REPUBLIC OF KENYA

HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEALS NOS 1036 & 1019 OF 1976

GIKONYO KURUMA .....APPELLANT

MBURU MBUGUA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Criminal Appeals Nos 1036 and 1019 of 1976 have been consolidated. The appellants, Gikonyo Kuruma and Mburu Mbugua, were charged and convicted of robbery contrary to section 296(1) of the Penal Code, that they on 30th June 1976 at Gathiruini in the Kiambu district jointly robbed Njoroge, son of Mahuthu, and were sentenced to three years' imprisonment each and, on the expiry of such prison sentences, to be under police supervision for five years; from which convictions and sentences the appellants now appeal to this Court. (The sum of money was Shs 150 and not Shs 160).

Mr Muchemi who appeared for the two appellants, abandoned grounds 1, 2, 3, 5, and 6 of the amended memoranda of appeals, and stated that his main grounds of appeal would be grounds 7 and 8, but he said that he would leave the remaining grounds on record, although he would not argue them.

The point taken in grounds 7 and 8 of the amended memoranda of appeals was that the magistrate convicted the two appellants on the evidence of a single witness, which he should not have done in the circumstances of this case.

The magistrate fully appreciated that there was only one identifying witness and did correctly advise and warn himself of the dangers of convicting on the evidence of Njoroge, son of Mahuthu (the complainant), the only identifying witness. We refer to *Abdallah bin Wendo v R* (1953) 20 EACA 166 and to the case of *Roria v The Republic* [1967] EA 583.

The magistrate also remarked that there was no light, or at least there was no evidence to show that there was electric light at the scene (the time of the robbery being given as about 9.00 pm).

We are aware of four reported decisions of the Court of Appeal on the subject of convictions depending on the identification of an accused by a single witness. In *Abdallah bin Wendo v R* (1953) 20 EACA 166 the Court said that (subject to certain exceptions) a fact was possible of proof by the testimony of a single witness but this did not, however, lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring identification are difficult. In such circumstances other evidence, circumstantial or direct, pointing to guilt

is needed. That means, as we understand it, that a Court may act on the evidence of a single witness; but, before doing so, it should test it with the greatest care whatever the conditions favouring identification may have been but especially when those concerning identification were difficult when other evidence was needed. On the facts of the case, conditions were difficult and what perturbed the Court was expressed this way:

> What we think is open to question, however, and what causes us difficulty in this case, is whether the judge warned himself adequately as to the risk of a mistaken identification. It was proved that this was a very dark night and none of the other members of Magondo's party were able to identify anybody.

With respect, in those circumstances, some other evidence was obviously required, one of several people only claiming to have been able to identify the accused. And, of course, the appeal was allowed. Then, in *Thairu s/o Muhoro v R* (1954) 21 EACA 187 the Court held that to convict an accused person, relying on the identification by a single witness was dangerous, but that a conviction so based, could not, in law, be regarded as invalid. In this case the appeals were dismissed. The Court said:

> It is true that the conviction of the second and third appellants rests solely upon the evidence of Goko … This Court has often stressed the obvious dangers of relying upon an identification by a single witness, but we have also invariably pointed out that a conviction so based cannot in law be regarded as invalid. In the present case the trial judge very carefully directed himself … The trial judge accepted the evidence of Goko. …

Thirteen years later came *Roria v R* [1967] EA 583 in which the Court of Appeal held that, as there is a danger in basing a conviction solely on the dentification of a single witness, it had the duty where a conviction was entered on such evidence, to satisfy itself that it was, in all the circumstances, safe to act upon it. The appellant's conviction was quashed on the facts of the case which related to a dawn, armed, raid; and if we may with complete respect say so, rightly quashed; but the Court, referring to *Abdallah bin Wendo's* case said:

> A conviction resting entirely on identity invariably causes a degree of uneasiness … The danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this Court to satisfy itself that in all the circumstances it is safe to act on such identification ....

It was, of course, a first appeal. Lastly in *Kamau v The Republic* [1975]EA 139 the Court said that whether or not a conviction could be supported when based on the evidence of a single witness was a question of mixed fact and law where the circumstances were such that identification was difficult; and they relied on *Abdallah bin Wendo's* case once more.

The case now before us on appeal has caused us some concern for although the magistrate warned himself of the dangers of convicting on the evidence of one witness, did he correctly apply his warning to the evidence? Let us more closely examine the recorded evidence of the complainant's identification of the two appellants.

> I went to Marume's and bought a ram at Shs 130. When I went to Marume's I was accompanied by Gikonyo [the first appellant]. When I was bargaining the first [appellant] took part in the discussion. After buying the ram I left Marume's home. I was accompanied by the first [appellant] and [the second appellant]. They assisted me up to Njoroge's home. The two [appellants] started smoking. It was 9·00 pm. I left the two [appellants] smoking and proceeded home. While on my way home I was held from the back and held at the throat. I recognised those who held me. They were two people and they were the first and second [appellants]. I screamed. I recognised the two [appellants] because I had been with them during the day and I had just left them smoking.

It is not known, at least to us, what Njoroge's house is: whether a bar or some other such place; but it was

there (according to the complainant) that the two appellants took leave of the complainant and started smoking. Whether they entered Njoroge's house or not is not known; or whether there were other persons near or within Njoroge's house is also not known. Neither is it known how far Njoroge's house is from the place where the complainant was attacked which fact would be relevant in determining whether or not other people could be about and in the vicinity.

Then according to the complainant he proceeded home and while on his way he was held from the back and held at the throat. Then the complainant continued in evidence: "They were the two [appellants] because I had been with them during the day and I had just left them smoking".

The complainant's reason, as recorded, for recognising the two appellants is not, with respect to the magistrate, foolproof or cogent; for there may well have been other people at Njoroge's house or others who held the complainant from the back and held him at his throat; and for the complainant to give as his reason for recognising the two appellants as his attackers that he had been with them during the day is not, in our opinion, proper identification or recognition as required by the four cases above cited.

In a recent case in England, *R v Turnbull* [1976] 3 All ER 549 a distinction was drawn, *inter alia*, between identification and recognition; but we do not think that the distinction can possibly avail the prosecution in this case in view of the recorded evidence of the complainant, notwithstanding that there was some evidence, not disputed, that the complainant and the two appellants were in some way related.

Having made our own assessment of the recorded evidence, as we are required to do, this being a first appeal, we have no alternative but to find that the complainant did not, beyond reasonable doubt, identify or recognise the two appellants as his assailants and accordingly for this reason we find we must allow the appeal which we hereby do and we quash the conviction of the two appellants and set aside the sentences and orders imposed and made.

Appeals allowed.

Dated and delivered at Nairobi this 5th April 1977,

E. TREVELYAN

.....

JUDGE

J.H.S TODD

.....

JUDGE