REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 43 of 2002
(From the Original Conviction and Sentence in Criminal Case No. 1219 of 2002 of the Chief Magistrate's Court at Nairobi)

GEOFFREY MUSWANI HARUN ….……..……..…..…….. APPELLANT

VERSUS

REPUBLIC …….……..…….RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 154 of 2003

DOMONIC NJOROGE KAMAU…..…….....……..…….APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

GODFREY MUSWANI HARUN and **DOMINIC NJOROGE KAMAU** hereinafter referred to as the 1st and 2nd Appellants were both charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars were that on 13th May, 2002 along Luthuli Avenue Nairobi within Nairobi area they jointly with another not before Court while armed with a knife robbed Ibrahim Mustafa Musa of Kshs.1,200/= and at or immediately before or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Ibrahim Mustafa Musa. They were found guilty after a full trial convicted and sentenced to be detained at the President's pleasure as provided under our Law. They were aggrieved by the conviction and sentence and consequently lodged this Appeal.

The Prosecution case was that the Complaint (PW1) who was a student at Jamhuri High School on 13th May, 2002 left school for home at about 6.30 p. m. On reaching Luthuli Avenue three boys confronted him. One of them stood in his path. The other two stood on both his sides. One of them produced a knife and pointed it at him and demanded money. He had Kshs.1,200/= which they took and ran away. The Complainant followed them shouting for help. The three went and joined a group of other street boys. Fearing for his life the Complainant retreated and went to the Police station and made a report. He was assigned some Police officers and returned to the scene. He pointed out two boys who were arrested and taken to the Police Station. The two boys turned out to be the Appellants. The two were later charged with the offence. Put on their defence, the first Appellant in his sworn statement of defence stated that he sells batteries and handkerchiefs along Tom Mboya Street. He gave his age as 18 years. That on the day in question he finished his work at 8.30 p. m. He saw three Police officers who were all armed came and

arrested him. He as ordered into their vehicle and found the Complainant who claimed that they had robbed him. He was together with the 2nd Appellant taken to Central Police Station and was later charged with instant offence.

As for the 2nd Appellant also in his sworn statement of defence claimed that he was aged 14 years. That his occupation is to sell paper bags in town. He stated that he was on Luthuli Avenue after he had finished the day's business when the Police arrested him and the 1st Appellant. It was at 5 p. m. They were forced into a land lover in which there was another boy. They were taken to the Police Station and later charged. The Appellants have basically raised one ground of Appeal and revolves around their identification. They both allege that the identification if at all, was made under hectic and unfavorable condition and that therefore error or mistake cannot be excluded entirely. Miss Gateru, Learned Counsel for the respondent opposed the Appeal, and supported both the conviction and sentence. She submitted that the Appellants were properly identified at the scene of crime by the Complainant. That there was sufficient light at the scene of crime a=that enable the Complainant to positively identify the Appellant. On the question of the Appellants being infield by a single identifying witness, Counsel conceded that the Appellants were only identified by the Complainant but hastened to add that the Learned trial Magistrate duly warned himself of the dangers of convicting the Appellants on the evidence of a single identifying witness.

Regarding identification parade Counsel also conceded that it was conducted that it was due not conducted. However this was due to the fact that he Appellant were arrested in his presence and indeed he was the one who pointed them out. In those circumstances identification parade would not have been useful. We have carefully re-evaluated the entire evidence adduced before the trial Court bearing in mind that we neither saw nor heard the witnesses as they testified and therefore we are not in a position to comment on their demeanor and giving due regard to that, in line with the Court of Appeal decision in **OKENO VS REPUBLIC (1972) EA 32.**

The conviction of the Appellants was based solely on the Complainant evidence of identification. The Learned trial Magistrate appreciated this fact and duly warned himself of the dangers. Nonetheless he proceeded to act on the same and convicted the Appellants. It is trite la that such evidence should be watertight in order to sustain a conviction. This was so held in the case of **REPUBLIC VS ERIA SEBWATO (1960) EA 174** in the following terms:-

> ***"…….When the evidence alleged to implicate an accused is entirely on identification, that evidence must be absolutely watertight to jointly a conviction…."***

And in the case of **ODHIAMBO VS REPUBLIC, CR. APP. NO. 77 OF 2001,** the Court of Appeal held:-

> ***"……. Court should receive evidence on identification with the greatest circumspection particularly where circumstances are difficult and do to favour accurate identification…"***

According to the Complainant, he left school at 6.30 p. m. and reached Luthuli Avenue where the alleged offence was committed at 7 p. m. darkness must have fallen in. Yet nowhere in his evidence in Chief does he alluded to any light that could have assisted him in identifying the Appellants. The only reference to any light came through cross-examination by the 2nd Appellant when he stated:-

> **"…..I arrived in the city at 7 p. m. There was enough light…."**

We are of the view that the Learned trial Magistrate did not receive and consider the evidence of identification with circumspection as expected of him. The offence having occurred just after nightfall it was imperative for him to delve into the circumstances of identification. If as the Complainant claims there was enough light, it was upto the Court and prosecution to lead evidence to show the nature and intensity of that light. How far was it from the Appellant and the identify witness. How long did the Complainant keep the Appellants under lose observation as to be able to subsequently identify them. All these are part of the inquiry the trial Magistrate is expected to conduct while recording the evidence of

identification. It s not enough for the trail Magistrate to merely state:-

> ***"……The Court believes the Complainant's evidence that he was robbed while on his way home. It was at 6.30 p. m. and the Court believes that he was in a position to identify the robbers. Ti was at 6.30 p. m. There was therefore ……."***

First and foremost the Magistrate got it allowing regarding the time of the alleged incident. It was not 6.30 p. m. but 7 p. m. according to the Complainant. It was at 6.30 p. m. that the Complainant left school. Secondly the trial Magistrate presumed wrongly so in out view that because it was 6.30 p. m. then there must have been light. Before any conclusion regarding lighting condition at the scene of crime if it is at night it is mandatory to conduct the sort of inquiry that we have alluded to above. In the case of **PAUL ETOLE & REUBEN OMBIRI VS REPUBLIC**, criminal appeal no 24 of 2000, the Court of Appeal settled the issue beyond any shadow of doubt when it stated:

> ***- "……In the absence of any inquiry (as we set hereinabove) the evidence of recognition may not be held to be free form error……"***

The law is therefore settled that even if the identification witness states that he recognised the accused person, the Court is still enjoined to make an inquiry as to the nature of light available tat could have aided the witness in making the recognition. Since such an exercise as not undertaken in this case, we are of the considered view that he evidence of visual identification or recognition was not free from the possibility of an error or mistake.

The Complainant also testified that after he was robbed, he chased the robbers screaming for help. However when the robbers joined a group of other street boys, stopped and retreated fearing for his life. It is then that he informed his father what had happened and then later and proceeded to Central Police Station to make a report. In the case of **ALI RAMADHANI VS REPUBLIC, CR. APPEAL NO. 79 OF 1985 (UNREPORTED**) the Court of Appeal held that:

> ***- "…..The identification of a Epson who took part in the alleged offence and was chased from the scene o crime to the place where he was arrested is ofcourse strong evidence of identification and if all links in the chain are sound, it may be safely relied upon……."***

In the instant case the links were broken the moment the Complaint stopped chasing the robbers fearing for his own life and thereafter contacted his father before proceedings to central Police Station to report the incident. So that the evidence of the chase was in our view worthless.

We would have expected that if the Complainant had truly identified the Appellants as the culprits he would have given their description to the Police in his first report. He should have described how they looked and manner and style of dressing. After all the Complainant made the report to the Police soon after the incident. In his testimony however the Compliant was categorical that:-

> ***"……I did not give any description to the Police as to how they were dressed. My statement does not bear their description……."***

Further it is strange that the Appellants knowing that they had committed an offence would remain in the same place until they were arrested by the Police. That is not conduct consistent with a robber. Finally we also observe that upon their arrest none of the Appellants had in his possession of Kshs.1,200/= allegedly stolen from the Complainant. The Appellants were arrested within an hour of the incident and in the same neighborhood of where the incident occurred, what would have happened to the money?

Having considered the Appeal we find that the Prosecution did no prove its case to the required standard and that he Appellants were not properly identified by the Complainant and the identification was not safe and free from the possibility of any error or mistake. We find that the Appeals by both Appellants has merit and we allow then accordingly the conviction are hereby quashed the sentences imposed set aside.

The Appellants should be set free forthwith unless they are otherwise lawfully held.

Dated at Nairobi this 30th day of September, 2005

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LESIIT

JUDGE

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MAKHANDIA

JUDGE