REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 247 of 2004

(From original conviction (s) and Sentence(s) in Criminal case No. 2630 of 2003 of the Senior Resident Magistrate's Court at Limuru (Ezra O. Awino – S.R.M.)

JOHN CHEGE NDUNGU……..……..……..…..APPELLANT

VERSUS

REPUBLIC…… ……..…….....RESPONDENT

J U D G M E N T

The Appellant **JOHN CHEGE NDUNG'U** was found guilty and convicted for the offence of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to Section 297(1) of the **Penal Code.** He was sentenced to serve three years imprisonment. Being aggrieved by the conviction and sentence the Appellant lodged this appeal.

The facts of the case were that the Complainant went out of her house at 7.30 p.m. in order to close the outer gate to her home. As she did so, two people entered and pushed her back to her kitchen. They held her by the neck and demanded money. When the Complainant screamed, PW2, her granddaughter who was in the main house saw her being held and also started screaming. That was when the two assailants ran away stealing nothing from them.Later, four days after the incident, the Appellant was arrested for the offence and charged. The Complainant said that she saw Appellant for one minute and also heard and recognized his voice. The Appellant has raised issue with the evidence of recognition given by the Complainant and pointed out that the incident occurred at night and that the Complainant was old being 70 years.

I have considered this ground of appeal and the learned state Counsel's submission that the Complainant knew the Appellant before, that there was light at the scene and also that the Complainant recognized the Appellant's voice. From the evidence adduced, the Complainant was not clear as to the source of the light, the distance the light was from the assailants and also the brightness of the light. We have also considered the evidence of PW2, the Complainant's granddaughter. PW2 said that she too witnessed her grandmother (the Complainant) being held by the neck by two people. Despite living in the same village as the Complainant, she said she could not recognize either of the assailants.

Applying the test in the case of **REPUBLIC vs. TURNBULL (1976) 3 ALL ER 549,** I have examined closely the circumstances in which the identification by the Complainant were made. They were not in my view good for positive identification of the Appellant. It is not clear from the Complainant's evidence whether she was able to clearly see the Appellant sufficiently to identify him. This is made more critical considering the Complainant's evidence that she saw the assailants for one

minute.

On the evidence of recognition by voice, the exact words spoken by the assailants were not given. In the circumstances I am unable to decide whether the words allegedly spoken were sufficient to enable positive identification by recognition. In any event I considered it material that the Appellant was arrested four days after the incident. If the Complainant had recognized him as one of the assailants, why did it take so long for the Complainant to have him arrested? In **SAMUEL M. KIBOI & ANOTHER vs. REPUBLIC CA No. 144 of 2002**, the Court of Appeal held that delay in arresting a known assailant is a matter that should be resolved in the case. I have perused the learned trial magistrate's judgment. Nowhere did the learned magistrate deal with the issue of delay in the arrest of the Appellant.

PW3 was the Assistant Chief of Kambaa village where the Complainant lives. He told the Court that he arrested the Appellant on the 7th after receiving report that the Appellant was in a group of three who attacked the Complainant in a bid to rob her on the 3rd. First of all the evidence by PW3 in which he implicated the Appellant with the offence was hearsay and therefore inadmissible for reason that the source of that information was not disclosed nor the informer called as a witness. Secondly, PW3's evidence does not give any explanation why the Appellant could not be arrested immediately. The issue of delay in arresting the Appellant as a known assailant cannot be resolved in this case. the benefit should therefore be given to the Appellant.

I must raise my concern at this point in the taking down of hearsay evidence in criminal trials. In this case, the evidence of PW3, apart for the fact that he arrested the Appellant, was all hearsay and should not have been recorded. I hope that the learned trial magistrate will note this fact and record only the evidence that is admissible as provided under the Evidence Act.Recording inadmissible evidence can lead to the allowing of an appeal by the appellate court especially on the ground that the trial court abused his mind with inadmissible evidence and therefore opening up criticism that the possibility of bias and prejudice against the Appellant can not be ruled out.

Going back to the grounds of appeal, the Appellant has also challenged the learned trial magistrate's finding on the basis that he convicted solely on the basis of the evidence of a single witness. **MR. MAKURA** for the State submitted that the conviction on the Complainant's evidence alone was proper because the court's view was that the Complainant was a credible witness. In **NJOROGE vs. REPUBLIC 1982 KLR 291,** Muli, J. as he then was, held that it would be unsafe to base a conviction on the evidence of identification given by a single witness when the alleged identification occurred at night in circumstances not favouring accurate identification. I am strongly persuaded by my brother's holding. I found that the circumstances of identification were not favourable for accurate identification by a single witness, that is, the Complainant in this case. Such evidence could not therefore be the basis of a conviction. In addition I believe that before relying on the evidence of identification by a single witness to convict, a trial court must first caution itself of the dangers of relying on such evidence to base a conviction. Having perused the learned magistrate's judgment, I find that he did not caution himself anywhere before entering a conviction. That rendered the conviction the more unsafe in the circumstances.

The Appellant's last ground of appeal was that the conviction was based on bias and suspicion. More so because PW3 the arresting officer admitted he arrested the Appellant on receiving hearsay information. I do agree that from the evidence on record, suspicion would not be ruled out entirely in this case.

Having considered this appeal I find that the grounds raised by the Appellant in his petition had merit. Accordingly, I allow his appeal, quash the conviction and set aside the sentence. I direct that the Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 13th day of July 2005.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

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LESIIT, J.

JUDGE