**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 339 & 340 OF 2007**

**MARTIN MAINA ……..1ST APPELLANT**

**DAVID KARIUKI……2ND APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(From original conviction and sentence in criminal case Number 3429 of 2006 in the Chief Magistrate's Court at Kibera – Mr. Maundu (SRM) on 28th May 2007)***

**JUDGMENT**

1. The two appellants **David Kairuki** and **Martin Maina** were tried for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It had been alleged that on the 25th day of April, 2006 at Chiromo along Waiyaki way in Kileleshwa within Nairobi area Province, they jointly, being armed with a dangerous weapon namely a knife robbed Mr. Joseph Waswa of shoes, watch, and a wallet all valued at Kshs.1000 and cash Kshs.70 and at or immediately before or immediately after such robbery used actual violence to the said Mr. Joseph Waswa.
2. The two appellants were convicted and sentenced to death as by law prescribed. They promptly filed appeals, in which they raised identical grounds of appeal stating that they stayed in police custody for a long period before they were produced in court. They further contended that the evidence of identification was not satisfactory, while the evidence as a whole did not link them or their arrest to the crime. The appellants also argued that the learned trial magistrate did not evaluate the evidence properly, and disregarded their defence statements without giving reasons thereto.

3. The two appeals which were Nos. **340 of 2007** and **339 of 2007** respectively, were subsequently consolidated and proceeded as **Cr. Appeal no. 340 of 2007.** When the appeal came up for hearing on 21st May 2013, Mr. Kabaka the learned state counsel appeared for the respondent holding Miss Wang'ele's brief. He explained to the court that Miss Wang'ele was indisposed but had instructed him to seek leave of court to proceed by way of written submissions. Leave was granted and the written submissions of the appellants' served upon Mr. Kabaka in court. The respondent was given 14 days to file responses thereto. As at the time of writing this judgment the state had not filed any response to the appellants' written submissions.

4. We have anxiously re-evaluated the evidence on record bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence

to support the lower court's findings and conclusion. In **Kiilu and Anor v Republic [2005] 1 KLR pg 174,** the learned Judges of Appeal, Tunoi, Waki and Onyango Otieno JJA, held *inter alia* that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."***

5. Upon re-evaluation of the evidence on record we are of the considered view that this appeal can be disposed of upon determining the question of identification. The complainant's evidence was that he was walking along Chiromo road in Kileleshwa at about 7.20 p.m. on the evening of 25th April 2006, when a gang of four machete wielding men jumped out of some flowers growing by the road side and attacked him. They robbed him of his shoes and wallet, and when they were finished he ran up the road where he came upon some KK guards and reported the incident to them. The KK guards went back and arrested two men whom they found at the scene. These two men were subsequently charged, tried and convicted and are the appellants before the court.

6. The prosecution's case turns on the question of identification. We noted that there were no recoveries made from the Appellants apart from Kshs.50/= which could not be proved conclusively to belong to the complainant. No other evidence was adduced to connect the Appellants with the offence other than the fact that the Complainant claimed to have identified them. We also noted that the trial magistrate did not warn himself of the dangers of convicting the Appellants on the basis of a single identifying witness, but are cognisant of the case of **ANTHONY KANGETHE MWANGI VS REPUBLIC Cr. App No. 81 of 2008**, in which it was held that this failure was not fatal if the Appellant was convicted on sound evidence of identification.

7. We are however minded of the decision in **KARANJA & ANOR VS. REPUBLIC [2004] 2 KLR pg 140** and have examined the manner in which the trial court dealt with the evidence of identification. In the case of **Karanja and anor**, (supra) the Hon. Judges of Appeal Githinji, Onyango Otieno and Deverell JJA held *inter alia* that:

1. ***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.***

2. ***Whenever the case against accused depends***

> ***wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.***

8. Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.

9. Of note in this case is the manner in which the actual robbery occurred. The complainant testified that two of the four men tackled him from the front and when he turned to flee the other two confronted him from behind. The four men knocked him to the ground and one of them sat on him as a second man took his shoes and ransacked his trouser pockets taking his wallet. The said wallet contained his identification card SafariCom sim card, voters card and Kshs.70/=. A third man held his head down as the fourth man threatened him with the machete. The complainant held on to the blade of the machete to prevent his assailant from cutting him. The assailant pulled back the machete inflicting deep cuts on the complainant's four fingers that held the machete.

10. The time of the attack was 7.20 p.m. and both **PW1** and **PW2** testified that there was a street light near the scene of the attack. Whereas however, **PW2** testified that the area was well lit, **PW1** on the other hand testified that **"It was not very dark."** This implies that the scene was dark, albeit not very dark. On cross-examination the complainant added that the robbery only lasted a minute before he was ordered to disappear and he complied. The complainant appears to have placed much reliance on the manner of dress of his attackers, yet there was nothing in particular to mark their clothes except that one man wore a blue pair of trousers while the other wore a black one.

11. Applying the principles in **KARANJA & ANOR V. REPUBLIC** (supra) and **ABDALLA BIN WENDO AND ANOTHER VS. REPUBLIC (1954) 20 EACA**, we came to the conclusion that in view of the circumstances obtaining at the time of the robbery, it was not possible to correctly and conclusively identify the robbers, and that it was not safe to convict on such inadequate evidence of identification.

12. For the foregoing reasons we find that the appeals are **meritorious,** and allow them. We quash the conviction and set aside the sentence imposed on the appellants, and order that the appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED** and **DELIVERED** in open court this **1st** day of **July 2013**.

A. **MBOGHOLI MSAGHA** **L. A. ACHODE**

**JUDGE** **JUDGE**