IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, KOOME & KIAGE JJA)

CRIMINAL APPEAL NO. 120 OF 2014

BETWEEN

PETER NJOGU NDEGE.................................... APPELLANT

VERSUS

REPUBLIC.. RESPONDENT

(An appeal from a conviction/Judgment of the High Court of Kenya at Nyeri (Kasango, Makhandia, JJ) dated 29th May, 2008

In

HCCRA NO.204 OF 2005

****

JUDGMENT OF THE COURT

The single issue of law in this second and final appeal by the appellant PETER NJOGU NDEGE is whether he was properly and safely identified as one of three people who attacked and robbed Lepayon Lemaranya (PW2) for which he was alone charged, convicted and sentenced to suffer death by the Nanyuki Senior Resident Magistrate, which was confirmed by the High Court at Nyeri (Kasango J and Makhandia J, as he was then) and dismissed his first appeal.

The particulars of the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** were that on 23rd January 2005 and Doldol Stage in Nanyuki Town of Laikipia District, the appellant jointly with others and while armed with dangerous or offensive weapons namely knives and *simis* robbed PW2 of cash 5,300 and a Maasai sword valued at Ksh. 8,000 and used actual violence to PW2.

The prosecution called PW2 as the sole eye-witness and two others, namely P.C. Jackson Gichuki (PW2) who received PW2's report of having been robbed as well as the torn shirt he brought in token of his misfortune; and Richard Katenya (PW3) a clinical officer at Nanyuki District Hospital who examined PW2 on 24th January 2005 and reported that he had "***been assaulted by a group of three persons two of whom he knew on 23rd January 2005."*** PW3 assessed the injuries suffered by PW2 as amounting to '***harm'*** and filled out a P3 form which he produced as an exhibit.

PW2's own evidence was that on the material day at about 1.00 pm he was near the Doldol bus stage within Nanyuki town when three people came to him and attacked him, wrestling him to the ground. The appellant is the one who held him by the neck, PW2 stated, and removed his wallet containing some Ksh. 5300/= from his shirt pocket before throwing it to his two partners in crime who ran off with it. The appellant was apprehended by PW2 and members of the public who helped in giving chase after PW2 raised an alarm. Nothing was recovered from the appellant but he was led to a police Landrover nearby and then driven to the police station. None of the members of the public involved in the chase and apprehension of the appellant was called as a witness. The appellant was unknown to PW2 prior to the ten-minute robbery incident.

When put on his defence, the appellant stated that he was a victim of mistaken identity. He had visited Nanyuki Hospital on the material day at 4.00 pm to see one Kadoji, a colleague of his who was injured at Timau where they both sold clothes. The appellant stated that he used to get casual work from one Mama Wambugu. As he left the hospital, he met two people one of whom, PW1, pointed at, and they hit him with a *rungu* while claiming that one of his assailants was wearing a jacket resembling the one the appellant wore. He was then taken to the police station and charged with the offence about which he knew nothing.

Both the trial court and the High Court on first appeal considered, correctly in our view, that the case turned on the identification of the appellant as among the three robbers who attacked PW2, the only witness as to the appellant's identity and involvement in the robbery. ***Mr. Kimunya*** the appellant's learned counsel argued the appeal on that single point submitting that the conviction was not safe while Mr. Kaigai, the learned Assistant Director of Public Prosecutions was of the view that the evidence was overwhelming.

It is clear from our perusal of the record, which we must carefully do, notwithstanding that on a second appeal our jurisdiction is limited by **Section 361** of the **Criminal Procedure Code** to a consideration of matters of law only and not

of facts, that both courts below were greatly swayed by the fact that the robbery occurred in broad day light. For that reason, the courts proceeded, erroneously in our respectful view, on the basis that there could be no possibility of error or mistake. Indeed, the learned Judges stated that "***there was no suggestion that the complainant was in any way inhibited from seeking and observing his assailants***" which, to our mind, appears to be a presumption that unless otherwise stated it must be assumed there was no inhibition. We think the proper approach would have been for the prosecution to lead evidence that there was no hindrance, obstruction or inhibition by a process of elimination. Indeed, the record itself shows, contrary to what the learned Judges' observed, that the appellant, who was unrepresented at the trial, did allude to exactly the kind of circumstances that would have rendered identification difficult. He cross-examined PW2 and elicited the following responses;

> ***"You robbed me at the Doldol Bus Stage. There were other people at the bust stage. There were also vehicles at the stage"***

It was incumbent upon the prosecution to seek to clarify whether the other people present at what could well have been a busy bus stage were or were not a crowd that could in any way obstruct PW2's view of his assailants and whether the vehicles also ever came between him and the fleeing robbers.

In this case, the prosecution did not in fact conduct any re-examination of PW2 after those factors were raised in cross-examination. Nor did the trial court on its own motion ask any clarification questions. The presumption imported by the High Court was thus based on no evidence and therefore an error of law.

It has been stated many times before that identification of suspects is a fertile ground for injustice because mistaken identification, especially of total strangers whose encounter with a witness may be fleeting and under stressful or otherwise difficult conditions does in fact occur. As stated by the Lord Chief Justice in **<u>REPUBLIC –VS- TURNBULL</u>** [1976] 3 All ER. 459 quoted by the learned Judges, the careful enquiry that the court ought to conduct on the issue of identification is;

> ***"…the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. <u>How long did the witness have the accused under observation</u>? <u>At what distance</u>? <u>In what light</u>? <u>Was the observation impeded in any way, as for example by passing traffic or a press of people</u>? <u>Had the witness ever seen the accused before</u>? How often? If only occasionally, had he any special reason for remembering the accused?"*** (Our emphasis)

The risk of mistaken identity and the ensuing misjustice is of course greater when the only identification evidence is that of a single witness, who is, moreover, the subject of a sudden and violent attack and not a calm, unstressed observer. It is for this reason that courts must approach such sole identification evidence with a commonsensical amount of caution, which should manifest in a more searching scrutiny of the evidence so as to eliminate any possibility that the witness may be mistaken. The court should also warn itself of the danger inherent in relying on the evidence of a sole identifying witness before using it as a basis for convicting a suspect and then only if fully satisfied beyond reasonable doubt that the identification was error-proof. See **<u>RORIA –VS- REPUBLIC</u>** [1967] EA 583 and **<u>WAMUNGA –VS- REPUBLIC</u>** [1989] KLR 424,

Having given full consideration to the record, and having particularly noted the prosecution's failure to call any of the members of the public who are said to have come to PW2's aid and helped in the apprehension of the appellant or even the police officers closer to the scene of the incident and who are supposed to have driven the appellant to the Police Station; together with the fact that no item was recovered from the appellant, we very much doubt that the two courts below applied the cautionary principle that the case called for. We think that the appellant's defence of mistaken identity backed by a rather detailed record of his having been at the Nanyuki Hospital to see a named patient before being pointed out by PW2, on account of similarity between the jacket he had on and the one worn by one of the robbers, should not have been so peremptorily dismissed.

This is a case deserving of our rare interference with the concurrent findings of fact by the two courts below. There are compelling reasons for doing so and we have set them out above. See **<u>CHRISTOPHER NYOIKE KANGETHE –VS-</u>**

<u>REPUBLIC</u> [2010] e KLR. The appellant's conviction was not safe and he was entitled to the benefit of the doubts, created by the totality of the circumstances of the alleged robbery and his own arrest.

This appeal is allowed. The conviction is quashed and the sentence set aside. Unless the appellant is otherwise lawfully held, he shall be set at liberty forthwith.

Dated and delivered at Nyeri this 6th day of April, 2016.

P. N. WAKI

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true

copy of the original

<u>DEPUTY REGISTRAR</u>