REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 308 OF 1992

ALPHONSE MUSAU MUTISO……… APPELLANT

VERSUS

REPUBLIC……….…………...….….. RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No

1696 of 1991 of S Resident Magistrate's Court at

Malindi: J R Karanja Esq)

JUDGMENT

The appellant, Alphonse Musau Mutiso, was convicted after trial by the learned Senior Resident Magistrate, Malindi of the offence of robbery with violence contrary to section 296(2) of the Penal Code. Upon conviction, he was sentenced to the mandatory death sentence. His appeal in this Court is against conviction and sentence.

There is no dispute on the facts adduced by the prosecution witnesses that on the night of 10th and 11th of October, 1991 at about 2 am, while the complainant, Marlin Righa Malogho (PW1) who was a receptionist at Paradise Lodge, Malindi; was at his place of work, he was suddenly attacked by a gang of three robbers who were armed with stones and knives. One of them grabbed the wooden box which they normally used as a cash box. He was terrified. As they walked away with the said box, he followed them while raising alarm and held one of them but he was slashed with a knife and hit with a stone. The said gangsters then fled before the watchmen of Paradise Lodge could come to his rescue. As one of the said watchmen, Samson Wambua (PW2) tried to pursue the said men towards Tropical Hotel while blowing his whistle, they went out of his sight and he could not identify any of the said men.

It was the prosecution case that as the said men ran away, they were confronted by some two other watchmen from the nearby Tropical Village Hotel, Andrew Nyambu Jiwe (PW3) and Mbaja Kalua (PW5). They testified that the said men ran away in different directions seeing them but they pursued one of them who is the appellant and arrested him. However, the 2 men that escaped were again confronted by the police officer, P C Mwangangi Zongo (PW4) and P C Barasa Kulecho (PW7) who were then on patrol and heard the alarm that was being raised. As the two men approached them while carrying a wooden box and knives, they challenged them to stop but they defied the orders thereby forcing the police officers to release the police dog which they had and to fire warning shots in the air. The said men continued to run and having pursued them for about 100 meters, PW7 shot one of them who died instantly while the other escaped. There was a wooden box (Exh 1) lying besides the man that had been shot. It was soon identified

by the complainant (PW1) as the one that he had been robbed of while containing a stamp pad, one rubber stamp and a receipt book. When the complainant saw the appellant who had been arrested by the two watchmen (PW3 and PW5), he stated that he was one of the men who had taken part in the said robbery. He was then re-arrested by the police officers and later charged with the offence that was laid against him.

The appellant denied any involvement in the said robbery. His defence was that he is a curio dealer along the Malindi Beach. On the material night he had gone to visit some of his European friends who were residing at White Elephant Hotel. They later proceeded to Tropical Hotel. As he had been entertained with a lot drinks, he became drunk and while he was now on his way home, he met with a group of people and police officers who stopped him and asked for his identification card. On realizing that he was one of those who are selling curios, they decided to arrest him. He was subsequently charged with an offence which he never committed.

As we have said, there is no dispute that a robbery occurred at hotel reception of Paradise Lodge. The complainant (PW1) was robbed of almost an empty wooden cash box containing merely, a receipt book, stamp pad and a rubber stamp all valued at approximately Shs 3,145/-. According to the evidence of the complainant, the robbery was sudden and was executed within a matter of seconds. The place had some electric lights that were on but the evidence is silent as to their location *viz-a-viz* the place where the complainant was seated. There was also no evidence as to the intensity or strength of the light that was on as it is common knowledge that some hotels do not prefer strong lights. It is under these circumstances that the complainant says that he was able to see the appellant among the said robbers. He had never known him before that night.

The conviction of the appellant was largely based on single witness identification by the complainant. In essence, his main complainant is that the learned trial magistrate failed to analyse this evidence satisfactorily in the face of the defence that he was not present at the scene of the said robbery.

Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of a conviction: *Cleophas Otieno Wamunga v Republic* CA Cr A No 20 /89 (un-reported). 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. The need for caution was reiterated by the Court of Appeal for *Eastern Africa in the case of Abdalla Bin Wendo – vs – Republic* 20 EACA 166 at page 168 where it was stated thus:

> "Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that conditions favouring correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

It is clear from the evidence of the complainant that the said robbery took only a matter of seconds. Indeed in most cases, those type of men do not usually want to waste time. This is what happened in this case. They opened the reception door and all the complainant saw were 3 men armed with knives and stones. He correctly says that he was terrified. One of the men then grabbed the wooden cash box and in no minute they were out on their heels escaping. Under those circumstances, however good were the lights and there is no evidence on this, the complainant did not have sufficient opportunity to see any of those men well to be able to identify him at a later stage. In accepting the evidence of the complainant, we think the learned trial magistrate erred in failing to exclude altogether the possibility of mistake on his part. We know that mistakes often occur and a witness may be honest and yet mistaken: *Roria –vs- R* [1967] EA 583 and a number of witnesses could all be mistaken: *R – v – Turnbull and Others* [1976] 3 All ER 549. Where the evidence relied upon to implicate an accused person is entirely that of identification, that evidence should be watertight to justify a conviction. *R –v- Evia Sebwato* [1960] EA

Apart from the evidence of the complainant which we have shown was not all that perfect, the learned magistrate also relied on the evidence of the two watchmen who arrested the appellant, PW3 and PW5, to conclude that he must have been one of the three men who had robbed the complainant. The appellant clearly says that indeed he was from one of those nearby hotels where he was being entertained by some visiting European friends. These hotels are within the same locality as the one where the robbery occurred. It is not uncommon in Malindi that almost at any time of the night, there would be people walking about to or from those hotels and at famous night spots. According to the appellant, it was just a matter of bad luck that he happened to be walking drunk near those hotels when the alleged robbers were running away and he was simply mistaken as one of them. This is the point which Mr Wetangula tried so much to impress upon us and we think that it is not without merit. Indeed at the time of his arrest the appellant had only a pair of pliers (Ex,2). He was not armed with any knife or stone as those who had robbed the complainant whom the police chased and shot one of them. He was not seen by either PW23 or PW5 dropping any object as they allegedly chased him and we doubt whether he could have set out a robbery mission at night while simply armed with a pair of pliers.

Upon our consideration and evaluation of the recorded evidence, we are not satisfied as the law requires us to be that the guilt of the appellant was proved beyond all reasonable doubts. We consider that his conviction was not safe.

For reasons given, we allow this appeal. We quash the conviction of the appellant and set aside and sentence that was imposed. We order that he shall be set free and be released forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 9th day of March, 1993

A.MBOGHOLI – MSAGHA

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JUDGE

S.O. OGUK

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JUDGE