IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: Masime JA, Gicheru & Kwach AG JJ A)

CRIMINAL APPEAL NO 202 OF 1987

BETWEEN

DAVID MAKOKHA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a conviction and sentence of the High Court at Nairobi, Shields J, dated 2nd November 1987

in

High Court Criminal Appeal No 1060 of 1986)

****

July 12, 1989, the following Judgment of the Court was delivered.

David Makokha (hereinafter called the appellant), was arraigned on an indictment containing a single count of robbery contrary to Section 296 (1) of the Penal Code. It was alleged that on the night of 22nd March, 1986, along Elmolo Drive, Lavington, within the Nairobi area, jointly with others not before the Court, robbed Surinder Nath Sharma of Shs 8,000/-, in cash and material items which included one motor vehicle registration number KVP 913, a Fiat, all valued at Shs 119,500/-.

The appellant was on 23rd July, 1986, convicted by the Senior Resident Magistrate in Nairobi after a trial and sentenced to 5 years imprisonment and 10 strokes of the cane. His appeal to the High Court against both conviction and sentence was dismissed on 2nd November, 1987, and he has now appealed to this court.

The prosecution case was that the complainant was attacked at his home at night by three robbers who after robbing him, drove off in his Fiat car – KVP 913. This car was shortly thereafter sighted on Nyakinywa Road, Satellite, Dagoretti Corner. A police witness (PW3), flashed his torch on the stationary vehicle and he saw three occupants who quickly got out and started running in different directions. Although it was a dark night, and that part of the street was not lighted, he chased and apprehended the appellant using his torch. The other two escaped.

When reviewing the evidence at the end of the trial, the learned Senior Resident Magistrate thought the chase and arrest of the appellant was undertaken by two policemen but as the record shows this is obviously not correct. Corporal Mathenge (P.W 2), admittedly visited the scene of the robbery in response to a radio signal from a Police 999 Control but was not involved in the arrest of the appellant. The appellant was arrested by Police Constable Kithaka (P.W.3) of Kabete Police Station, who was at the material time on patrol duty along Nyakinywa Road. His identification evidence which was accepted by both the trial court and the High Court was that when he flashed his torch on the motor vehicle, three men jumped out and started running away. He chased them, two of them escaped but he managed to arrest the appellant. He then added:

> "From the time the accused jumped from the said motor vehicle I never lost sight of him until he was arrested."

This is a case of a conviction of a defendant on the identification evidence of a single witness. While a defendant may be convicted on the identification evidence of a single witness, it is now settled law that before a conviction can be based on such evidence the court must warn itself of the danger of doing so and should only so convict if satisfied that the circumstances of identification were favourable and that the evidence is reliable and free from the possibility of error. In the case of *Cleophas Otieno Wamunga v Republic* (Kisumu Criminal Appeal No 20 of 1989), where the appellant was convicted for robbery on the identification evidence of two witnesses which evidence he challenged on appeal, this Court said *inter alia*:

> "What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant.
>
> Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize 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."

(see *R v Turnbull* [1976] 3 ALL E.R 549 at p 552 and *Abdalla Bin Wendo v R* 20 EACA 166 at p 168).

In the instant case the trial court did not warn itself of the danger of relying on the evidence of Police Constable Kithaka before convicting the appellant. On our own assessment of that evidence we can say without hesitation that it did not come within a mile of the test adumbrated above.

For these reasons, we have come to the conclusion that the appellant's conviction is unsafe and we accordingly allow his appeal, quash his conviction, set aside his sentence and order that he be immediately released unless otherwise lawfully held. The order for his repatriation under Section 26A of the Penal Code as proposed by the first appellate court will remain undisturbed.

Dated and Delivered at Nairobi this 12th day ofJuly , 1989

J.R.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR