



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 738 of 2001**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 1066 of 2001 of the Chief Magistrate's Court at Thika (B.A.O. Asunah – SRM))**

**STEPHEN KARIUKI WANGARI.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**STEPHEN KARIUKI WANGARI** was found guilty and convicted of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. It is alleged that on 11<sup>th</sup> February 2001 at 9.00 p.m. at Majengo Estate in Thika District jointly with another not before the Court while armed with a knife robbed **MWANIKI NGANGA** of Kshs.300 and also used actual violence on the Complainant. The Appellant was sentenced to death as by law prescribed. It is against the conviction that he now appeals to this court.

The facts of the case were that the Complainant was walking home alone at 9.00 p.m. when he met two people who pinned him down and robbed him of cash Kshs.300/-. The two ran in different directions but were chased by members of public who heard the Complainant scream. The Appellant was arrested and charged. In his defence, the Appellant said he was coming from a funeral meeting when he met people running. He also decided to run. It is then that he met 2 people who held him. The Complainant came later and identified him as one of those who had robbed him.

The Appellant was represented by counsel who relied on three out of the 8 grounds of appeal cited in the filed petition of appeal.

The first ground argued is whether the Complainant PW1, positively identified the Appellant as one of his assailants. The second was whether there was need for corroboration of the Complainant's evidence. Thirdly, whether it was safe for the learned trial magistrate to rely on the single evidence of the Complainant.

We have carefully considered this appeal and evaluated and analyzed afresh the evidence adduced before the trial court as expected of us as a first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32**. The appeal was opposed by the State through its counsel **MISS GATERU**.

On the issue of the identification by the Complainant, **MR. ANAMBO**, counsel for the Appellant submitted that the incident took place at 9.00 p.m. and that according to the Complainant there was moonlight. That it was the moonlight which the Complainant alleged enabled him to see his two assailants. Counsel submitted that however the strength of the moonlight was not described. That further

the attack was short, sudden, unexpected and surprised the Complainant. That the assailant who actually robbed the Complainant was first held by the Complainant and that the Complainant alleged that the Appellant stabbed him in order to force him to release his accomplice. Counsel submitted that the circumstances of identification were not conducive for positive identification.

**MISS GATERU**, learned counsel for the State submitted that the Appellant was positively identified by the Complainant. That the Appellant was not a total stranger to the Appellant and so the identification was safe. Counsel submitted that the Complainant was able to see the colour of the Appellant's clothing at the time of attack as a red trouser and white T-shirt. Mr. Anambo had submitted that the learned trial magistrate based the conviction on the Complainant's ability to identify the Appellant on the basis of the clothing he wore but submitted that no reliance should have been placed on that piece of evidence as the clothing was not made an exhibit.

It is true that the Appellant was convicted on the sole identification evidence of the Complainant. At J1 of the judgment, learned trial magistrate found that

***“He (appellant) was arrested and PW1 identified him by his clothing.”***

At J2 of the judgment the learned trial magistrate found further as follows: -

***“Complainant said he noted that one man wore a pair of red trouser and a white short and he is the one who'd stabbed him and ran as the Complainant screamed.”***

The evidence of identification especially by a single witness made under circumstances that are known to be difficult must be received with circumspection and considered with great care and caution. The incident in question occurred at 9.00 p.m. and definitely at night. It was in between estates in Thika Town which is a semi-urban area. There was no street lighting. The Complainant talked of moonlight. We are concerned that reference to the moonlight was casual and in passing and therefore the emphasis required to enable the court get a clear picture of the conditions of the light to determine whether positive identification was possible was totally lacking in this case. From this evidence it does not clearly come out that there was sufficient light with which a person could identify another. We think that why the Complainant emphasized the clothing rather than the Appellant's physical features like his face since he knew him prior to this attack is basically because there was not sufficient light from the moon to enable him see the Appellant clearly to identify him. We are concerned about another aspect of the case which emerges from the Complainant. The Complainant first testified on 4<sup>th</sup> April 2001. For no apparent reasons, he was re-called and cross-examined further by the Appellant on the 24<sup>th</sup> May 2001. That was almost 2 months later. In cross-examination by the Appellant during the second time the Complainant stated as follows: -

***“I met two people who beat me up. I didn't know them and I didn't talk to them. I came to when you were arrested...” (Emphasis ours)***

The learned trial magistrate did not put this phrase “I came to” into consideration. However in the ordinary sense, “I came to” gives the impression that one had fainted or temporarily lost consciousness. The Complainant was confessing he became unconscious after the attack and before the Appellant's arrest. The Appellant's arrest was by others without the assistance of the Complainant in terms of identification. We also noted that the Complainant saw his assailants being chased by members of public, none of whom testified in court. PW3 who apprehended the Appellant at a trench saw people running towards him and he decided to chase and arrest one. There was therefore a missing link between the offenders and the Appellant's arrest and the Complainant's loss of consciousness and failure to call members of public who chased the offenders was fatal to the prosecution case.

Mr. Anambo submitted that there was a need for corroboration of the Complainant's evidence due to poor conditions of identification. **MISS GATERU** did not think so. As we have already found there was a missing chain between the perpetrators of the offence, the chase and the Appellant's arrest. Those who saw the offenders running away after attacking the Complainant would have provided this link but they

did not testify. Consequently the Appellant's defence that we found people running and he joined in sufficiently casts doubt to the already shaky evidence of the prosecution.

Yes there was need for corroboration of the Complainant's evidence on the basis of our finding that the circumstances of identification were difficult. There was need to either corroborate the Complainant's evidence or alternatively adduce other evidence, whether direct or circumstantial, that would implicate the Appellant with the offence. See **ODHIAMBO vs. REPUBLIC CA 77 of 2001 Mombasa.**

We have looked for such other evidence and what comes nearest to it is the "knife holder" found on the Appellant after his arrest. The evidence of PW4 was that the Complainant was stabbed by a short object. The Complainant said that the Appellant was the one who stabbed him. If indeed he had, then the knife should have been found either on the Appellant or at the scene. We do not think that the recovery of the "knife holder" would suffice as evidence to support the Complainant's evidence. There was no proof that the said object would have caused the injury found on the Complainant. The object was not an exhibit and as a result the trial court had no opportunity to see it. We find the said object of no probative value to the prosecution case and that the Complainant's evidence remained uncorroborated.

**Mr. Anambo** submitted that the evidence of the Complainant could not safely sustain the conviction in this case and we agree with him. We believe we have said enough on the case, issues raised by the Appellant's advocate and the evidence before court, to be able to dispose of this appeal.

The upshot of the appeal is that he conviction entered herein was unsafe and cannot be allowed to stand. Same is quashed and the sentence set aside. The Appellant should be set free unless otherwise lawfully held.

Dated at Nairobi this 13<sup>th</sup> day of June 2006.

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Mr. Anambo Counsel for the Appellant

Mrs. Gateru State Counsel

CC: Erick/Tabitha

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**LESIIT, J.**

**JUDGE**

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**M.S.A. MAKHANDIA**

**JUDGE**