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

Criminal Appeal 99 & 100 of 2004

(From original conviction (s) and Sentence(s) in Criminal Case No. 1947 of 2003 of the Senior Principal Magistrate's Court at Kiambu (Wachira - SPM)

SIMON KIHANYA KAIRU…..…. …….....…….
APPELLANT

VERSUS

REPUBLIC …….....…….
…..RESPONDENT

CONSOLIDATED

CRIMINAL APPEAL NO. 100 OF 2004

(From original conviction (s) and Sentence(s) in Criminal Case No. 1947 of 2003 of the Senior Principal Magistrate's Court at Kiambu (Wachira - SPM)

ELIJAH KARANJA WAINAINA. …….....…….
APPELLANT

VERSUS

REPUBLIC …….....…….
…..RESPONDENT

J U D G M E N T

The two Appellants, **SIMON KIHANYA KAIRU,** 1st Appellant and **ELIJAH KARANJA WAINAINA,** the 2nd Appellant were the 3rd and 2nd accused respectively in a charge of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** in the trial before the lower court. They had been charged jointly with two others who were later acquitted. After the trial, the learned trial magistrate reduced the capital robbery charge and convicted both Appellants of the lesser charge of **ROBBERY** contrary to **Section 296(1)** of the **Penal Code**.

The learned trial magistrate proceeded to sentence each Appellant to 7 years imprisonment. It is against the conviction and sentence that they now appeal before this court.

When the appeal came up for hearing on 13th July 2006, the State through **Miss Konuche**, State Counsel, gave notice to the Appellant's that it would be asking for the enhancement of the conviction to **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code and the sentence to that of **DEATH** if the appeal court was to find that the conviction was safe. Each Appellant, who acted in person before us and after understanding the warning, opted to pursue their appeal despite the notice.

We shall go straight to evaluate and analyse the evidence adduced before the trial court. PW1, the Complainant in this case, with PW2 who is his wife, were asleep in their house on the night of 13th and 14th August 2003 when people broke into their house and stole several items. The Complainant said he saw the three men who entered their bed-room to ask for money from him and that he could identify them. PW2 said she could not identify anyone. Subsequently, the Complainant identified the two Appellants in identification parades conducted on 11th September 2003 by **IP Muchoki** and **IP Marangu**. Both Appellants denied the charges and described the manner in which they were arrested on 2nd September 2003 as they went about their businesses.

The 1st Appellant has raised three grounds of appeal. One, that the evidence of identification was not sufficient to base a conviction. Secondly that the evidence of identification parade could not prove corroboration to the evidence of identification by PW1 and thirdly that the learned trial magistrate did not give due regard to his submissions and defence. In court during the appeal, the 1st Appellant raised a fourth ground, which was a point of law, that the identification parade in his respect was not properly conducted. The 2nd Appellant raised only one ground in his written submissions which challenged the reliability of the evidence of identification by the Complainant and the lack of corroboration of PW1's evidence. In his petition of appeal and oral submissions on the date of hearing of the appeal, the 2nd Appellant raised a second issue which challenged the efficacy of the identification parades conducted without prior description of the suspects having been made to the police by the Complainant.

Miss Konuche for the State opposed both appeals.

On identification both Appellants challenged the evidence of visual identification by the Complainant contending that the same was made under difficult circumstances since the incident took place at night and since the only available light at the scene was torchlight.

Miss Konuche submitted that according to the evidence of the Complainant, bright torches were used to light the Complainant's house and that it enabled him to see and identify those who robbed him. Counsel submitted that the learned trial magistrate had ruled that the Complainant had a good demeanour and that there was no reason to doubt his evidence. That the learned trial magistrate also warned herself of the dangers of relying on the evidence of a single identification witness before convicting. Counsel also submitted that it was true that PW1 did not give a description of his attackers until much later but that he explained the reason of so doing.

The Appellants were convicted on the basis of the evidence of visual identification by a single witness, the Complainant in this case. The learned trial magistrate was impressed by the Complainant's evidence and stated thus at page J4 of the Judgment.

"***In this instant case the complainant who is the identifying witness testified that during the robbery he was composed and he had his eyes well focused on the robbers and he had their images quite well registered in his mind. Further that he is always sure to identify people he encounters. I am persuaded to accept the basis of identification …. PW1 stated repeatedly that during the time of the robbery he concentrated on identifying the faces of the robbers,.... That the robbers had powerful torches that enabled him to see them."***

We appreciate the pains the learned trial magistrate took to describe the circumstances under which the

Complainant identified the Appellants. However, the points that the learned trial magistrate should have concentrated on and inquired into seem to have eluded her. We shall set them down again here for its benefit as they were set out in the Court of Appeal case of **MAITANYI vs. REPUBLIC [1986] KLR 198**.

"***It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not careful test if one of these matters are unknown because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, State counsel and defence. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves." Emphasis ours.***

The learned trial magistrate in the instant case, in her judgment, made no reference to the position of lights relative to the suspects which the Complainant asserts enabled him to identify the robbers. It may have been bright but how bright was it. What kind of a torch did the Complainant think could have produced such a light? A three batteries torch? New cells? How far was the light from the persons he identified? All these issues were not addressed at all during the trial, and as the Court of Appeal held in the **Maitanyi case**, supra, it was the duty of the trial magistrate to inquire into them. Other issues also arise for example since the Complainant said there were three men who entered his bed-room, how come he was able to see all three? There was a need for an explanation. The other issue which is equally important is the lack of a time frame or the period of time that the Complainant kept the robbers under observation. This too was never addressed. We find that the court having not considered all these issues, it cannot be said that the Complainant's evidence of identification was tested with the greatest care.

On our part, we have tested the Complainant's evidence of identification and find that it was made under difficult circumstances. The light used to identify the Appellants was torchlight whose intensity and size was not clearly described and whose position relative to the Appellants was not given. We do not find the quality of the identification good for positive identification by a single witness.

The learned trial magistrate also considered the Complainant's demeanour and found him, to quote her words;

"***This court observed the demeanour of the witness. The witness was firm and bold and the court is satisfied that it is safe to act on such evidence…"***

The trial court in assessing the demeanour of a witness is expected to make a finding as to the integrity, honesty and truthfulness of such witnesses not his boldness or firmness. We are not in a position to comment on the demeanour of PW1 since we did not have the opportunity of seeing him. However, we wish to identify ourselves with the Court of Appeal's observation in the case of **TOROKE vs. REPUBLIC [1987] KLR 204** and adopt them as relevant to the instant case.

"***It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification."***

We say no more.

On the identification parades the 1st Appellant faulted them on grounds that the same members used in the parade where the Complainant identified him were the same used one hour before in the identification parade of the 2nd Appellant. We have confirmed that indeed that was the position.

The 2nd Appellant faulted the identification parades on grounds that the Complainant gave descriptions of his assailants on 7th September 2003 while the two Appellants had been arrested on the 2nd September 2003. We perused the record of the proceedings and confirmed that in his evidence the Complainant said

he made a further statement in which he described his assailants, on 7th September 2003.

Miss Konuche for the State urged the court to find that the use of same parade members in the two identification parades in which the Appellants were identified by the Complainant was fair. Counsel further submitted that the date the Complainant gave descriptions of the attackers was unknown and could have been before their arrest. We have confirmed from the record that the Complainant gave descriptions of his attackers five days after the two Appellants had been arrested.

We have considered the issues raised by the Appellants concerning the identification parades and have carefully analysed the evidence adduced before the trial court in that regard. PW4 **IP Marangu** conducted the identification parade in respect of the 2nd Appellant on 11th September 2003 at 1.20 p.m. PW3, **IP Muchoki** conducted the identification parade in respect of the 1st Appellant on the same date at 3.30 p.m. Parade members in both parades were the same.

The value of that parade as evidence against the 1st Appellant was greatly depreciated by that fact. Considering that the Complainant's evidence of identification was of poor quality and the value of the identification parade against the 1st Appellant also poor, there was no credible and reliable evidence to support a conviction against the 1st Appellant.

In regard to the 2nd Appellant we noted that his parade was the first to be conducted even though by a different parade officer to that of the 1st Appellant. In his evidence, the parade officer, PW4 stated thus at page 12 of the proceedings: -

"***After we were ready I sent for the witness. He came and I explained to him that I have a parade of 9 people and I invited him to identify the suspect. I asked him to touch the suspect…"***

In **Ssentale vs. Uganga 1968 EA 365** at page 369, the Chief Justice of Uganda **Sir Udo Udoma**, while quoting from a Court of Appeal for Eastern Africa case **Republic vs. Mwango S/o Manaa [1936] 3 EACA 29** laid down the method of identification set out rules in **Kenya Police Order No. 15/26** otherwise known as "**Instruction for Identification Parade."** We quote only rule 12 and 13 thus: -

"***12. In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person.***

Don't say" Pick out somebody" or influence him in any way whatsoever.

13. Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably."

In **Oluoch vs. Republic [1985] KLR 549** the Court of Appeal **Chesoni**, **Nyarangi** and **Platt Ag, JJA** held: -

"***In an identification parade, it is dangerous to suggest to an identifying witness that the person to be identified is believed to be present in the parade. The value of the parade as evidence in this case was considerably depreciated."***

We find that PW4, while introducing the Complainant to the parade suggested to him that he "had a suspect" in the parade and all he needed to do was to pick him out. That depreciated the value of the parade as evidence against the 2nd Appellant. Taking into account the poor quality of the Appellants visual identification and the depreciated evidence of identification parade, we find that there was no credible evidence adduced by the prosecution that could sustain a conviction against the 2nd Appellant.

We shall not end without making a comment on the manner in which the trial court recorded the evidence of the arresting and investigating officer. PW5 **PC Thiga**, gave graphic details of information

in the form of confessions, which he obtained from the 1st Appellant. All the evidence tending to show the 1st Appellant's role in the robbery in question and indicating the identity of others who were involved in the robbery was inadmissible evidence. By taking down that evidence the learned trial magistrate violated **Section 29** of the **Evidence Act** which gives the rank of a Police Officer to whom a confession can be made. The learned trial magistrate was also guilty of non compliance with Section **62** and **Section 63(1)** and **(2)** of the **Evidence Act** which gives guidance on the nature of evidence which can be adduced to prove facts and the nature of evidence which would be inadmissible.

The upshot of these appeals is that the convictions entered herein are unsafe and that both appeals are allowed.

The convictions are quashed and the sentences set aside. The Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi 26th day of September 2006

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant(s)

Miss Konuche for State

Tabitha/Erick – CC

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE