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

**Criminal Appeal 629 & 630 of 2003**

**(From original conviction and sentence in Criminal Case No. 22516 of 2003of the Chief Magistrate's Court at Makadara, - R. Kimingi, Mrs. PM))**

**JOEL THUKU KIMANI……..…….....……..…APPELLANT**

**VERSUS**

**REPUBLIC…….....……RESPONDENT**

**CONSOLODATED WITH**

**CRIMINAL APPEAL NO. 630.2003**

**DAVID WAINAINA NJOROGE…….....…….. APPELLANT**

**VERSUS**

**REPUBLIC…….....…….. RESPONDENT**

**JUDGMENT**

***JOEL THUKU KIMANI*** and ***DAVID WAINAINA NJOROGE*** to whom we shall hereafter refer to as the 1st ad 2nd Appellants were jointly charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code before the Chief Magistrate's Court at Makadara. After the Prosecution had availed 4 witnesses, the trial Magistrate found the Appellants guilty on both counts and convicted them. Upon conviction, the Appellants were sentenced to death as required by law. The Learned Magistrate further ordered:-

*"……**Each of the two counts to run concurrently…."***

We are at a loss to understand what exactly the Learned Magistrate meant by this order. We are not

aware that a sentence of death can be ordered to run concurrently. It is common knowledge that if the sentence is executed, one can only be hanged and or executed once. We would appeal to trial Magistrates to be extremely careful in whatever they record so that it does not appear in the mind of the general public that they dealt casually with a matter that is otherwise weighty and serious. It smacks of lack of due diligence on the part of the trial Magistrate.

Be that as it may, the Appellants were aggrieved by the conviction and sentence. They separately lodged instant Appeals which we ordered to be consolidated when they came up for hearing before us.

All the Appellants have raised similar grounds of Appeal in their petitions of appeal. They all allege that:-

(i). THAT the Learned trial Magistrate erred in both law and fact for failing to find that the Prosecution of the case was partly conducted by an unqualified person.

(ii). THAT the Learned trial Magistrate erred in law and fact in failing to observe that the Appellants were no properly identified.

(iii). THAT the Learned trial magistrate erred in law and fact in failing to observe that the Appellants were not arrested at the locus quo.

(iv). THAT the Learned trial Magistrate erred in Law and fact in failing to resolve material contradictions in the Prosecution case in favour of the Appellants.

(v). THAT the Learned trial Magistrate further erred in law and fact in failing to give due consideration to the Appellant defences.

In brief the Prosecution case was that on the night of 18th/ 19th September, 2002 at around 10pm the Complainant in count 1 and the Complainant in count II went to sleep. They were all employees at Igana Bar along New Pumwani Road. They went to sleep with other co-workers in the same premises. The Complainant in count 1 (PW1) switched off the lights in the room as they proceeded to sleep. At about 2 am PW1 was suddenly awoken by bright lights emanating from two torches in the room and he was ordered by the people with the said torches to stand up and lead them to the bar offices. Something cold like a metal was placed on his neck as they proceeded to the office on the ground floor about 20 metres away outside the bar. He found the lights in the office on. He opened the office and with the aid of the electricity light therein, he was able to see the two people. He identified them as the Appellants herein. The first Appellant had a panga and he is the one whom PW1 gave Kshs.13,600/= from the office as well as his mobile. The 2nd Appellant was with 1st Appellant all through. After they had received the money and the mobile phone, they ordered PW1 back to the hotel and proceeded to search and tie the other workmates with robes. However before they could tie PW1, there was aloud bang from the back of the building. On checking there as fire and PW1 told his colleagues about it and they all ran out of the building whereupon they encountered Police officers. The Police officers ordered them to lie down on the floor. PW1 and his colleagues informed the police that they were employees of Igana Bar and had been the victims of the robbery. They also informed the officers that the robbers were still in the building. The Police proceeded to the building and conducted a search. Soon thereafter they came out with the Appellants whom the witnesses positively identified as having been the robbers and had them robbed them of the items particularized in the charge sheet.

Put on their defence, the 1st Appellant stated that at the material time he was selling tea within Gikomba Market when he met with Police officers who asked him for his identity card which he gave. The Police officers then asked for his employment card which he did not have and though the officers took him to his place of work, they still took him to Kamukunji Police Station. At daytime he was called from the cells and found three people whom he did not know who were told to look at him properly as he will be brought to Court for them to identify him. He was later charged with an offence he knew nothing about. The three people he saw according to the appellant are the same ones who testified in Court against him.

As for the 2nd Appellant, he testified on oath that on material day he had bought fruits at Wakulima Market very early in the morning for hawking at Kayole. As he was looking for a porter, he was stopped by Police and asked for an identity card which he did not have at the time as he had forgotten it at home. The police then demanded kshs.500/= so as to let him go. He did not have the money. He was then asked to give names of the known robbers in the area. When he declined to do so he was told by the Police offices that unless he produced the identity card or gave out Kshs.500/= or the names of the robbers, he would be taken to the Police Station. He was taken to the Police station and after 3 days he was called out of the cells by a police officer. When he came out he found 3 people who were told to look at him. He was then taken back to the cells. Thereafter h was then brought to Court and charged with an offence he knew nothing about. He stated that the witnesses who testified against him in Court were the same one who saw him in the police cells.

In support of the Appeals, each Appellant with the permission of the Court tendered written submissions that we have carefully perused and considered.

Both Appeals were opposed by Mrs. Kagiri, Learned State Counsel. Counsel submitted that the evidence on record was sufficient to convict the Appellants. In particular Counsel relied on the evidence of PW1, PW3 and PW4. That the Appellants were positively identified by PW1 in the bar office as they robbed him of the money as well as his mobile phone. There was electricity light in the said room. Counsel further submitted that no sooner had the Appellants robbed PW1 and were in the process of robbing PW2, that there was a loud bang outside the building. The victims all rushed out leaving the robbers in the building. According to PW4, one of the Police officers at the scene, they conducted a thorough search of the building which yielded the Appellants who were found hiding underneath a bed. They also recovered a panga. Counsel submitted that the Prosecution evidence was consistent and well corroborated. There were no contradictions in evidence whatsoever contrary to the submissions of the Appellants. As regards the Appellants' defences, Counsel maintained that the defences were duly considered by the trial Magistrate and rejected. The trial Magistrate gave reasons why she found the defences unbelievable.

As we consider the submissions by the Appellants as well as the Learned State Counsel, it must be remembered that at this is a first Appeal we are duty bound to examine and re-evaluate the evidence on record so as to reach our own conclusion in the matter, always remembering that we had no advantage, as the trial Court did, of seeing and hearing the witnesses and making due allowance thereof. See ***OKENO VS REPUBLIC (1972) EA 32***.

It is also an established principle that an Appeal Court will not normally interfere with a finding of fact by the trial Court, whether in a Civil or Criminal Case, unless it is based on no evidence, or on misapprehension of the evidence, or the trial Court is shown demonstrably to have acted on wrong principles in reaching the findings. See ***CHEMANGONG VS REPUBLIC (1984) KLR 611.***

The Appellants stated that the proceedings in the trial Court were a nullity as at some point in time, the Prosecution was undertaken by one Police Constable Radak. In accordance with Section 85 (2) as read together with Section 88 of the Criminal Procedure Code, PC Radak was not qualified to act as a Prosecutor and hence the trial of the Appellants in which he purported to act as a Public Prosecutor must be declared a nullity. This issue was not addressed at all by the Learned State Counsel. However since it goes to jurisdiction, we must deal with it.

Having perused the record of the trial Court, we note that on 9th May, 2003, when the case came up for further hearing, the Court Prosecutor thereat was P.C. Radak. He made an Application for the case to be adjourned and the Court rejected the Application and ordered the case to proceed. It was at this juncture that P.C. Radak applied to close the Prosecution case which as allowed. He was in attendance when the appellants gave their defences.

In our view although P. C. Radak never led any Prosecution witnesses, however his act of applying to close the Prosecution and his presence during the defence hearing meant that he actively participated in the prosecution of the case. Since P. C. Radak was below the rank of a Police officer required by the Law to qualify to be a Public or police Prosecutor, the proceedings were thereby rendered a nullity and we

would have so held and proceeded to consider whether or not to order a retrial. However this is not necessary in view of the fact that there are several other grounds upon which the Appeals must of necessity succeed and considering further that the issue of retrial was not canvassed before us.

The Appellants allege that the circumstances obtaining at the scene of crime could not have afforded proper identification of the robbers. According to PW1 and Pw2 the robbery occurred at about 2 a. m. The two witnesses were suddenly awaken from their sleep by people with two torchlight's beamed at them. Before retiring to sleep, they had switched off the electricity light. That as the thugs were ordering them around, they would occasionally turn the torchlight on each other and that way, the two witnesses were able to identify the Appellants. Further PW1 testified that he was able to identify the Appellants in the bar office as he gave out the money and his mobile phone. There was electric light in the bar office. He further testified that they were in the bar office for approximately 2 minutes. In those circumstances can it be said that the identification of the Appellants was conclusive and free from possibility of mistake? We do not think so. The circumstances were no doubt difficult. On the issue of identification, we can do no more than refer to the well known English case of ***REPUBLIC VS TURNBULL (1976) 3 ALL ER 459*** in which the Lord Chief Justice gave the following directions:-

"…….***..First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.***

***In addition he should instruct them as to the reason for the need for such a warning and should make reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of words.***

***Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observations and the subsequent identification to the Police? Was there any material discrepancy between the description of the accused given to the Police by the witness when first seen by them and his actual appearance…….?"***

From the record, neither the Court nor the Prosecution made such inquiries. The two witnesses were unexpectedly awaken from their sleep by torches beamed at them. Though they claim that the robbers would occasionally turn the torches to themselves, they did not say for how this would last to enable them positively identify them. If it was just for a fleeting moment, we doubt whether it would have been possible for them to see the said robbers who were in any event strangers to them sufficiently to be able to identify them. The witnesses did not even state for how long if at all they kept the robbers under observation, the intensity of the light emitted by the torches and whether the robbers were static as they occasionally directed the torches on each other. How many people were in the room as well as the size of the room were all matters that required to be inquired in to. It is also noteworthy that PW1 was thereafter frog marched to the bar office in darkness whilst:-

"***Something cold like a metal pressed on the neck…"*** .

The bar office adventure only lasted two minutes. Although there was electricity in the said office, once again no inquiries similar to those set out in the ***TURNBULL CASE (SUPRA)*** were made.

In the circumstances, we doubt very much whether the much touted identification of the appellants by PW1 and PW2 and which was heavily relied on by the trial Magistrate to find the conviction was free from possibility of mistake or error.

The trial Magistrate also relied on the fact that the Appellants were arrested by the Police at the locus in quo following a search mounted by them. All the Appellants maintain that they were arrested away from the scenes of crime going about their daily chores and brought to the scene of crime. These clearly come out in their cross-examination of PW1, PW2 and PW4. It is interesting to note that though the crime was committed at 2 am. It was not until 5 a. m. that the Police allegedly brought the Appellants were the witnesses were. Further it would appear that some of the witnesses merely identified the Appellants because as stated in evidence by PW1:-

"…***I am only saying that you were involved because you were brought by the Police I recognised you as one of those who had robbed us when you were brought by the Police….***"

It would appear therefore that had the Police not brought the Appellants to where the witnesses were most likely the said witnesses could not have identified them or any of them. Faced with a similar situation the Court of Appeal in the case of ***PAUL MWANIKI KITILI VS REPUBLIC, CR. APP. NO. 270 OF 2002 (UNREPORTED)*** delivered it self as follows:-

"….***The first point of law raised by Mr. Buti who argued the Appellants Appeal before us was that his mode of identification was flawed. Mrs. Mwangi the Assistant Deputy Public Prosecutor conceded this point and for our part we have no doubt that if the Prosecution relied solely on this form of identification, they would have found it very difficult to sustain a conviction of the Appellant before us. The proper procedure would have been for the two Police officers (PW5 and PW7) to take the Appellant straight to the Police Station, arrange for an identification parade and see if the Mouseleys would have been able to identify the Appellant at a properly organized parade. The kind of identification alleged by PW1, PW2 and PW3, though strictly not dock identification, can add very little to the Prosecution case. In our view Mrs. Mwangi was perfectly right in conceding this point…..***"

***It is very likely and very natural that if Police confront Complainants with one individual arrested soon after a robbery on them the witnesses would say the person so arrested was among those who robbed them (emphasize ours).***

We think that the same situation obtains here. None of the aforesaid witnesses were present when the Appellants were allegedly arrested underneath a bed in the building. The Appellants were brought to where the witnesses were 3 hours after the robbery. All along the said witnesses had been forced to lie down. The Police came with a panga, pliers and a chisel which items were allegedly recovered in the process of fishing out the Appellants from their hideout. It is instructive however to note that none of the witnesses testified as to seeing the Appellants or any one of them with either the pliers or chisel. The witnesses' only claimed to have seen the first Appellant with the panga. Again according to the evidence of PW4 who recovered the panga, the panga was not found in the possession of the Appellants or any one of them. Instead it was allegedly recovered at the door in the room where the Appellants were said to have hidden. On the same issue however PW2 stated :-

"…..***During the robbery, I saw more than five robbers. The one who I saw with a panga is not in Court. None of those I saw with torches is in Court…..***"

Clearly the evidence regarding the alleged recovery of the panga is not consistent. Taking into account all the foregoing, it is most probable that these witnesses who identified the Appellants as the robbers, did so merely because the robbers were brought to them by the Police officers as correctly submitted by the appellants..

The Appellants have also raised the issue that the Prosecution case was riddled with contradictions which the Learned Magistrate failed to resolve in their favour. This argument is not without considerable merit. According to PW1:-

"……***The robbery in the officer took about two minutes. Accused one brought by Police at about 5 a. m. None of items from him were recovered…..***"

Yet PW4 testified that the Appellants were arrested at 2 a. m. at the time of the alleged crime. From the foregoing it would also appear that the 1st Appellant was arrested and brought to where PW1 was alone at about 5 a. m. Yet according to PW4 he arrested the Appellants at the same time and brought them to where the witnesses were. It is in the evidence of PW2 that:-

"*….When they were still there I heard a bang from a distance away but within the plot form upstairs as it something had been dropped…… The intruders were still with us. They escaped. Maina who had not been tied untied us within a minute after they had left….*"

Now if the robbers escaped, could they still have been found under the bed in the offices in which they had committed the robbery? Further if for sure the robbers were arrested as aforesaid PW1 could have been aware of that fact in order not to tell the Court that the robbers escaped. Further PW1 said the 1st Appellant was the one who had the panga. However according to PW2:-

"…..*During the robbery I saw more than five robbers. The one who I saw with a panga is not in Court. None of these I saw with torches is in Court……*"

Now between these two witness who were all victims of robbery, who is telling the truth? Were they really alive to the events as they unfolded? In our view one of them is not being candid.

Then there is the question of the number of the robbers involved in the incident. According to PW2, he put the figure at 5 and stated that those robbers escaped while PW1 put the figure to be 2. As to the number of torches, whereas PW1 stated that the robbers had two torches, PW2 when re-examined on the issue by the Prosecutor stated thus:-

"… *During the robbery I saw only one panga., I saw three torches. The robbers were more than five in number…..*"

Had the trial Magistrate evaluated the evidence properly in the light of the aforesaid contradictions, she should have come to the conclusion that he Prosecution evidence was not credible and proceeded to resolve the contradictions in favour of the Appellants. Because of the contradictions, the Appellants' contention that the case was fabricated against them would appear to be plausible. This view is reinforced by the fact that according to PW4, when the Police arrived at the scene, they found the building already surrounded by Administration Police. Now if there were more than five robbers involved in the robbery, and the building where the robbery was said to have been committed had already been surrounded by Administration police how come the rest of the robbers other than the appellants managed to escape? Further if the Appellants were arrested as alleged how come none of the items allegedly robbed from the Complainants by the appellants was recovered on either of them? After all the evidence on record is that the robbers were arrested at the locus in quo.

The Appellants gave sworn statements of defence and were intensively cross-examined by the Prosecution. They remained firm and maintained their innocence. Given what we have already pointed in this Judgment, we are of the considered view that their defences raised sufficient doubts in the Prosecution case. It does appear that the Learned Magistrate elected to separately evaluate the defences against other evidence. This was wrong. Had the defences advanced by the Appellants re-evaluated vis a vis the evidence on record, the trial Magistrate could have arrived at a totally different conclusion other than that the Appellants were guilty of the offences charged.

Accordingly, we allow the Appeal of each Appellant, quash the conviction recorded against each one of them, set aside the sentence of death and order that each one of them be released from prison forthwith unless otherwise held for some other lawful purpose.

Dated at Nairobi this 25th day of July, 2006

……

**LESIIT**

**JUDGE**

……..

**MAKHANDIA**

**JUDGE**