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

Criminal Appeal 704 & 706 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 11 of 2002 of the Chief Magistrate's Court at Makadara (Mrs. R. Kimingi - PM)

FRANCIS KAMAU NGIGE…….……..……...……..APPELLANT

VERSUS

REPUBLIC…….…….....……..……...RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 706 OF 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 11 of 2002 of the Chief Magistrate's Court at Makadara (Mrs. R. Kimingi - PM)

JOHN NGUGI KARIUKI...…….....……...……..APPELLANT

VERSUS

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

J U D G M E N T

FRANCIS KAMAU NGIGE hereafter referred to as the 1st Appellant and **JOHN NGUGI KARIUKI,** the 2nd Appellant were the 3rd and 2nd accused persons in the trial before the court below in which they together with three others were jointly charged with one count for the offence of **ROBBERY WITH VIOLENCE** contrary to **section 296 (2)** of the **Penal Code.** After the trial, the two Appellants together with the 1st accused in the trial were found guilty of the charge and subsequently each was sentenced to death as by law prescribed. The Appellants and the 1st accused in the trial were dissatisfied with the conviction and therefore lodged their appeals separately. Unfortunately the 1st accused person passed away in 2003, before his appeal could be heard abating it. We have however consolidated the appeals by the 1st and 2nd Appellants as they arose out of the same trial.

In these appeals, both Appellants had counsels representing then, **Miss Mugo** for 1st Appellant and

Mr. Ndungu for 2nd Appellant. **Mr. Makura** learned State Counsel represented the State. The Appellants raised similar grounds of appeal which we have summarized as follows: -

That the learned trial magistrate erred in law and facts when she failed to consider that the evidence of the three prosecution witness was not watertight to justify a conviction.

That the learned trial magistrate misdirected herself when she found that the Appellants were found in possession of the stolen items.

That the defence by the Appellants was not given due consideration

The brief facts of the case are that on 22nd December 2001, the Complainant, PW1, was asleep in his house when thugs broke in and robbed him of his watch and jacket with Kshs.8000/ in it. He identified the one who took the items and hit him on the eye as the 2nd Appellant. Complainant said that the 1st accused, in the case now deceased, took the radio cassette and television and handed them over to the 1st Appellant. The 2nd Appellant was left guarding them for 20 minutes. Later on 27th October 2001, the Complainant said he saw the deceased in the company of 2nd Appellant carrying his TV set to PW2, a radio and TV repairer. He called police and caused their arrest.

Both Appellants denied the charge. The gist of their defences was that they were arrested over suspicion that they may have committed the offence and further that they owed illicit brew money to the Complainant in the case.

Miss Mugo for the 1st Appellant submitted that it was not clear, or consistent from the Complainant's evidence, whether he had seen the 1st Appellant at the scene of crime and whether he had identified him. Counsel submitted further that the evidence against her client was by a single identifying witness and that the court had failed to warn itself of the danger of relying on such evidence. Further that there was no report made by the Complainant between 22nd December and 27th December when the Appellants were arrested.

Counsel also submitted that there was inconsistent evidence of the circumstances leading to the 1st Appellant's arrest. That while the Complainant said he spotted the 1st Appellant and lay on him in order to save him from the mob before taking him to the Chief's camp, PW3 an administration Police officer said he arrested the 1st Appellant at a radio workshop where he, 1st Appellant and the deceased had taken him. That while PW3 talked of a workshop, the Complainant talked of a house. Further, that PW3 said the Complainant had gone to him to report he saw a man with his TV while Complainant did not mention of going to police for assistance to arrest anyone.

Mrs. Ndungu for the 2nd Appellant associated herself with the submissions of the counsel for the 1st Appellant. In addition, counsel submitted that the Complainant's wife who was present throughout the trial of the incident was not called yet her evidence would have best corroborated that of the Complainant.

Mr. Makura submitted that the evidence adduced by the PW3 was overwhelming and proved beyond any reasonable doubt that both Appellants committed the offence. That the evidence of identification was that of recognition. That the Complainant saw the Appellants under bright solar lights for a period of 30 minutes, which counsel submitted was sufficient to see and recognize the Appellants.

We have analysed and evaluated afresh all the evidence adduced before the trial court while bearing in mind that we neither saw nor heard any of the witnesses and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**. It is quite correct to state that the conviction entered against the Appellants was predicated on the evidence of identification by a single witness, the Complainant in this case. This is how the learned trial magistrate delivered herself at page 6 and 7 of the judgment.

"***He (Complainant) stated that he recognized the 1st, 2nd and 3rd accused during the robbery.***

He (PW1) stated what each of the said accused persons did during the robbery. The court finds that PW1's evidence is corroborated by the rest of the prosecution evidence. The court find the defence by each accused to be far fetched. The court find PW2, PW3 and PW4 to be independent witnesses. The court accept the prosecution. Witnesses to be witnesses of truth and reject the defence case for each of the accused persons."

We have stated often, as indeed has the Court of Appeal that mistakes occur in the identification even of very close relatives. It is therefore very important that a trial court takes the evidence of identification with circumspection especially where it is the evidence of a single witness made under conditions which are known to be difficult. In the instant case the Complainant claims to have seen the Appellants under bright solar lights. That however is not sufficient if in fact the Complainant did not testify as to the intensity of the light and its position relative to the Appellants he claims to have seen. In **MAITANYI vs. REPUBLIC 1986 KLR 198**, the Court of Appeal held.

"***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 convicting magistrate, State Counsel and defence counsel. 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."***

The learned trial magistrate did not make inquiries to ascertain the position of the lights relative to the Appellants the Complainant claims he saw in order to test with great care the evidence of identification by the Complainant.

It did not escape our attention that the learned trial magistrate in the judgment excerpts we quoted herein above, made sweeping generalized statements of the Complainant's evidence. That is not testing with great care the evidence adduced before her. As the counsels for the Appellants stated in their submissions there was not only inconsistency in the evidence of the Complainant but admissions that were important to consider while putting to the test the Complainant's alleged ability to identify the Appellants. In cross-examination the Complainant admitted that he knew the 2nd Appellant after his arrest. That discredits the Complainant's evidence that he knew the 2nd Appellant before the robbery. It also makes the evidence of identification by the Complainant against him dock identification which in the circumstances of this case would be worthless given the absence of evidence of distance at which the Complainant saw the 2nd Appellant and how far the light was from him. In further cross-examination, the Complainant also admitted that it was dark at the house at time of the attack and that what the Complainant had recognized was the 1st Appellant's voice. Concerning voice identification, such evidence is regarded the same way visual identification is considered. However in voice identification, the exact words spoken must be given to enable the court determine whether they were sufficient to enable positive identification. In this case, the words the 1st Appellant spoke which the Complainant alleged enabled him to identify the voice of the 1st Appellant were never disclosed. The evidence of identification of the 1st Appellant was in the circumstances unreliable.

There was another matter which caused us concern. The fact that the Complainant made no report of the incident to the Police for five days until the arrest of the Appellants. The fact that the Complainant alleges he knew his assailants before the attack and yet did not make any report nor give their names to any authority causes uneasiness. In P**eter Ochieng Okumu vs. Republic CA No. 185 of 1987**, the Court of Appeal held: -

"***failure to make a prompt report and giving names of the assailants in the first instance causes uneasiness in believing the witness..."***

Likewise, we find it difficult to believe the Complainant's evidence that he knew who robbed him on the fateful day and instead we find his evidence that he knew them was an afterthought.

We also find that contrary to the learned trial magistrate's finding, the evidence of the Complainant did not receive corroboration from PW2, PW2 and PW4 on material particular. The most important evidence needing corroboration was the evidence of identification and that was lacking. In addition whatever evidence that PW2 and PW3 could have corroborated they actually contradicted. For instance the fact of the Appellants' arrest, while the Complainant said he saw the deceased and 2nd Appellant taking the TV to PW2. PW2 said he could only recognize the 2nd Appellant. Further while Complainant said he arrested the 2nd Appellant in person, PW3 the Police officer said he arrested both him and the deceased at PW2's workshop. PW3 talked of recovering a TV set, a radio and battery on the floor of the workshop which negated the Complainant's evidence that the evidence was in possession of the 2nd Appellant and that both the deceased and 2nd Appellant led to the 1st Appellant whom they identified to him. That negated the Complainant's evidence that the battery was recovered elsewhere by PW3 after the deceased and 2nd Appellant led him to where they were.

We find that the evidence of the prosecution was riddled with inconsistency and was full of controversy. Such evidence was not strong and could not have sustained a conviction. Having considered these appeals even without going into any other issues raised by the counsels for the Appellants, we find that the convictions were unsafe and should not be allowed to stand. We allow the appeals, quash the convictions and set aside the sentences. We order that the Appellants be set free unless they are otherwise lawfully held.

We end this judgment by expressing our sorrow for the passing on of the deceased while awaiting his appeal, which predictably was going to culminate in this release.

Dated at Nairobi this 26th day of October 2006.

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LESIIT, J.

JUDGE

….…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Miss Mugo for the 1st Appellant

Mr. Ndungu for the 2nd Appellant

Mr. Makura for State

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE