IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 398 OF 2009

BETWEEN

ERASTUS KIARIE WAMBUI ……..……. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Nairobi (Ojwang & Warsame, JJ.) dated 1st October, 2009

in

HC. CR.A. No. 532 of 2006)

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JUDGMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code.** The particulars of the offence were that on 1st April, 2006 at Dagoretti Market within Nairobi area, jointly with others not before court, being armed with offensive weapons, namely; knives and clubs, robbed **Geoffrey Gakuru Kamau** of his mobile phone Nokia 1108, one coat, one steel metal and cash 900/=, all valued at kshs.5,600/= and at or immediately before or immediately after the time of such robbery wounded the said Geoffrey Gakuru Kamau.

Four prosecution witnesses testified during the trial before the Chief Magistrate's Court at Kibera. On the material night, **Geoffrey Gakuru Kamau, PW2**, was together with **John Njenga Ndung'u, PW3**, at a bar known as Honey Pot. It was not clear what time they went to that bar but they left at about midnight, having taken several bottles of beer. On their way home, PW2 saw five people coming from behind. Suddenly PW2 and PW3 were confronted by the said people. They robbed them of the items stated hereinabove. PW2 testified that only the appellant had not covered his face, while the other assailants had hoods on their faces. PW2 further stated that there were electricity security lights from the nearby buildings and he was able to see the face of the appellant. The complainant further alleged that he had been seeing the appellant in that area and he knew that he was working at a petrol station at Ndunyu market. PW2 told PW3 that he had recognized the appellant.

After that incident PW2 and PW3 went home and slept and made a report to the police on the

following day. On the way to the police station PW1 said that they met with the appellant and he pointed him out to PW3 but they did not talk to him. After two days, PW2 saw the appellant again and notified the police who proceeded to arrest him.

The evidence of PW2 was corroborated in all material aspects by PW3, except that he was not able to identify any of the assailants.

Police Constable Josphat Muya, PW4, testified that on 1st April, 2006 the complainants reported the robbery at Dagoretti Police Post. PW2 said that he identified one of the robbers. PW4 did not however state whether PW2 gave any description of the appellant. PW4 did not also explain to the court how the arrest of the appellant was executed, he merely stated that the complainants identified the appellant before they arrested him.

In his defence, the appellant testified that he was staying at Dagoretti market and on 7th April, 2006 at about 7 p.m. while going to his house he met two police officers. They interrogated him briefly after which he was arrested and taken to a police station where he was locked up for four days before his alignment in court. He denied having committed the robbery as charged.

In its judgment, the trial court held that the appellant had been properly identified by PW2 as he knew him before the time of the robbery and was able to see him clearly because there were electric lights near the scene of the robbery. The appellant was sentenced to death as by law prescribed.

The appellant's first appeal to the Higher Court was unsuccessful. The High Court held:

> *"**After considering all the papers on record; reviewing and analyzing the evidence, addressing our minds to the manner in which the learned Magistrate disposed of the case, hearing both the appellant and the respondent, we have come to the conclusion that an offence was committed in accordance with the details set out in the charge sheet; that the appellant was certainly with the party of the offenders; that the witnesses, and more particularly the complainant, did recognize the appellant at the material time; and we have come to the conclusion that the trial was properly conducted, the conviction rightly entered, and sentence imposed in accordance with the law."***

Being dissatisfied with the decision arrived at by the first appellate court, the appellant preferred a second appeal to this Court. Although the appellant raised six grounds of appeal in his homemade memorandum of appeal, during the hearing of the appeal, **Mr. Mogikoyo**, the appellant's learned counsel, chose to argue only one ground of the appeal: that the identification of the appellant was not free from error and in the circumstances as stated in the evidence the conviction was unsafe.

Counsel submitted that the robbery took place at night when PW2 and PW3 were heading home after a heavy drinking spree. It was therefore reasonable to assume that they were fairly intoxicated and their sense of judgment was thus impaired. The attackers came from behind and although the complainants alleged that there were nearby security lights, they did not state how bright those lights were. Counsel added that PW2 had not given any description of the appellant to the police and it is not clear how the police were able to arrest the appellant.

Ms Murungi, Senior Assistant Director of Public Prosecutions for the respondent, opposed the appeal. She contended that PW2 positively recognized the appellant at the time of the robbery, given that he had seen him at his place of work prior to the date of the robbery. The scene of the robbery was well lit by electric lights and so PW2 had no difficulty in seeing the appellant, she stated. Counsel conceded that neither the trial court nor the first appellate court warned themselves of the danger of convicting on the evidence of a single identifying witness but that in itself did not render the conviction unsafe.

It is not in dispute that the appellant's conviction was premised on the evidence of a single witness, PW2. In **ABDULLAH BIN WENDO & ANOR v REPUBLIC (1953) 20 EACA 166,** it was held that:

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

We must therefore carefully consider the evidence of PW2 to see whether it met the requirements stipulated in the above quoted decision. PW2 and PW3 had been drinking for several hours before they left the bar at about midnight. The people who attacked them came from behind and the attack was sudden. PW2 said that the incident lasted about 7 minutes. Although he stated that the scene was lit by electric lights from nearby buildings, the witness did not tell the trial court how bright the lights were. It is also doubtful whether PW2 was able to see and recognize the appellant.

The complainant did not give any description of the appellant to the police. PW4 did not tell the trial court how the appellant was arrested, he only stated that:

> ***"Later complainant came and identified the suspect to us and we arrested him."***

The date of the arrest was not even stated by any of the prosecution witnesses. The appellant said that he was arrested on 7th April, 2006.

Considering that the only evidence against the appellant was that of recognition by PW2, the trial court was under an obligation to examine that evidence very carefully before reaching a conviction. In **WAMUNGA v REPUBLIC [1989] KLR 424,** this Court held as follows:

> ***"….it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make the basis of conviction."***

In the same decision, the Court went on to state:

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of injustice 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 correctness of one or more identification 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 our view, had the trial court and the first appellate court carefully analyzed the evidence on identification that was tendered against the appellant, they would have come to the conclusion that the same was neither free of error nor watertight to sustain a conviction. Consequently, this appeal must be allowed, which we hereby do. The appellant's conviction is quashed and the death sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 4th day of July, 2014.

M. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

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