REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 1217 OF 1990

PIUS NYAOLO ANDANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Pius Nyaolo Andango was convicted by the Senior Resident Magistrate, Homa Bay of the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to death. The particulars of the offence as stated in the charge sheet were that on the nights of 31st December, 1988 and 1st January, 1989 at Awendo Trading Centre, Central Sakewa Location, in South Nyanza District of the Nyanza Province, jointly with others not before the Court, robbed Chocho Opondo of various items of shop goods (specified in the charge) all valued at Ksh 44,676/20, and wounded the said Chocho Opondo during the time of robbery .

The complainant, Joseph Chocho Opondo (PW1) gave evidence. He was a night watchman employed by Said Mohamed (PW5) to guard his wholesale shop at Awendo Market. While he was on duty seated on a stool at the veranda of the said shop on the material night at about 1.00 am he saw a group of people running towards the shop he was guarding while flashing torch lights. He stood up. The watchman of the neighbouring Bata shop, Mbonyo Adhanjo (PW3) also saw the said men approaching while flashing their torches but he managed to run away before they could get to him.

Three of the said men then surrounded the complainant (PWl) and engaged him in a fight while other members of the gang were breaking the doors of the shop he was guarding and carrying the goods away. The complainant testified that in the course of the fight, one of the gangsters speared him on his right hand but he managed to hit the said man on the forehead with the *rungu* before he managed to run away to safety.

The other watchman who had ran away (PW2) also testified that from where he was he was able to see the complainant hit one of the gangsters on the forehead with a *rungu*. The gangsters then made away with shop goods valued at Sh 44,676/20.

In the meantime, the police officers who were stationed at Wendo Police Post heard of the alarm being raised at the market. This alarm was being raised by PW2 who was then blowing his whistle.

They dashed to the scene and found that the watchman (PW1) had been injured and the shop which he was guarding broken into. The watchman informed them that he had managed to hit one of the said gangsters on the face during the robbery. PC Mwema (PW3) in company of PC Langat, then started combing the surrounding area looking for the said gangsters. On reaching Milimani Estate, they heard some people talking in a certain house. They went there and knocked on the door. They ordered that the

door be opened and on entering the house, they found some two men sleeping on a mat and one woman. They woke the said men up and noticed that one of them, the appellant, had a fresh wound on the forehead from where he was bleeding. They questioned him about the said injury and he informed them that he had fallen down as he was drunk. They suspected him to be one of the gangsters who had attacked the watchman at the centre. They arrested the two men and took them back to the scene of the robbery where the watchman (PWl) confirmed to them that the appellant was the man who had speared him during the robbery and whom he had hit on the face. The appellant and his companion were then arrested. After both the appellant and the watchman were treated for their respective injuries at Ombo Mission Hospital, and the necessary P3 forms duly completed confirming the state of their injuries (Ex l & 2 respectively), the appellant was charged with the offence.

In his defence, the appellant denied any involvement in the said robbery. In his sworn evidence, he stated that on the evening 31st day of December, 1988, he was invited by one Vitalis Owato to the New Year Eve party at Milimani Estate. He stayed at the party till 10 pm. When he decided to leave, his host encouraged him to stay behind and sleep there since his home was about 1 kilometre away and it was then raining. He decided to remain. He and two other guests whom he had not known before were then taken to a certain house to sleep. At about 3 am, police officers came to the house were they were sleeping and questioned them about their identity cards. He had none. He was lead out of the house into a Landrover. He then got injured on the face as the police officers pushed him into the vehicle. He was locked up at Awendo Police Post and on the following morning he was informed of the alleged robbery. He stated that he knew nothing of the said robbery and alleged that he had been framed as the said watchman (PW1) had a grudge against him. They had once worked together for someone who had employed him as a driver and a jack got lost which turned out to have been sold by PW1 who was also employed there as a watchman.

The main points taken up on appeal before us were as follows:

1. The learned Senior Resident Magistrate errered in law and fact or misdirected himself in failing to consider that there was no proper evidence of identification before the Court to sustain a conviction.

2. That the learned Senior Resident Magistrate errered in law and fact by failing to evaluate the prosecution case regarding the arrest of the appellant with no incriminating evidence to connect him with the offence charged.

3. That the learned Senior Resident Magistrate errered in disbelieving the alibi defence of the appellant without any sufficient reasons.

There is no dispute that there was a robbery at the wholesale shop of Said Mohammed (PW5) at Awendo Market on the night of 31st December, 1988 and 1st January, 1989 at about 1.00 am in which his watchman (PW1) was injured. He had been speared on the right hand in the course of the said robbery and his middle finger was later amputated as confirmed by medical evidence adduced by Dr Hottman (PW6) of Ombo Mission Hospital.

Several shop goods were then stolen all valued at Sh 44,676/20. Despite the fact that the police made an early arrest of the appellant, who was suspected to be one of the robbers, not a single item that had been stolen was recovered. The appellant denies that he was involved in the said robbery.

The conviction of the appellant depended on the evidence of a single identification witness, Chocho Opondo (PW1), who was the watchman guarding the shop where the robbery had occurred. The learned trial magistrate found this witness truthful and found no reason to disbelieve him that the appellant was one of the men who had attacked him on the material night whom he (the watchman) managed to hit on the forehead with his *rungu*. He said as follows with regard to this witness:

> "Court finds PW1 truthful witness and find no reasons to disbelieve his concrete and creditworthy evidence that remains unshaken even after thorough cross-examined by accused."

What did this witness say in his evidence which the magistrate believed.

He said as follows:

> "Since the group had torches and I had mine, I could see them clearly. They surrounded me (3) men flashed torches on my face. I could not see. I then hit someone on the face as others held me...The others encouraged the spear man to kill me. Among the group, I recognised accused in the dark. I hit him on the face with a *rungu*. I could not see the man with the spear clearly. I only managed to hit one man. I had not seen him before the incident."

It is clear from the above, that according to the testimony of this witness, he had not known the appellant before the said incident. The question of recognition does not therefore arise. He could not have recognised a man who was a stranger to him. If he claims to have seen the appellant then in what light was he able to see him?

The only source of light was his own torch light and that which the robbers had. The robbers were said to have been flashing torches, meaning that they had more than one torch. If three of them had surrounded the appellant and one of them was aiming to attack him with a spear, with others encouraging him to kill the watchman, could the watchman (PW1), be really able to see him and identify him? He gives the answer himself when he says:

> "I could not see the man with the spear clearly."

The simple truth appears to us that the watchman (PW1) was not in a position to identify any of the three men who had attacked him. All that he was sure of is that he had hit the man who had speared him with a *rungu* on his forehead before he ran away to safety. This is exactly what he told the police (PW3) when they visited the scene soon after the incident.

> "PW1 told me that he had managed to strike one of the gangsters on the face with a *rungu*."

He did not say that he could identify any of the robbers.

Clearly the circumstances for accurate identification were not favourable for the watchman (PW1). It is common knowledge that evidence of visual identification in criminal case can bring about miscarriage of justice and it is of vital importance that such evidence be examined carefully to minimise this danger. Whenever the case against a defendant 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 defendant in reliance on the correctness of the identification. In this particular case, the trial magistrate did not go on record as warning himself. This was an error. We once again set out, as a general guidance the following passage from *Abdalla Bin Wendo v R* (1953) EACA 166 at page 168:

> "Subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence respecting identification, especially when it is known that the conditions favouring a 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."

The trial magistrate thought that the fact that the appellant had a fresh injury on his forehead, strengthened the complainant's identification of the appellant. Far from it, the appellant explained how he sustained such injury and his explanation was not rebutted by the prosecution.

Such injury, without more, could not therefore prove that the appellant was one of the robbers who had attacked the watchman and was injured in the process. Moreover, we doubt whether the watchman could

have laid a finger on the appellant is a properly conducted identification parade if the appellant was not taken to him to see soon after his arrest. We deplore this practice which is now becoming quite common amongst the police officers of inviting witnesses to see and identify suspects either in police cells, or at the scene of crime soon after arrest other than at a properly conducted identification parade. This has the effect of destroying very useful evidence which could have been gained had a proper parade been conducted.

In the case of *R v Cartwright* (1974) 10 Cr Appeal R 219, it was held that the practice of inviting a witness to identify a defendant for the first time in the dock is understandable and should be avoided if possible. We would add, that such identification is generally worthless and the Court should not place any reliance on it unless it has been preceded by a properly conducted identification parade: *Gabriel Kamau Njoroge v Republic* [1982-88] 1 KAR 1134.

In the instant case, it was even worse in that, the suspect was taken to the scene of the robbery after his arrest to be identified by potential witnesses. It was precisely for this reason that the learned state counsel quite rightly conceded the appeal.

The conclusion we have reached is that we uphold the appellant's grounds of appeal to the effect that the lower court misdirected itself on the evidence of identification which was not sufficient to prove his participation in the crime beyond reasonable doubt. Consequently, we allow the appeal, quash the conviction of the appellant and set aside the sentence that was imposed. We order that the appellant shall be set free and be released forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 18th day of February, 1992

T. MBALUTO **S.O OGUK**

JUDGE **JUDGE**