REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 1024 of 2003

(From Original Conviction and Sentence in Criminal Case No.1067 of the Chief Magistrate's Court at Makadara).

Simon Omollo ………………………………….………..APPELLANT

VERSUS

Republic………………………………………………….RESPONDENT

JUDGMENT

The charges that were brought against the Appellant in the subordinate Court at Makadara were that of stealing from a person contrary to Section 279 (a) of the Penal Code and malicious damage to the property contrary to Section 339(1) of the Penal Code.

On 9th January, 2003 Mercy Muyera (PW1), (to whom I shall refer to in the judgment as the "Complainant") was a passenger in a Nissan Matatu along Landhies Road seated next to the window. The appellant it was alleged came and snatched her handbag and ran into Muthurwa Estate. The Complainant testified that she clearly saw the Appellant. The Complainant reported the matter to Muthurwa Police Station and was given two Police Officers to look for the Appellant. The following day they saw the Appellant and arrested him. In the process of arresting the Appellant he became violent as resisted arrest. He tore PW3's clothes. PW3 was a Police Officer detailed to arrest the Appellant. Eventually the Appellant was subdued and taken to Muthurwa Police Station and subsequently the two counts were preferred against him.

After a full hearing, the trial count found the appellant guilty, convicted him on both counts and sentenced him to four and two years imprisonment respectively with regard to counts I and II aforesaid. Being aggrieved by the conviction and sentences, the appellant lodged this appeal. He advanced 10 grounds in his petitions of Appeal. However a careful perusal of the ground suggest that the issues raised revolve around of identification and the prosecutions failure to call vital witnesses.

At the hearing of the appeal the appellant with the permission of the court handed in written submissions in support of the appeal. I have carefully read the said submissions.

Mrs. Gakobo, learned state counsel appeared for the state and in her oral submissions in opposition to the appeal submitted that PW1 positively identified the Appellant when he snatched her bag while she was seated in the matatu. That she alighted and reported the incident at Muthurwa Police Post. She submitted further that PW2 who was also a passenger in the matatu witnessed the incident and corroborated the evidence of PW1. That she noted the Appellant's appearance and the clothes that he wore. She further submitted that Both PW1 and PW2 identified the Appellant for purposes of arrest, one

day after the incident.

Counsel further submitted that PW3 in his testimony indicated that when he identified himself to the Appellant as a police officer and attempted to arrest him, the appellant tore his pull over. PW2 witnessed the incident. Counsel further submitted that over all there was sufficient evidence on record to convict the Appellant on both counts.

On sentence, Learned State Counsel submitted that both were legal and indeed lenient and should not be disturbed. She therefore urged this court to dismiss the appeal as lacking in merit.

This is a first appeal. In **GABRIEL KAMAU NJOROGE – VS – REPUBLIC (1982 – 88) 1 KAR 134,** the Court of Appeal held inter alia, as follows:-

> **"It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law, and the court is required to weigh conflicting evidence and draw its own inference and conclusions, bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this……………..".**

It is with the above in mind that I now consider the appeal. The appellant, as I have already stated raised two main grounds of a appeal; identification and failure to call vital witnesses. My understanding of the appellant defence is that he could not have been properly identified as he was not at the scene of crime and the complainant's evidence together with that of PW2 was fabricated against him. On the other hard the Complainant and her witness were certain in their evidence that the Appellant was the thief who snatched her bag. Similarly PW3 was certain that the Appellant was the one who maliciously tore his pull over as he attempted to arrest him.

In the case of **CLEOPHAS OTIENO WAMUNGA – VS – REPUBLIC, CRIMINAL APPEAL NO. 20 OF 1982 at Kisumu, the Court of Appeal** stated:

> **"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.**
>
> **Whenever the case against this defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of identification was succinctly stated by Lord Widgery C.J in the well known case of REPUBLIC – VS – TURNBULL (1976) 3 ALL E.R. 549.**

Were the circumstances for identification favourable in this case? The evidence of PW1 is to the effect that on the material day, she was traveling in a matatu from her place of work whereby along Landhies road there was a traffic jam. She was seated next to a window that was open. Suddenly one person came and snatched her bag and ran towards Muthurwa Estate. From the foregoing it would appear that PW1 merely had a fleeting glimpse of the person. The vehicle was moving though slowly due to the traffic jam. The person who snatched the bag immediately ran off into the estate. What this means therefore is that the Complainant could see the back of that person as he ran away. In any event no evidence was tendered to show how long PW1 had kept the said person under observation. I may make the same observation as regards the evidence of PW2. PW2 added in her evidence that when the suspect snatched the bag and ran off towards the estate, he was followed by some other street boys. There was therefore commotion and pandemonium further compounding the possibility of PW1 and 2 to positively identify the appellant. It is common knowledge that Muthurwa Estate is a densely populated estate and coupled with the fact that people were just coming back from duty, the circumstances for positive identification were made worse.

PW2 further testified that she alighted and reported the matter to the police. From the recorded evidence it is not clear as to how long it took PW2 to alight after the bag had been snatched from PW1. It is also noteworthy that although the report was made to Muthurwa Police Station no arrest was made on the same day. It should also be observed that though PW1 and PW2 claimed to have recognised the suspect by appearance and clothes he wore, no such description of the suspect was given to the police upon the first report by PW1 and PW2. In the case of **DAVID MASINDE SIMIYU & ANOTHER – VS – REPUBLIC CRIMINAL APPEAL NO. 33 OF 2004 (ELDORET),** the court of appeal observed:-

> **"……….In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused, and then by the person or person to whom the description was given."**

The omission on the part of the PW1 and PW2 to describe the suspect to PW3 goes to show that they were not sure of the suspect's identity.

As regards PW3, he testified that on 10th January 2003 whilst on patrol duties at Muthurwa Estate he was called to proceed to Muthurwa Police Post where he found PW1. PW1 informed him that she had spotted the person who had snatched his bag the previous day. In the company of police constables Mwangangi, Makau and Kihara, PW3 and PW1 proceeded to a hotel where the suspect had entered and managed to arrest him. However apart from PW3, these other police officers were never called to testify. No explanation was tendered by the prosecution for this failure. Their evidence would have been able to corroborate the evidence of PW1, PW2 and PW3 as to the mode of arrest of the appellant.

Finally, it is evident from the record that none of the witnesses stated exactly what time the incident occurred. We can neither assume that it was during the day or night. The prosecution ought to have led such evidence. If the incident occurred at night or even in the evening, other considerations arise for instance, light, its source, intensity and its direction vis a vis the suspect. The omission in my view was serious and may have occasioned a miscarriage of justice.

All in all, it is my view having considered the totality of the evidence on record that the identification of the Appellant was suspect in the circumstances obtaining and therefore unsafe to find a conviction on the first count of stealing from a person contrary to Section 279(a) of the Penal Code.

As regards count II, PW3 testified that when he attempted to arrest the appellant, he violently resisted and in the process tore PW3's pull over. PW3's evidence was corroborated in material particulars by PW2 and PW1. The torn pullover was tendered in evidence as an exhibit.Although the police officers who were at scene with PW3 during the scene did not testify and no reason was advanced by the prosecution, I nonetheless find that the failure to call the said police officers did not prejudice the appellant's case. The evidence of PW1 was sufficiently corroborated by PW1 and PW2. In any event the appellant did not dispute the evidence of PW1, PW2 and PW3 on this aspect either in his cross examination of the witnesses or in his defence. I am inclined on the evidence on record to hold that the appellant tore PW3's jacket and in so doing he acted willfully. PW3 was a police officer and the appellant ought to have complied with orders rather than violently resist arrest and in the process tear his jacket. In act I am surprised that the police did not bother to charge the appellant with a further count of resisting arrest.

In conclusion, I have no doubt that the appellant's conviction on the 1st count was unsafe and unsatisfactory. The appeal is allowed, conviction quashed and sentence set aside in respect of the 1st count. However, in respect of the 2nd count, I think the conviction was safe and sound and the appeal ought to be dismissed. For the avoidance of doubt, the Appellant will only now serve jail term of two (2) years for the offence of malicious damage to property contrary to Section 339(1) of the Penal Code effective from 28th October, 2003. Should the Appellant have served the said term, then he should be

released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 21st September 2005.

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M. S. A. Makhandia

JUDGE