REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 1051 OF 2001

(From original conviction (s) and Sentence(s) in Criminal case No. 5101 of 2001
of the Senior Principal Magistrate's Court at Kibera (Ms. Siganga - SRM)

JOHN KANJA NDUNGU…..…….APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant **JOHN KANJA NDUNGU** was charged with another with one count of **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code. The particulars of the offence were as follows: -

> ***"On the 4th of August 2001 at Warai South Road Karen within Nairobi area, jointly with others not before the court robbed DAVID KAMAU of Kshs.950/-, a pair of shoes and a leather belt and at or immediately before or immediately after the time of robbery used actual violence on the said DAVID KAMAU."***

After a full trial, the learned trial magistrate found the Appellant guilty as charged and convicted him, sentencing him to death as mandatorily provided by the law. He now appeals against both the conviction and sentence. www.kenyalaw.org

The chief facts of this case were that the Complainant, PW1 was walking home in company of PW2 at 10.00 p.m. on the night in question when they passed one man whose clothes were bulging. The Complainant became suspicious and looked back to see what he was carrying. On turning, he noticed that the man had raised an axe ready to hit him. There were others with him who flashed torchlight. Both the Complainant and PW2 claim they saw the Appellant with the torch light coming from a torch held by one of his accomplices. The Complainant said he knew the Appellant for 10 years while PW2 said he also knew him before PW2 ran away 30 metres back to get PW3 and another. In the meantime, the Appellant cut the Complainant on his leg and head and together with his accomplices robbed him of shoes, belt and cash. The Complainant saw the Appellant and his co-accused 2 days after the incident and caused their arrest.

The Appellant has raised following issues. The first one is that of visual identification. Quoting **DAKWEL vs. REPUBLIC 1976 WLR 32,** (a persuasive Authority) he relied on the courts holding;

> **"A conviction cannot stand for example where the identifying witness had only a fleeting glance at the subject."**

He also relied on the case of **TOM IMALA MABIA vs. REPUBLIC HCCC No. 393 of 1991** (Nairobi) where the court held: -

> ***"The torch depended upon for identification was that of the assailants, she was assaulted, the intensity of light emitted by the torch itself, the number of cells it uses and the state of such cells whether new or old etc. was not let into evidence. In the absence of such evidence regarding the quality of light, where the Complainant was at the time, we entertain some doubts as to whether he did recognize the attackers."***

Learned counsel for the State **MISS GATERU** submitted that the Complainant and PW2 saw the Appellant clearly by torchlight and that having known him before, and having been able to tell the role he played in the attack, the identification was safe.

While we do not think that it would be fair to expect the Complainant and PW2 to tell how old the batteries of the torch used by the assailants in this attack were, it is reasonable to expect the two witnesses to give evidence as to the intensity of such light. It was also reasonable to expect the two to disclose the distance from which the torch was flashed at the Appellant and the length of time that they spent observing him. That was not disclosed. These issues are important principles to consider while determining whether the identification of an assailant by the witness or witnesses was safe as set out on **REPUBLIC vs. TURNBULL & OTHERS (1976) 3 WLR 455.**

It is trite law that before a court can base a conviction on the evidence of identification at night or when it is known that the conditions favouring a correct identification are difficult, such evidence must be watertight. See **KARANI vsREPUBLIC 1985 KLR 290; PETER KIMARU MAINA vs. REPUBLIC C.A.No. 11 of 2003 (Nyeri) and REPUBLIC vs. ERIA SEBWATO 1960 E.A. 174**.

It is our considered view that the identification of the Appellant was not watertight. The Complainant and PW2 did not disclose the intensity of the light under which they saw the Appellant, the distance from which they saw him or the length of time they observed him. In the case of PW2, we agree with the Appellant's submission that he had a fleeting glance at the assailant.

The Appellant raised the issue of first reports; that the witnesses did not give his description to the Police. That submission was premised on the absence of any reference as to the Appellants description in the OB report made by the two witnesses. That submission was without, however, basis. It is quite clear to us from the evidence on record that both the Complainant and PW2 had mentioned the Appellant as one of the attackers.

The other important issue raised in the Appellants written submission was that of his defence. He submitted that he had raised an alibi defence which was ignored. In that defence, the Appellant alleges he went to sleep at 4.00 p.m. on the day in question. That does not qualify to be alibi evidence.

We have on our part considered the Appeal from an added dimension that none of the parties to this Appeal raised. The particulars of the charge were in our considered view defective. The charge alleged that the Appellant and his accomplice robbed the Complainant. The charge made no reference to whether or not the Appellant was armed with any offensive or dangerous weapon. Yet from the evidence adduced in the case, the Appellant was said to have been armed with an axe.

The Court of Appeal in **MOM C.A. NO. 86 of 2000 DANIEL MORE vs. REPUBLIC, GICHERU, OMOLO and LAKHA JJA,** in a case of similar circumstances held: -

> ***"These facts no doubt disclosed the offence of robbery contrary to section 296(2) of the Penal Code. But the omission of the essential ingredients in the particulars of the offence the Appellant was alleged to have committed meant that he had to wait until 3rd September 1998 when PW3 and PW4 had given evidence in the court of first instance to know that the charge against him entailed after having been arrested on 13th March 1998 and brought to court…. Considering that the nature of the charge against the Appellant was a matter of***

life or death and that he was unrepresented at his trial in the court of first instance the omission referred to above constituted a defect in the said charge which may have embarrassed the conduct of his defence, with the resultant possible failure of justice. On this account we think that such defect is not curable under sections 382 of Criminal Procedure Code in the sense that the particulars of the charge did not disclose an offence known to the law under section 296 (2) under which the charge was laid."

Having considered the charge preferred and the omission to include an essential ingredient of the particulars, we do find that the charge was bad in law in the sense that the particulars of the charge did not disclose an offence under Section 296(2) of Penal Code. The defect is incurable under Section 382 of the Criminal Procedure Code.

For the two reasons advanced in the body of this judgment, we are of the view that the conviction entered against the Appellant should not be allowed to stand. Consequently, we quash the conviction, set aside the sentence and order that the Appellant should be set at liberty unless he is otherwise lawfully held. Those are the orders of this court.

Dated at Nairobi this 23rd day of September 2004.

LESIIT

JUDGE

OCHEING

Ag. JUDGE