REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 1088 OF 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 902 of 2002 of the Chief Magistrate's Court at Nairobi (Mr. B. Olao -CM)

SIMON NGURE NDUNGU..…..……..……..……...APPELLANT

VERSUS

REPUBLIC…… …….…….…....RESPONDENT

J U D G M E N T

The Appellant, SIMON NGURE NDUNGU, was convicted for ROBBERY WITH VIOLENCE, contrary to Section 296(2) of the Penal Code, and was then sentenced to suffer death in accordance with the law.

It was the Prosecution case that the Complainant, PW1, was walking along Tom Mboya Street on the material night, at about 8.00 p.m. A number of persons attacked PW1 from the back, with some strangling him while others lifted him up, and yet others ransacked his pockets and robbed him. He lost Kshs.17,000/- cash, a "Nokia 3310" mobile phone, an ATM card and a "Casio" wristwatch, all valued at Kshs.30,600/-.

Although PW1 did not identify any of his attackers, PW2 and PW3 who were police officers did. These two witnesses were on patrol duty, when they heard screams. They rushed to the scene where they saw PW1 being robbed by about five to six persons. The robbers ran off, when they were ordered to stop robbing PW1. However, the police officers pursued them, and managed to arrest the Appellant. The Appellant was then searched, but no recoveries were made. Thereafter, the Appellant was charged with the offence of Robbery with Violence.

At the trial, there were four prosecution witnesses and three defence witnesses. After evaluating the evidence on record, the learned trial magistrate found the Appellant guilty as charged. This Appeal challenges the findings of the learned trial magistrate, and seeks to have the Appellant's conviction quashed, and his sentence set aside. In his Petition of Appeal, the Appellant set out the following grounds;

> **"1. THAT the learned trial magistrate erred in law and fact and/or misdirected himself in relying on the purported mode of arrest on the basis of conviction of the Appellant while the chain link leading to the arrest was not free from the possibility of error or mistake.**
>
> **2. THAT the learned trial magistrate gravely erred in law and fact in finding the charges preferred against the Appellant proved despite lack of sufficient or any evidence at all.**
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> **3. THAT the learned trial magistrate erred in law in arriving at a conviction in the absence of nothing incriminating found in possession of the Appellant.**
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> **4. THAT the learned trial magistrate erred in law and fact in arriving at a conviction and sentence in the face of glaring contradictions and gaps in the prosecutions case.**
>
> **5. THAT the learned magistrate misdirected himself as to onus and burden of proof by shifting it to the Appellant.**
>
> **6. THAT the learned magistrate erred in law, in failing to give the benefit of doubt to the Appellant."**

At the hearing of the Appeal the Appellant was represented by Mrs. A. M. Wahome advocate, whilst the Respondent was represented by Miss Nyamosi, learned state counsel.

The Appellant submitted that the first court was biased against him. The said bias is said to have manifested itself on the first day of the trial. From the record, it is clear that the trial commenced on 8th May 2002. On that day, the Appellant asked the court to give him time, as he was sick. The court responded to that Application as follows: -

> ***"You have just been chatting with other accused persons a few minutes a go. I do not trust you. The Complainant is here. We will hear his evidence then you can go to hospital."***

The first notable matter is that the Prosecution is not shown to have said anything at all, in answer to the Appellant's Application for time. It is therefore somewhat startling that the learned trial magistrate was able to know that the Complainant was present in court.

Secondly, although we appreciate that the Appellant was in court and that, therefore, the trial magistrate was in a position to observe him, we nonetheless feel that the court ought to have first heard the Prosecutor, and if necessary questioned the Appellant before arriving at a conclusion, such as the one it did. It is important that courts do follow these procedures because it is only by so doing that justice will not only be done but will also be seen to have been done.

Miss Nyamosi submitted that the Appellant was not prejudiced, as PW1 was subsequently recalled for cross-examination. If we were to assume that the Respondent was right, that would nevertheless not imply that the actions of the trial magistrate were beyond reproach. In our view, fairness would actually be achieved only if at the time the prosecution witnesses were testifying, the accused person was in such state of health as to be capable of following the proceedings. It is only then that the accused would be best placed to formulate his cross-examination. We say so because, if during the testimony of a witness, the accused was not well, he may not be capable of following the proceedings in every respect. In those circumstances, if an accused person did not then have access to the court record for perusal, his cross-examination would be formulated on only such evidence as he would be able to recall.And his recollection would be founded on a body which was not physically or mentally wholesome. The final result might well be that the Appellant could be prejudiced.

In this case however, the Appellant applied successfully, for the recall of both PW1 and PW2. We believe that if he wished to peruse the record of the evidence by the two witnesses, he would have applied accordingly. We therefore, find that although the learned trial magistrate could be criticized for denying the Appellant time before the trial started, the said action did not prejudice the Appellant.

We have found nowhere else in the record where the learned trial magistrate could be criticized for acting in a manner that lent credence to the Appellant's allegations of bias. And, in any event, the Appellant also did not draw our attention to any other such action. We, therefore, hold that there was, ultimately, no justification for the allegation of bias.

Before we move on from this aspect of the Appeal, we would also like to humbly suggest that if any party to court proceedings feels that the court was biased against him/her, it is best that the said party should raise the issue before the same court. We are sure that if the party has sufficient material to show bias, the presiding judge or magistrate would disqualify himself/herself. But if the presiding officer did not disqualify himself/herself, we believe that an appellate court could then cause the case to be transferred to another court, if necessary.

Next we tackle the issue of the Appellant's identification. The Complainant did not identify the Appellant, at the time of the incident which gave rise to the charges preferred against the Appellant. Thus, the only identifying witnesses were PW2 and PW3. It was the Appellant's contention that the evidence of those two witnesses were inconsistent. We also understand him to be saying that the circumstances prevailing at the time of the incident were difficult, therefore, making positive identification impossible. Just what were those circumstances?

It is common ground that the incident in issue occurred at about 8.00 p.m., on 5th April 2002. PW1, Nephat Ngigi Njengwa, testified that he was walking along Tom Mboya Street. He was on his way to a matatu stage, near Odeon Cinema. Suddenly, a person held him from behind while strangling him. Another person lifted him up, and other persons ransacked his pockets.PW1 lost consciousness. When he later recovered, he found himself lying in the middle of the road. The Appellant was nearby, under arrest by police, who were also restraining members of the public from beating the Appellant. PW1 said that he was robbed along Tom Mboya Street, where there were street lights.

When PW1 was recalled for cross-examination, he said that the Appellant was wearing a jeans trouser and a T-shirt. He said that the Appellant did not have a jacket.

As regards the scenario, the witness said;

> ***"I was walking on the right side of the road. The pavement is congested with pedestrians and hawkers at that time of the night. There are also lots of matatus. It is true that there is a lot of activity at night on that road. It was a Friday night. I would not say it was chaotic but there was a lot of people and the road is generally busy."***

Having been given that as the scenario prevailing at the time when PW1 was attacked, we now look at the evidence of PW2.

PW2, PC Michael Kimundi, said that he was on patrol, along Tom Mboya Street, Nairobi. He was together with PW3, Cpl. Onyango, when at about 8.00 p.m., they heard shouts.

He testified as follows:

> ***"We went there and found some men on the ground shouting for help while being held down by others numbering about five. Cpl. Onyango removed his pistol and ordered the five persons to stop. They ran away but we ra n after them and arrested one of them."***

PW2 said that he is the one who arrested the Appellant. The arrest was effected near the junction of Ronald Ngala/Tom Mboya Streets. It was PW2's recollection that the Appellant wore trousers, and had a

jacket, and that the arrest was made "a few metres from the scene."

When PW2 was re-called for cross-examination, he reiterated that the Appellant was arrested a few metres from the scene. However, he clarified that as he was new in Nairobi, he may have confused the road names. He therefore, explained that the Appellant was arrested at the junction of Tom Mboya Street and Latema Road. Elsewhere, he reinforced his evidence about the proximity of the place at which the Appellant was arrested, vis-à-vis the scene of crime, by saying;

> ***"I was there when the accused was arrested. He was arrested on the spot at the incident."***

As far as PW2 could recall,

> ***"There are shop lights at the scene. I am familiar with the area well. I know there are hawkers and other people around the scene at that time but not many people."***

Both PW1 and PW2 are in agreement, that there were hawkers and other pedestrians at the scene, at the material time. PW1 did not identify the Appellant, as he was attacked from behind, and became unconscious. But PW2 said that he saw the Appellant amongst the five people who were attacking PW1. He said that he and PW3 chased after the Appellant, without losing sight of him, until PW2 arrested him. The chase must have taken place through the hawkers and other pedestrians who were around the scene. When PW2 was asked about the clothing of the Appellant, he said;

> **"I was not concerned about what he was wearing."**

Since the Appellant was not previously known to PW2, and the police were chasing him through hawkers and other pedestrians, we cannot help but ask ourselves, how did PW2 then identify him, if not by the clothes the Appellant was wearing?

Then PW3, Cpl. George Onyango, testified as follows: -

> ***"We were on patrol along Tom Mboya Street and Accr a Street. The screams were about ten metres behind us. I am familiar with the area. I did not see any hawkers at the scene on that day. There is usually a lot of traffic (people) at that hour."***

By this piece of evidence, PW3 contradicts the evidence of both PW1 and PW2, who had said that the area had hawkers and pedestrians. One therefore, wonders if PW3 was talking about the same scene as the other two prosecution witnesses.

And whilst PW2 said that he arrested the Appellant a few metres from the scene, PW3 said;

> ***"So when we heard the screams, we went backwards to see what was happening. We ran some 200 -210 metres to arrest the accused. We never lost sight of him. The area was well lit.Accused was wearing a trouser, shirt and jacket but I can not recall their colours."***

Clearly 200-210 metres cannot be the same as "a few metres". We, therefore, have an inconsistency between the evidence of the only two identifying witnesses. In the circumstances, the question is this; which between the two of them does the court believe?

And also whilst both PW2 and PW3 testified that the Appellant was wearing a jacket at the time of arrest, PW1 categorically stated that the Appellant did not have a jacket. One wonders what happened to the jacket between the time PW2 arrested the Appellant a few metres from the scene, and the time PW1 came to, a few minutes later.

Another interesting issue which was raised by the Appellant was that although PW3 said that the Appellant was arrested after a chase over some 200-210 metres, PW3 also said that it took barely a minute to effect the arrest. To the Appellant, the time taken to cover the distance of 200 metres was so

short as to suggest that the two police officers must either have been terrific sprinters, or alternatively that PW3 was not telling the truth.

In order to place the issue of speed in its proper perspective, one ought to appreciate, that if a person was to run at world record pace, he would cover the distance of 200 metres in about 20 seconds. Strictly speaking therefore, it should not be un-imaginable for the police officers to have covered about 200 metres in "**barely a minute".**

Of course, if PW3 was to be believed, there were no obstructions in their path, as there were no hawkers on that day. But if the evidence of PW1 and PW2 were accepted, the speed would be very much reduced by the presence of hawkers and other pedestrians. But this is a non-issue, in any event, as the court cannot pick and choose between various prosecution witnesses. We only conclude that the evidence is inconsistent.

In relation to the Appellant's defence, we are satisfied that the learned trial magistrate gave it appropriate consideration. He correctly observed that although DW2 and DW3 may have been honest witnesses, they were not with the Appellant at the time of the incident in issue. In those circumstances, both witnesses could not assist the Appellant's cause. The Appellant's defence was properly analyzed by the trial court, and therefore, the said court cannot be faulted for allegedly dismissing the defence without good reasons.

The other issue raised by the Appellant was that the Prosecution failed to call an essential witness. The person said to be an essential witness was Lydia Njoki, who PW1 had been with when he left the University. The Appellant submitted that Lydia Njoki would have been an essential witness because she would have been able to corroborate the evidence of PW1, about the manner in which he was attacked. That would presuppose that Lydia Njoki was in the Company of PW1 at the material time.

However, upon a perusal of the evidence of PW1, it is clear that at the time when he was attacked, he was not in the company of Lydia Njoki. PW1 expressly testified that at the material time, he was walking along Tom Mboya Street, alone. Therefore, it is obvious that Lydia Njoki could not have been an essential witness as imagined by the Appellant. In effect, the failure by the prosecution to call Lydia Njoki as a witness, had absolutely no impact at all on the case.

Finally, as PW2 and PW3 said, the Appellant was not in possession of anything which was stolen from the Complainant. That means that the Appellant's conviction was founded solely on the identification by PW2 and PW3. The Appellant submitted that in the circumstances, it was vital to closely scrutinize the evidence on his identification. There is no doubt that the Appellant is correct, in that regard. His said submission finds support from the decision of Sir Clement de Lestang V. P. in RORIA vs. REPUBLIC E.A. 583 at 584, wherein he held as follows;

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardner L.C. said recently in the House of Lords in the course of a debate on section 4 of the Crimi nal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts;***
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> ***There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in question of identity."***

The courts in this country have, for quite a while now, recognized the need for careful scrutiny of identification, especially where it is the basis for the conviction of an accused person.That explains the reasons why we have, in this case, re-evaluated the Appellant's identification with a fine toothcomb. And having done so, we have come to the conclusion that the Appellant's conviction would be unsafe to uphold. Therefore, this Appeal is allowed. The Appellant's conviction is quashed, and his sentence is set aside. We direct that the Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 27th day of January 2005.

LESIIT **F.A. OCHIENG'**

JUDGE **JUDGE**

Read, signed and delivered in the presence of; Mrs. Nyamosi for State

Mrs. Wahome for Appellant

Muia/Odero CC

LESIIT **F.A. OCHIENG'**

JUDGE **JUDGE**