REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 1334 of 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 4342 of 2002 of the Chief Magistrate's Court at Thika (Betty Rashid –P.M.)

NAFTALI NJERU IRUNGU..……..…..……..…..APPELLANT

VERSUS

REPUBLIC…… ……..…....RESPONDENT

J U D G M E N T

The Appellant **NAFTALI NJERU IRUNGU** was convicted for one count of **ROBBERY WITH VIOLENCE** contrary to **Section 206(2**) of the **Penal Code**. He was sentenced to death as prescribed in the law. He was dissatisfied with the conviction and sentence and so lodged this appeal.

The facts of the prosecution case were that the Complainant was walking to Thika Town from Kiandutu when he met three youths. That one of them ordered him to stop. He had a panga. He was ordered to give all he had. He lost the money he had and a Somali sword. After being robbed, the Complainant was ordered to go away and not to turn back. That the Complainant pretended to do so but he turned and followed the robbers shouting thief, thief, until near some shops where PW2 and PW3 helped to apprehend the Appellant. In his defence, the Appellant said that he was just walking when the three Somalis – PW1, PW2 and PW3 stopped him. They asked him whether he was not one of those who robbed the Complainant due to his clothing. He denied but was still arrested and charged.

The first ground of appeal raised by the Appellant was that the learned trial magistrate erred in law and fact in basing his conviction on the purported identification irrespective of the same having not been free from the possibility of error or mistake. It was the Appellant's contention that the Complainant was chased away by his attackers after he was robbed. That by the time he decided to follow the robbers again, they had entered a thicket. The Appellant submitted that the Complainant's evidence that he had chased the robbers from scene of crime to scene of arrest was therefore not correct.

MRS. TOIGAT did not agree with the Appellant. She submitted that the incident took place at 1.30 p.m. which was in broad daylight and further that the Appellant was arrested after the Complainant gave chase. The Counsel submitted that there was no breach in chain of events between the chase and the arrest.

We have carefully re-evaluated the evidence adduced in Court. The Complainant's evidence in chief was brief and scanty. However, more details of the incident emerged when the Appellant cross-examined the Complainant at length. From the cross-examination, the Complainant admitted that after he was

robbed, his assailants chased him away together with a person who had gone to his rescue. The Complainant admitted that he walked away for 10 metres before turning back to go after his assailants. From the Complainants evidence, he found the group still inside a thicket and he claimed to have been able to see them inside that bush. He said that on coming back to them, the group decided to flee and they escaped. That he followed the Appellant who entered the village. That he was then arrested.

From the Complainant's evidence it is quite clear to us that he lost sight of his assailants after the robbery and before the Appellant's arrest. We noted that the Complainant did not describe any of his assailants. The reason for the Appellant's arrest was based purely on the basis that he was sweating profusely and had been running, a fact the Appellant denied in his defence. The Complainant's evidence was therefore not watertight. The fact that the incident was in broad daylight did not lessen the need to consider the Complainant's evidence with caution.

Before a conviction can be entered in the evidence of a single identifying witness, it must be watertight. There was a lapse between the robbery and the Appellant's arrest and therefore, in the circumstances of the case, it cannot be said that there was no possibility of mistake or error in the identification on record. What was needed was other evidence to support that of the Complainant. In the Complainants evidence, he said that the Appellant had a panga and that he used it to threaten him. If that panga had been recovered from the Appellant at time of arrest, it could have formed strong evidence against the Appellant and sufficient to support the Complainant's evidence. The panga was not recovered and so the Complainant's evidence lacked the necessary evidence in its support.

The second ground raised was that the learned trial magistrate relied on the evidence of attire to convict the Appellant. That is true from the learned trial magistrate's judgment. The learned trial magistrate noted that the evidence of PW2 was clear that the Appellant was dressed in same clothing he was arrested in at the time that PW2 testified. The trial magistrate made that observation at the point of analyzing the evidence of identification. That observation was quite unfortunate for the simple reason that PW2 did not witness the robbery. He only assisted to arrest the Appellant long after the robbery had taken place. The remark of the Appellant's clothing was irrelevant having been made by PW2 who was not there at the scene of crime. The Complainant himself did not describe any attire of any of his assailants yet he was the most important witness who needed to have done so.

The other issues raised by the Appellant included the issue of his arrest which we have dealt with. He was arrested because he was sweating and running in front of the Complainant. In absence of clear evidence that the Appellant was one of those who robbed the Complainant, mere running ahead of the Complainant was not conclusive evidence that of his guilt.

The Appellant also raised issue with the fact that nothing incriminating was recovered from him. We have already mentioned this aspect elsewhere in this judgment. The Appellant was not found with any of the stolen items. More important, the panga which the Complainant said was used by the Appellant in the robbery was not recovered from the Appellant or at all.The Complainant stated in passing that the Appellant dropped the panga as he ran. If indeed he had dropped the panga in the full view of the Complainant, why was it not recovered and made an exhibit in the case? No explanations were given why it was not recovered and exhibited in court. It is our view that why it was not recovered is because the Appellant never had it in his possession in the first place.

Even without going into any further details, we do find that the conviction entered herein was unsafe and cannot be allowed to stand for the reasons given herein. We find merit in this appeal and allow it. The Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 5th day of July 2005**.**

…… **…….**

LESIIT, J. **M.S.A. MAKHANDIA**

JUDGE **JUDGE**

Read, signed and delivered in the presence of;

…… **……..**

LESIIT, J. **M.S.A. MAKHANDIA**

JUDGE JUDGE