8 days. PW5 was **Dr. Kamau** who said he examined the Complainant at the Police Surgery 8 days after the attack. PW5 said that the Complainant had been admitted between 8th and 10th May 2002. Those were 3 days. We do not see where the inconsistency is and further, PW5 did not say that the Complainant was in hospital for a month since he clearly said that he examined her eight days after the attack. That complaint is without merit.

The Appellant also complained that his defence was not given due consideration. **MRS. GAKOBO** submitted that the defence was actually considered but was dismissed after it was found to have no merit. The learned trial magistrate considered the Appellant's defence at page J6 of the Judgment and at Page J8, dismissed it in view of the strong evidence by the prosecution. We are satisfied after analyzing that defence in light of the prosecution case and the learned trial magistrate's findings, that the rejection of the Appellant's defence was justified.

We also find that the evidence adduced proves beyond any doubt that the Appellant, who was armed with a Simi or double edge knife, in company with another who had a gun=like object robbed the Complainant of her handbag, cash and mobile phone and in the course of the robbery broke her right leg. We find the charge was proved as required and that the learned trial magistrate's finding cannot be faulted.

We accordingly dismiss the Appellant's appeal, uphold the conviction and confirm the sentence.

Dated at Nairobi this 16th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA, M.S.A.

JUDGE

Read, signed and delivered in the presence of;

Appellant(s)

Mrs. Gakobo for the State

Ann/Eric– CC

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LESIIT, J.

JUDGE

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MAKHANDIA, M.S.A.

JUDGE