IN THE COURT OF APPEAL

AT NAKURU

(Coram:Nyarangi JA, Platt & Gachuhi Ag JJA)

CRIMINAL APPEAL NO. 69 OF 1985

BETWEEN

1. BARBON MARIE

2.MARWA CHACHA

3. ELIJA KIPNG'ENO

4. RIOBA MWITA.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nakuru, Masime J)

JUDGMENT

On January 10, 1983, the four appellants, namely:

Barbon Marie

Marwa Chacha

Elija Kipng'eno

Rioba Mwita

and two others were charged in count one with robbery with violence contrary to section 296(2) of the Penal Code and on July 11, 1983 each was convicted of the lesser offence under section 296(1) of the Penal Code and each sentenced the next day to 4 years' imprisonment plus 10 strokes corporal punishment on that count and each was ordered to be subjected to police supervision for 5 years after release from prison. Marwa was additionally convicted under count two of the lesser offence under section 296(1) of the Penal Code and sentenced to 3 years' imprisonment plus 6 strokes corporal punishment.

The appeals of all four to the High Court at Nakuru (Masime J) were dismissed.

The substantial ground of appeal in each of the four substantive and supplementary petitions of appeal is

that the trial and first appellate courts erred in their findings that the appellants were adequately identified. That ground of appeal raises an issue of law which concerns this court, this being a second appeal: *R v Kalia* (1941) 8 EACA 66 and *Moses Thuo Stephen Njoroge v R*; Criminal Appeal No 145 of 1985 (unreported). On the issue of identification which is the real question for decision in this appeal, the evidence discloses that PW 1 was the only identifying witness as regards the first appellant Marie. No identification parade was held in the case of this appellant. With regard to the second appellant Chacha PW 1 said in chief that this appellant was one of the gangsters he identified. Under cross-examination, PW 1 he identified Chacha at the parade but not during the robbery. All that meant that PW 2 was the sole identifying witness in so far as Chacha was concerned. Matters were not any better or different in respect of the third appellant Kipng'eno PW 1 testified that he had known the third appellant and that during the night of the robbery PW 1,

"opened the door and flashed the torch and saw the first accused who snatched the torch from my hand."

The third appellant was the first accused at the trial. Surprisingly PW 1 was not able to identify the third appellant at the identification parade. The trial and first appellate courts did not even attempt to resolve the clear conflict.

The fourth appellant was identified by PW 1 and PW 2 at the identification parade which consisted of the same members in the same order as on the first parade. The trial court disregarded the evidence of identification.

As for the charge in the second count against the fourth appellant Rioba, the totality of the relevant evidence is that PW 4 was the only identifying witness, because PW 5 who was sleeping in the same house with PW 4 said he did not know any of the appellants.

The robberies took place at night, within houses without sufficient light. The complainants were attacked and awakened by a large gang of people who were armed with dangerous weapons including a pistol. The circumstances were not favourable for safe identification.

Now neither the trial court nor the first appellate court warned itself of the danger of relying on identification by a single witness. There was therefore no awareness that subject to certain well-known exceptions, a fact may be proved by a single witness but that this rule does not lessen the necessity for testing very carefully indeed the evidence of a single identifying witness especially when there is evidence that the conditions favouring a correct identification are difficult: *Benjamin Mugo Mwangi & Anor v R*, Criminal appeal No 100 of 1984 (unreported). The error to subject the evidence of identification of the single witnesses to scrutiny was fatal. The error created a climate whereby Mr Etyang the principal state counsel very properly conceded the obvious and urged that the convictions could not be sustained.

The evidence of identification parade against Rioba on the second count was valueless because the parades were so organised as to leave Rioba as the odd man who had to be regarded as the suspect by the witness: see *Githinji & Anor v R* (1970) EA 231 at page 232, letter H I.

We have to say respectively that the quite astonishing thing about this case is that the two lower courts did not warn themselves of the danger of convicting on a single witness in the circumstances. In the upshot the appeals are allowed, convictions quashed, sentences set aside and the appellants shall be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Nakuru this 18th day of February 1986.

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

I Certify that this is a true copy

of the original

DEPUTY REGISTRAR.