REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

PAUL KARANJA KIARIE ……..……..1ST APPELLANT

GEORGE WAWERU NG'ANG'A ……..2ND APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

(From the original conviction and sentence in Criminal Case No. 10909 of 2004 of the Chief Magistrate's Court at Thika by U. P. Kidula – Chief Magistrate)

JUDGEMENT

The two appellants were charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code and were sentenced to death in respect of the 1st count and the magistrate ordered the sentence in respect of counts 2 and 3 to stay in abeyance. The particulars in count 1 are **that on the 30th day of November 2004 at Nembu village in Thika District within Central Province, jointly with another not before court, being armed with dangerous weapon namely a pistol and a panga, robbed PETER KARANJA KUBAI of cash Kshs.1,900/= and at the time of such robbery threatened to use actual violence to the said PETER KARANJA KUBAI.** In count 2 the particulars are **that on 30th November 2004 at Nembu village in Thika District within Central Province, with another not before court being armed with dangerous weapon namely a pistol and a panga robbed PETER KIIRU NDEGWA of cash Kshs.1,500/= and a mobile phone make Sagem 922 valued at Kshs.3,500/= all valued at Kshs.5,000/= and at the time of such robbery threatened to use actual violence to the said PETER KIIRU NDEGWA.** The particulars in count 3 are **that on 30th November 2004 at Nembu village in Thika District within Central Province, jointly with another not before court, being armed with dangerous weapon namely a pistol and a panga, robbed JOEL WAINAINA WANJIKU of cash Kshs.8,000/= and a mobile phone make Nokia 8210 valued at Kshs.8,000/= all valued at Kshs.16,000/= and at the time of such robbery threatened to use actual violence to the said JOEL WAINAINA WANJIKU.**

The basis of the conviction entered by the trial court against the appellant is the evidence tendered by PW1, PW4 and PW5. The complainants in counts 2 and 3 gave the evidence as PW2 and PW3 and in their evidence they stated that they could not recognize the persons who attacked them since it was dark and the attack was sudden and swift. The evidence of PW1 Peter Karanja Kubai the *(complainant in count 1)* stated as follows: On the material day at about 7.30 p.m. while on his way home he was attacked by three people who robbed him a sum of Kshs.1,900/=. He stated that he was able to identify the 1st appellant with the help of the moonlight as he used to come to his butchery to do casual jobs for him. He

also stated that he was able to identify the 2nd appellant as one of his customers who used to come for soup at his business place. He stated that he did not know the third person and that he was dragged towards a plantation where there was total darkness. He also says that the attackers divided the money in his presence but they continued demanding for more money but he had none. As the appellant was being harassed by the attackers the complainants in count 2 and 3 appeared and they were attacked by the said gang. As they were stealing from the two new comers, a vehicle came and they all screamed for help. The attackers ran away and the complainants proceeded to report the matter at the APs camp. They were told to come the following day and proceed to Gatundu Police Station. Later PW1 attended an identification parade where he identified the 2nd appellant as one of his attackers. He says that he did not attend an identification parade for the 1st appellant because he was well known to him. Under cross-examination from 1st appellant, PW1 replied:-

"It was 7.30 p.m. There was moonlight. You attacked me suddenly. I was surprised. I gave out your names Karanja alias doctor. There was grass on both sides of the road. I did not know how long it took after you lit the newspapers."

The evidence of PW4 PC Gabriel Njagi is that on 1st of December 2004 while in the office, PW1 came and reported that he had been robbed by three people on 30th November 2004. He then recorded the statement of the complainant and stated that the 1st appellant was arrested because he had been identified at the scene. He also stated that he investigated the 1st appellant who led him to 2nd appellant. In his evidence PW4 stated that he did not arrest the 1st appellant and that the first report was made at Nembu Police Post AP camp and he did not see the OB containing the first report.

PW5 IP John Muli stated that on 4th December 2004 he proceeded to Gathage village in Gatundu to look for the 1st appellant having received a report that he had robbed PW1 on 30th November 2004. He went to the house of the 1st appellant and arrested him. He also contended that on 9th December 2004, the 1st appellant led him to the house of the 2nd appellant where he also arrested him.

PW6 IP Kennedy Oloo stated that on 15th December 2004 he was asked to carry out an identification parade for the 2nd appellant. He conducted the parade where PW1 identified the 2nd appellant as one of his attackers.

After considering the evidence on record the trial court was of the view that there was sufficient evidence to sustain the conviction of both appellants. This is a first appeal and it is our mandate to reevaluate the evidence afresh in order to determine whether there is sufficient evidence to sustain the conviction of both appellants. First and foremost we do not understand why the trial court convicted the two appellants in respect of counts 2 and 3 since the evidence of PW2 and PW3 is that they were not able to recognize the attackers and they could not confirm whether the two appellants were part of the gang that attacked them on the material day.

The basis of the conviction entered against the appellant is that PW1 recognized the 1st appellant and the 2nd appellant as part of the gang who attacked him and robbed him on the material night. There is no dispute that the attack took place during the night in a dark area but nevertheless PW1's contention is that he was aided by moonlight to identify or recognize the attackers. In his evidence he stated that he was attacked near a quarry and dragged into a plantation by a group of three people who immediately removed a sum of Kshs.1,900/= from his pocket. Identification evidence attributed to PW1 did not clearly state the nature of the light that assisted him to identify the attackers. The question is whether the conditions prevailing at the time PW1 was attacked could reasonably be said to be free from error or mistake. The law is that the testimony of a single witness in matters of identification or recognition has to be tested to the greatest care. The court has a duty to ensure that the conditions favouring correct identification were not difficult and distressing to the victim. And when such circumstances prevail, there is need for other evidence pointing to the guilt of the accused person from the circumstances surrounding or brought forth before court. We are not in any way saying that testimony of a single witness cannot be relied upon as a

basis for conviction but what we are saying is that such evidence has to be considered with greatest care and circumspection. In **Criminal Appeal No.409 of 2006 Stephen Njenga Wairimu vs Republic** we held;

"**Although the complainant said in his evidence that there was moonlight, he didn't specify how bright that moonlight was. If it was a new moon, its light would probably not have been as bright as that of a full moon. In the absence of any evidence as to the quality of the moonlight, one cannot be certain that the attacker was properly identified beyond a shadow of doubt, especially considering that PW1 was on the ground during part of the attack which lasted only three minutes.**

In this case there is no other evidence, circumstantial or direct. The evidence of this single witness must therefore be tested with the greatest care. IN MATANYI v. REPUBLIC [1986] KLR 198, the Court of Appeal addressed the issue of the identification evidence at night by a single witness and rendered itself thus –

"**It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve … it is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into …"**

And in **criminal appeal No.436 of 2007 John Njeru Kithaka & another v Republic** the Court of Appeal addressed the issue of identification and recognition and stated as follows:-

"**As we have stated, only two matters of law were raised and are for consideration before us. On identification, the law is now well settled and that is that a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases conviction on it. In particular, if the conditions under which such identification is purported to have been made were not favourable and if the identification is by a single witness. Although recognition raises less problems than identification of strangers, nonetheless, even in cases of recognition, there is need to exercise caution before a conviction is entered. It is thus established that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In the case of KIARIE V REPUBLIC (1984) KLR 739, this Court made it clear that before conviction can be entered against a suspect on account of visual identification, such evidence must be watertight as it is possible for even an honest witness to make a mistake. In cases of recognition it was stated in the case of R V. TURNBULL (1976) 3 ALLER 549 as follows:**

"**Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

The law is thus certain that there is need to exercise utmost care before the appellants could be convicted on the evidence of Kariuki and Murani who were the only two identifying witnesses."

PW1 did not describe the conditions prevailing at the time of the attack in order to persuade us the conditions prevailing were free from mistake or error. He did not describe the intensity of the moonlight, whether it was a full moon, crescent or otherwise to persuade us that the circumstances prevailing at the time of the attack could not result in mistaken identity or was free from error. In the circumstances, the evidence of identification or recognition attributed to PW1 was not conclusively and positively rendered in a clear and watertight manner. And this case being a case of identification or recognition there was need for the trial magistrate to sieve and approach the matter with greatest care in order to minimize the dangers of convicting an innocent party. The court was required that the evidence on record was watertight and was proper to be relied upon in order to sustain the charges which were against the appellants. The incident occurred at night where visibility was not clear, the attack was committed in a

sudden and surprise manner so that PW1 could not have said to have attentive or to have anticipated the persons or the nature of attack that was to be committed against him. In his evidence he stated that he was dragged to a plantation and that the offence was committed near a quarry making the circumstances favouring recognition or identification a matter open to suspicion and speculation. It is therefore possible that the complainant was attacked by someone he knows yet being mistaken so that the possibility of error or mistake is still there whether it is case of identification or recognition of a stranger.

In our view therefore, we think the evidence tendered by PW1 cannot be a basis to convict the appellants for such a serious offence of robbery with violence which carries mandatory death sentence. In any case we have no evidence to show that in his first report PW1 gave the names and description of the attackers to the relevant authorities who were concerned with the matter. The persons who received the first report from PW1 did not give evidence to corroborate the evidence of PW1 that he was able to recognize or identify his attackers and that he mentioned them to the relevant authorities at the first instance when he had opportunity to do so. It is also not clear the circumstances that led to the arrest of the 1st appellant. As regards the 2nd appellant, the evidence on record is that the 1st appellant mentioned him and as a result he was arrested. We cannot trust that evidence since it is that of an accomplice and cannot be a basis to say that he was involved in the commission of the offences that were committed against PW1, PW2 and PW3. In the circumstances narrated hereinabove we think it is not safe to sustain the conviction of the two appellants. We allow the appeal of each of the appellant, quash the conviction and set aside the sentence imposed by the trial court. We order the immediate release of the two appellants unless lawfully held.

Dated, signed and delivered at Nairobi this 4th day of November 2009.

L. NJAGI **M. WARSAME**

JUDGE **JUDGE**