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

**CRIMINAL APPEAL 949 OF 2000**

**MARTIN OMONDI ODERO..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

***(From Original Conviction and Sentence in Criminal CaseNo. 3179 of 2000 of the Senior Principal Magistrate'sCourt at Kibera.)***

**JUDGMENT OF THE COURT**

The Appellant was arraigned in the Senior PrincipalMagistrate's Court at Kibera, and charged with two counts ofrobbery with violence contrary to Section 296 (2) of the penalcode. It was stated in count one that on or about 31st march,2000 at Kawangware within Nairobi jointly with others notbefore Court while armed with dangerous weapons namelyknives and iron bars robbed *JOHN NJOROGE* of Kshs.2000/=,one wrist watch and one jacket valued at Kshs.5,000/= and ator immediately before or immediately after such robbery usedactual violence to the said *JOHN NJOROGE*. In count two, the Appellant on 31st day of March, 2000 at Kawangware within Nairobi jointly with others not before Court, while armed with dangerous weapons namely knives and iron bars robbed *ANN WAMBUI* of cash Kshs. 1,450/=, a wrist watch valued at Kshs.2,000/= and at immediately before or immediately after such robbery used actual violence to the said *ANN WAMBUI*.

The Appellant faced a further count of rape contrary to Section 140 of the Penal code. In that on 31st march, 2000 at Kawangware within Nairobi Area jointly with others not before court unlawfully had carnal knowledge of *ANN WAMBUI* without her consent. After a full trial the Appellant was convicted on the two counts of robbery with violence. However he was acquitted under Section 215 of the Criminal Procedure Code on the third count of rape. Being aggrieved by the conviction and sentence, the Appellant lodged this Appeal. In his petition of Appeal, the Appellant faults the findings of the trial Magistrate on four grounds:-

*(i). That the Learned trial Magistrateerred in both law and fact inholding that the Appellant was positively identified withoutconsidering that the circumstances obtaining did notfavour such identification.*

*(ii). That the Learned trial Magistrateerred in law and fact by relyingon the evidence of recovery of thejacket from the Appellant whichjacket was said to belong to theComplainant.*

*(iii). That the Learned trialmagistrate erred in both law andfact by rejecting the Appellant'sdefence without assigning anyproper reasons.*

*(iv). That the Learned trial Magistrateerred in both law and fact byholding that the prosecution hadproved its case beyondreasonable doubt.*

At the hearing of the Appeal, the Appellant had prepared written submissions in support of his Appeal which he presented to the Court. Miss Okumu, Learned State Counsel appeared for the state and made oral submissions in which she conceded to the Appeal. Basically she took the position that there was no sufficient evidence on record to enable the trial Court to convict the Appellant. That the Appellant was not positively identified and that even if he was the circumstances obtaining there at did not favour positiveidentification. The Learned State Counsel further submittedthat the defence advanced by the Appellant was plausable and should have been treated seriously. On the whole, theLearned State Counsel felt that the conviction of the Appellantby the Learned trial Magistrate was unsafe. Consequently sheurged us to allow the Appeal, quash the conviction and setaside the sentence.

Before we delve further in this matter it is necessary thatwe set out the facts of the case in summary. On 31st March,2000 at about midnight PW1 was going home in the companyof PW2 when suddenly somebody held him by the neck. Otherpeople emerged from the kiosk nearby, took his money and thewrist watch. They also removed his jacket and was then hit onthe face. In the meantime, PW2 who had been separated fromPW1 was pushed to the ground. PW1 escaped from the scene.He went back to the bar, which they had come from and in thecompany of the watchman jointly tried to trace PW2 in vain.On the following day PW1 sought treatment for his swolleneyes. On 2nd April, 2000 whilst having a drink at the same bar in Kawangware the Appellant entered. He was wearing ajacket which the Complainant thought was his. PW2 who wasalso present was infact the first to notice that the Appellantwas wearing PWl's jacket. They alerted the Police and theAppellant was arrested. It is important to note that in histestimony PW1 said that on the night of the robbery he hadnot been able to identify anybody.

As regards the 2nd count, the Complainant herein wasPW2. She testified that on 31st March, 2000 at aboutmidnight, she was on her way home in the company of PW1when they were accosted by some three people who removedknives and demanded money from her. She gave themKshs. 1450/= and her watch. They then pushed her to theground removed her clothes and repeatedly raped her untilabout 4 a. m. when they released her. She further claimedthat at the scene of the rape it was well illuminated and wastherefore able to identify all the three because she saw themas they raped her in turns for three hours.

The Appellant apart from denying involvement in therobbery, testified to the circumstances leading to his arrestand subsequent arraignment in Court.

The High Court as the first Appellate Court mustconsider the evidence adduced afresh, evaluate it and draw its own appropriate conclusions in determining whether or not touphold, the decision of the trial Court. (See *OKENO -VS-REPUBLIC (1972) EA 32).* To our mind, the issue that callsfor our determination in this Appeal is whether or not theAppellant was positively identified as part of the gang thatterrorised and eventually robbed PW1 and Pw2.

The Complainant *JOHN NJOROGE KIMANI, PW1* washair dresser at Kawangware where he also stays. On 31st march, 2000 at around 12 midnight he came from work andpassed via the bar to pick AMAT *WAMBUI PW2*. On their wayhome, PW1 was suddenly held by his neck by people whoemerged from the kiosk nearby. They took his money andwristwatch and also removed his jean jacket. He was then hiton the face. When he managed to escape he went back to thebar and with the watchman they went looking for PW2 to no avail. On Sunday 2nd April, 2000 PW1 went to the same barand ordered a soda. It was while he was sipping the soda thatthe Appellant entered the bar wearing the jacket allegedlybelonging to him. PW2 who was also present and noticed thejacket. Police were alerted and the Appellant was accordinglyarrested.

It is surprising that although PW1 and PW2 wereallegedly robbed they never made any report to the Police tothat effect. All that PW1 did was to report to the elders. Hesays "I *went to and reported to the elders."* PW2 claims to have identified the Appellant during the robbery "..... *The accused was among the people who came from thatkiosk."* Although PW2 was positive about identification of the

Appellant, she also did not file a report with the police. Whatshe did was *"after treatment I reported to the village elders."* Although PW1 and PW2 claim to have reported theincident to the village elders none of the elders were called to testify so as to corroborate the evidence of these two witnesses.

PW2 claims to have identified the Appellant due to thesecurity lights. However this is not borne out by the testimonyof PW1 who was also at the scene. How come PW1 was unableto identify any of the attackers at the scene if indeed there wassecurity light. The Learned trial Magistrate did not addressher mind to the source and intensity of the light vis avis theAppellant. Even though PW2 was positive about identifyingthe Appellant, there was no other supportive evidence forinstance, the first report to the Police. Here are people whoare suddenly and viciously attacked by a group of three ormore person in an alley. Would any one of them be in aposition to positively identify the attackers? We are satisfiedthat on the evidence, the circumstances obtaining did notfavour such positive identification. It is trite law that where aconviction is secured by relying on the evidence of a singleidentifying witness the Court ought to warn itself of thedangers of so doing especially where the circumstances andconditions favouring positive identification are difficult. Infailing to warn herself as aforesaid, the Learned trialMagistrate fell into error.

We wish now to comment on the issue of the jacket. PWlsaid that as soon as he saw the Appellant enter the bar, herecognised that the jacket he was wearing was his andimmediately contacted the Police who came and arrested theAppellant. It is important to note that neither PW l and PW 2testified as to any uniqueness and or special features or marksregarding the jacket that could have enabled them positivelyidentify the same as belonging to PW l. No receipt or any otherdocument was introduced in evidence to confirm that thejacket belonged to the PWl. Although PW2 testified that sheknew that the jacket belonged to PWl, she did not refer toanything significant about the jacket that would have led theCourt to conclude that indeed the jacket belonged to theComplainant. One should not also loose sight of the fact thatjeans jackets are everywhere in this country. Indeed when cross-examined by the Appellant Pwl said ". *jeans jacket are many.* "

If the jeans jackets are many as PWl confirmed then itwas necessary for him to persuade the Court by evidence thatthe jacket in possession of the Appellant were his. He failed to do so and the trial Magistrate ought not to have relied on theevidence of recovery of the jeans jacket from the Appellant asevidence of the Appellant's participation in the crime.

When the Appellant was put on defence, the Appellantstated that he was nowhere near the scene of crime. He hadbeen away in Siaya from 21st March, 2000 to bury his motherwho had passed on. He travelled back to Nairobi during thenight of 31st March, 2000 arriving in Nairobi on 1st April, 2000.He was therefore surprised when he was arrested on 2nd April,2000 for allegedly having committed the offence whilst he wasaway. As regards the jeans jacket in his possession, theAppellant stated that it was his as he had bought.

Was the defence put forward by the Appellant plausible?We think so. The prosecution was not barred frominvestigating the Appellant's alibi. It would have been veryeasy for the prosecution to establish whether indeed theAppellant's mother died and when she was buried. We thinkthat when the Appellant complains that the Learned trialMagistrate erred in flippantly rejecting his alibi defence, hehas a point. In the case of *KIMOTHO KIARIE -VS- REPUBLIC, CR. APPL. NO. 93/83 (unreported),* the Court of Appeal heldthat the trial Magistrate ought to give cogent reasons forrejection of the defence. No such reason (s) were given.

In the upshot and as the state has conceded to the Appeal, we allow the Appeal, quash the conviction and set aside the sentence. The Appellant is set at liberty unless he isotherwise lawfully held.

Dated at Nairobi this 30th day of April 2004.

**M. S. A. MAKHANDIA**

**Ag. JUDGE**

**L. K. KIMARU**

**Ag. JUDGE**