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

Criminal Appeal 181 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 1018 of 2004 of the Senior Principal Magistrate's Court at Kiambu (L. Muhiu - SRM)

PETER NJUGUNA MBUGUA……..……..APPELLANT

VERSUS

REPUBLIC…….....……....…….……....RESPONDENT

J U D G M E N T

PETER NJUGUNA MBUGUA was charged with two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. After a full trial, the Appellant was convicted in counts 1 and 2 but the charges were reduced to **ROBBERY** contrary to **Section 296(1)** of the **Penal Code**. The Appellant was then sentenced to 8 years imprisonment in each count with prison terms running concurrently. Being aggrieved by the conviction and sentence, the Appellant lodged this appeal.

In the filed petition of appeal the Appellant raised six grounds of appeal. These grounds are somewhat argumentative particularly the fourth, fifth and sixth grounds. I will summarize the gist of these grounds as I understand them as follows: -

1. The learned trial magistrate erred in convicting the Appellant on insufficient evidence that was full of discrepancies and contradictions.

2. The learned trial magistrate erred in disregarding the Appellant's defence.

The brief facts of the prosecution case were that the two Complainants in the case, PW1 Complainant in count 1 and PW2 Complainant in count 2 were mother and daughter respectively. They were lodgers at Green Hotel in Limuru owned by the Appellant's father. Both had in various occasions spent nights at the veranda of the hotel apparently at no cost except for food and drink. On the date in question, the two Complainants were locked in the veranda of the hotel where they slept on a form. Before day break, both Complainants heard people whispering in Kikuyu language and they claimed they heard the Appellant's voice. Those people entered the veranda through a window and robbed them of money. The Appellant was standing among them. They then left. The Complainants reported the incident and eventually the Appellant was arrested and charged.

In his defence in which he called five defence witnesses, the Appellant denied robbing the Complainants and said that he too was a victim of the said robbery.

I have analyzed and evaluated afresh all the evidence adduced before the lower court while bearing in mind that I neither saw nor heard any of them and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**.

The Appellant was represented by Counsel in this appeal. **Mr. Amukumu** who argued the appeal submitted that the learned trial magistrate erred for convicting the Appellant on doubtful evidence. Counsel submitted that both Complainants in their evidence said that after the incident they questioned the Appellant on whether he had robbed them and that he had answered to the negative. That in the circumstances the evidence of both Complainants cast doubt as to the Appellant's guilt which doubt was evident in the trial court's judgment where the learned magistrate used such terms as "I cannot say with certainty" "maybe", "perhaps". Counsel further submitted that there were contradictions in the evidence of the two Complainants whether the Appellant was having a panga and a torch as PW1 stated or had a torch and rungu as PW2 stated.

Mrs. Kagiri, learned counsel for the State submitted that the two Complainants saw the Appellant during the incident where the robbery took place. That the Complainants described the lighting conditions at the scene as similar to a vehicle's headlamps. That in addition, both Complainants who were conversant with the Appellant's voice heard him speaking just before the attack. Counsel submitted that even if there may have been discrepancies in the evidence of the two Complainants the same did not shake the prosecution case.

On the issue of the Appellant's role in the alleged robbery both Complainants claim that they heard the voice of the Appellant spoken in whispers explaining that there were 2 women at the hotel who did business and who had money. The Appellant's defence was that he was found lighting the hotel fire for purposes of preparing tea when the thugs struck. The Appellant said that he was taken to the counter of the hotel where he was told to lie down. It was the Appellant's defence therefore, that he was not present at the scene where the Complainants were robbed. It is therefore important to consider the evidence of both Complainants to find out the basis of their claim that the Appellant was present.

PW1 in her evidence said that after hearing the whispers, they heard people jump through the window as the hotel was locked from inside. Those people then came to where they were. PW1 described the Appellant as being the one who held a torch to light both Complainants throughout the time the robbery took place. PW1 said that the Appellant held a panga with his other hand. PW2 on her part said that the Appellant had a torch and rungu. However, PW2 said that all the time the two of them were robbed, the Appellant stood behind the man who had a rungu while the man with the gun first robbed PW1 before robbing her. The role played by the Appellant during the robbery is contradicted by the Complainants. While PW1's clear evidence was that the Appellant had the torch which he used to flash the two Complainants. PW2's evidence assigned him a passive role like one who stood by watching from behind the rest. Whether one considers the evidence of PW1 or that of PW2, the impression created as to the conditions of light at the scene is the same. It was dark and therefore the use of a torch. PW1's evidence was that the Appellant used the torch he had to enable the robbery to take place. PW2's evidence does not bring out the impression created by PW1 about the Appellant's torch.

However, it is clear that a torch was used by the robbers and that it was with one of them. If a torch was used, then the conditions prevailing at the scene at the time of the robbery were not conducive to positive identification. There was need of corroboration of the visual identification by PW1 and PW2, either through direct or circumstantial evidence pointing at the Appellant's guilt.

The learned trial magistrate in her judgment found the Appellant's conduct as proof of his guilt. The fact that he did not report immediately the offence was committed and the fact that he left the hotel the morning following the attack without reporting to police. That conduct is purely circumstantial.

In **SIMON MUSOKE vs. REPUBLIC {1985} EA 715** at page 716 it was held: -

"***In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the violence of the accused,***

and incapable of explanation upon any other reasonable hypothesis than that of guilt."

The Appellant's conduct that he did not report the robbery immediately and also that he left the hotel the morning after the robbery for the whole day was dully explained in the defence case. The Appellant explained two things. First he said he was not aware that apart from theft of certain properties at the hotel and of his own personnel belongings like clothes, that the Complainants had been robbed. The second explanation he gave about what necessitated him to leave the hotel that morning was that he had to attend his grandmother's funeral. His brother, DW4, corroborated the Appellant's evidence not only about the funeral but that he, DW4 directed the Appellant to leave the hotel immediately for the funeral venue that morning. These explanations are quite reasonable and demonstrate that there were co-existing circumstances which explained the Appellant's conduct of leaving the hotel that morning and which negates any inference of guilt on his part. Besides all these, the Appellant reported to DW3 about the robbery at 5.45 a.m. that morning. DW3 stated in evidence that he was surprised to find the Appellant unprepared having not lit a fire for the days cooking at the hotel. It is clear that the Appellant reported the robbery to DW4, his elder brother who thought that the report of the robbery to the police could be made later.

I find that contrary to the learned trial magistrate's finding there was no reliable direct evidence of visual identification against the Appellant. The evidence of PW1 and PW2 that they saw the Appellant at the place they were robbed was unreliable due to insufficiency of the light and the fact that the conditions of lighting were not shown to have been conducive to positive identification without a possibility of error or mistake. As for the voice identification the test applicable was explained in the case of **Karani vs. Republic 1985 KLR 290** where it was held: -

"***Identification by voice nearby always amounts to identification by recognition. However care must be taken to ensure that the voice is that of the Appellant, that the Complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."***

What both Complainants said was that the Appellant's voice was heard in whispers. Voices heard in whispers are unreliable since the danger of mistake is quite high. That evidence of voice identification cannot be used to corroborate that of visual identification. Evidence needing corroboration cannot be used to corroborate other evidence. There was need for other evidence, either direct or circumstantial pointing at the Appellant's guilt. I have sought for other such evidence in the entire case to no avail. There was no other evidence that could provide corroboration to that of visual identification given by PW1 and PW2 and render credence to their evidence that indeed the Appellant was one of the robbers. The fact that the Appellant remained at the hotel until DW3, a fellow employee reported on duty casts doubt to his involvement to the crime.

The Appellant's advocate submitted that the Appellant's defence was not given due consideration which **Mrs. Kagiri** disagreed with. In my own evaluation of the evidence and the findings of the learned trial magistrate, I believe that the learned trial magistrate considered the Appellant's defence. However, the learned trial magistrate misdirected herself as to the weight of the Complainant's evidence of identification both visual identification and voice identification and therefore fell into serious error which led to a miscarriage of justice. The Appellant's defence was good and taken against the prosecution case which was inconclusive. I find that the conviction entered herein was unsafe.

Accordingly I allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 3rd day of August 2006.

J. LESIIT

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Amukumu for appellant

Mrs. Kagiri – State counsel

Tabitha - CC

J. LESIIT

JUDGE