**REPUBLIC OF KENYA**
**IN THE COURT OF APPEAL OF KENYA**
**AT NAIROBI**

**Criminal Appeal 8 of 2004**

**JOSEPH KIMONDO WAWERU ……..…….….. APPELLANT**

**AND**

**REPUBLIC ……..…….…… RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya Nairobi (Mbaluto & Onyancha, JJ) dated 21st July 2003 In H.C. Cr. Appeal No. 541 of 2000)**

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**JUDGMENT OF THE COURT**

The appellant, Joseph Kimondo Waweru (the "appellant") was charged before the Senior Resident Magistrate's Court at Kajiado in Criminal Case No. 93 of 2000 with the offence of Robbery with Violence Contrary to section 296(2) of the Penal Code. The particulars of the offence were as follows:

"On the 9th day of October 1999 at Loitokitok forest in Kajiado District of the Rift Valley Province, robbed Danson Memba of Ksh.1,200/= and at or immediately before or immediately after the time of such robbery wounded the said Danson Memba."

The appellant pleaded not guilty to that charge but after full hearing, he was found guilty as charged, convicted and sentenced to death. In convicting him, the learned Senior Resident Magistrate (Miss Ndung'u) addressed herself thus:

"**I have carefully analysed the evidence laid before me. Although the accused denied the charge, I find that there is evidence that he attacked the complainant during broad day light. The accused was well known to the complainant for a long period of time as had even been his tenant. I believe that the complainant truly identified him by recognition. The accused then demanded the money the complainant had received from a goat sale. When the complainant said he did not have money, the accused produced a knife, stabbed him in the stomach injuring him grievously and then robbed him of cash 1,200. I caution myself that there was no other witness to this matter. However, the accused was well known to the complainant for a long time. The complainant struck me as a truthful witness. I believed that he did identify the accused by recognition as the person who robbed him and wounded him. On the evidence I am satisfied beyond reasonable doubt the accused is guilty as charged. I convict him accordingly."**

The appellant was naturally not satisfied with that conviction and sentence of death. He moved to the

superior court by way of an appeal vide High Court Criminal Appeal No. 541 of 2000. That appeal came up for hearing before the superior court (Mbaluto and Kubo, JJ) who, after full hearing dismissed it in a lengthy, well considered judgment, stating, *inter alia*, as follows:

"**We have considered the entire evidence, both for the prosecution and defence, tendered at the trial as well as the appellant's submissions before us including the cases cited. We find the facts proven and accepted by the trial magistrate very clear in this case. The complainant (PW 1), though alone during the robbery, knew his assailant, the appellant before; that the robbery took place at around 5.00 p.m. i.e. during day time; that PW 1 recognised the appellant at close range and named him at the earliest possible opportunity consistently to PW 2 and PW 3; that PW 1 positively identified the appellant as his assailant and that there was no evidence to suggest ill-motive for PW 1 to frame up the appellant.**

**We do not find, as the appellant urged us to do, inconsistencies or contradictions sufficiently material to vitiate the conviction.**

**The appellant's appeal against conviction is hereby dismissed."**

The appellant still felt dissatisfied with that decision of the superior court and hence this appeal which is the second and last appeal. Through Mr. Macharia, his learned counsel, the appellant both in the memorandum of appeal filed by himself in person, and in the supplementary memorandum of appeal filed by the firm of Advocates representing him, raises mainly three issues which are firstly, that the charge against him before the trial court was defective and at variance with the evidence because the evidence adduced at the trial shows that the appellant attacked the complainant using a knife, while the particulars of the charge do not mention that he had a knife. Secondly, that the learned trial Magistrate erred in convicting him whereas the evidence against him on identification was deficient and could not in law be relied upon for a conviction. Lastly, that the charge was at variance with the evidence adduced particularly as regards the date on which the offence was allegedly committed.

We will, as is our duty, consider the above complaints but first brief facts as appears in the record before us.

Danson Memba (PW 1) (Danson) is a farmer at Enkari near Loitokitok in Kajiado District. Ten years prior to the incident, the appellant was his tenant and had been his tenant for a period of two years. He had known the appellant since childhood. The appellant lived in that same area of Loitokitok. His evidence was that on 9th October 2000, he had gone to Kilombero Market in Tanzania to sell a goat. He sold it at Ksh.1,200/=. At about 5.00 p.m. he was on his way back from Kilombero Market. He was alone. After crossing the Kenya/Tanzania border, he walked a short distance and suddenly someone emerged from the bush about six steps ahead of him. That person wore a jacket and appeared to be holding something. He identified that person as the appellant. The appellant also had a cap on his head. The appellant moved near Danson and ordered him to produce money. Danson told him he did not have money. Suddenly, the appellant produced a knife and stabbed Danson on the stomach. Danson fell down on his side. The appellant then turned him over and took cash Ksh.1,200/= leaving Danson unconscious. When he came to his senses on the following day, he found himself at Loitokitok District Hospital where he had been admitted. Whoever attacked him left him at the robbery scene after taking his money.

Francis Njoroge Ngaruiya (PW 2) (Njoroge) was a barber at Kilombero area. On 9th October 1999, at about 5.20 p.m., he left Kilombero heading home. He was alone. As he walked, he found Danson on the side of the road. Danson was bleeding from the stomach. Danson told him he had been stabbed in the stomach by Joseph Kimondo. Njoroge looked for a vehicle and took Danson to Loitokitok District Hospital where he was admitted. The next day, Njoroge reported the incident to the Police Station at Loitokitok. Njoroge knew Kimondo, who was mentioned by Danson as his (Danson's) attacker.

Peter Kilonzo (PW 4) was the Clinical Officer attached to Loitokitok District Hospital. On 17th February 2000, he examined Danson, and he confirmed that Danson had a stab wound on the left lumber region and had sustained internal injuries. On operation, it was found that he had injuries on his gut (intestines).

He had undergone emergency operation to repair the wound. Peter assessed the degree of injury as grievous harm. He produced a P3 form filled by him as exhibit 1.

Police constable David Wamario (PW 3) (David) was attached to Loitokitok Police Station. On 10th October 1999, he was at the station when a brother to Danson reported that Danson was stabbed with a sword by Joseph Kimondo, the appellant and that the appellant also robbed Danson of Ksh.1,200/=. He booked the report in the occurrence book (OB) and later visited Danson at the Hospital. He found Danson in a serious condition but Danson told him, he (Danson) was stabbed with a sword by Joseph Kimondo, the appellant, while Danson was coming from Kilombero and that he was at the same time robbed of Ksh.1,200/= by Kimondo. Pc. David also noted that Danson had a stab wound on his stomach. Pc. David started looking for the appellant but the appellant could not be traced in the area. Two weeks later, Danson was released from hospital. His statement was recorded by the police and he was issued with a P3 form. On 15th February 2000, as a result of information he received, Pc. David proceeded to Loitokitok Township, found the appellant, arrested him and took him to the police station where he was charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code.

When he was put to his defence, the appellant stated that he was a hawker selling clothes at Loitokitok Market. On 16th February 2000, two policemen arrested him from his place of work, took him to the police station and placed him in the cells. Later Danson went to the cells with the OCS and the complainant said he (the appellant) had stabbed him. On 22nd April 2000, he was charged with the offence of which he knew nothing.

The above were the brief facts of the entire case that was before the trial court as can be deciphered from the record. As we have stated above, the appellant's first complaint before us was that the charge was defective as the evidence adduced showed that the appellant used a knife or a sword and yet in the charge as drawn, there was no mention of the knife or sword. Having a lethal weapon is one of the ingredients of a charge of robbery with violence, but it must also be accepted that if the robber wounds his victim, then it does not matter what weapon was used in wounding the victim, the charge would still be proper as wounding a victim is another ingredient of the charge. **Section 296(2)** of the Penal Code reads.

"**If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, <u>he wounds</u>, beats, strikes or uses any other <u>personal violence</u> to any person, he shall be sentenced to death."**

(underlining supplied)

Thus, if the victim is wounded or if personal violence is used against the victim, then whether a knife or any other instrument or weapon was used to wound him, there would be no need to mention in the charge that weapon. Nothing turns on that complaint and that ground is dismissed.

The next ground raised which we need to deal with before we consider the ground raised challenging identification, was that there was variance between the charge sheet and evidence as to the date when the offence took place. We were asked to consider that variance and to give the benefit of doubt as to when the offence took place to the appellant. It is true that the charge sheet reads that the offence took place on 9th October 1999, whereas the complainant, Danson, states in his evidence that the offence took place on 9th October 2000. That is the day that the trial court recorded as the date he recalled he was attacked and robbed. We have carefully perused the record to see if the failure to consider variation between the date in the charge sheet and the evidence of Danson could have occasioned injustice. In our view, it did not. In the entire record, only Danson talked of the incident having taken place on 9th October 2000. The charge sheet shows that the appellant was arrested on 15th February, 2000 for the offence of robbery with violence against Danson. He could not have been arrested on a date long before the offence took place. Again, the appellant was taken to court for the first time on 25th February 2000 and the hearing commenced on 9th May 2000. Danson gave evidence on that date and that is the day he mentioned the

date 9th October 2000 as the date of the offence. Surely, it beats logic that he was giving evidence on 9th May 2000 on an offence that he said had taken place yet the date it had taken place was still to come! That could not be so. Lastly, Njoroge who found him on the ground immediately after the offence and took him to the hospital stated in his evidence that he found him on 9th October 1999. Pc. David received the report of the incident on 10th October 1999 and Peter examined Danson for the injuries arising from the incident on 17th February 2000. It is clear to us, that the evidence given by Danson referring to the date of the incident as 9th October 2000 was an inadvertent mistake on Danson's part and we read nothing more in it.

That brings us to the main point raised in this appeal and that is whether the appellant was properly identified such that a court of law, properly applying its mind to the facts and the law, could convict on the evidence that was adduced to prove identity of the appellant in the trial court. It was not in dispute that the only person who alleges he saw the appellant commit this robbery was Danson, who was also the victim. No other person saw the accused commit the offence. Njoroge arrived at the scene after the incident and did not see who stabbed and robbed Danson. Pc. David in fact received the report of such robbery the next day and Peter assessed the injury about four months later. This was thus not only a question of identity in general but also a question of identity by a single witness. Further it was a question of visual identity.

Evidence on identification of an accused person which he denies needs to be carefully considered and a court dealing with a case in which such evidence comes up for consideration needs to warn itself of the dangers of mistaken identity even in cases of recognition. In the case of **Roria vs. R. (1957) 583 at page 584**, Sir Clement De Lestang V.P. stated:

"**A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on S4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts:**

"***There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.*""**

And in Kenya, this Court resonated Lord Gardner's sentiments in its comments made in the case of **Kamau vs. Republic (1975) EA 139** which were:

"**The most honest of witnesses can be mistaken when it comes to identification."**

Thus, courts need to exercise extra care when considering cases based solely or to a large extent on the evidence of identification of a suspect and particularly when dealing with visual identification which is denied by the appellant. The extra care needs to be exercised, with a warning by the court to itself when dealing with evidence of identification of a suspect which is adduced by a single witness. The well known case of **Abdalla Bin Wendo and Another vs. R. (1953) 20 EACA 166** sets out the guidelines that the Court needs apply when considering evidence of a single witness on identification of a suspect. The court stated, *inter alia*, as follows in that case:

"**Subject to certain well known exceptions, it's trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification especially when it is known that the 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 a jury can reasonably conclude that the evidence of identification although based on a testimony of a single witness can safely be accepted as free from the possibility of error."**

Lastly, even on cases of recognition, the law requires that care be taken before the court accepts evidence of recognition although evidence of recognition may be more reliable than that of identification

as there is still that danger that even an honest witness may make mistakes. In the case of **R. Vs. Turnbull (1976) 3 ALL ER 549 at page 552**, Lord Widgery C.J. stated, *inter alia*:

"**Recognition may be more reliable than identification of a stranger; but even when a witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

The above cases do not stop the courts from convicting a suspect on the evidence of a single witness, nor do they require that there must be corroboration of that single witness. **Section 143** of the evidence **Act Cap 80** Laws of Kenya is clear, that there is no limit as to the number of witnesses the prosecution needs to call to prove a case. All that the law requires is that in cases where visual identification evidence is the main evidence that the court has to consider, the same must be subjected to the greatest test by the court before a conviction is based on it.

It is with the above in mind, that we now proceed to consider the decision of the trial court and that of the superior court in this appeal. From the parts of the trial court's judgment we have reproduced above, we are satisfied that the trial court was alive to the duty imposed on it to consider with the greatest care the evidence of identification that was adduced by Danson. The trial court warned itself as appears in the judgment and did analyse and evaluate all aspects of the evidence of Danson. Having done so, it did, in our view, come to the only inevitable conclusion that the appellant was guilty of the offence as charged.

The superior court, again from the part of the judgment we have reproduced above, revisited the evidence adduced in the trial court afresh, analysed it and evaluated it as is required in law – see the case of **Okeno vs. R. (1972) CA 32**. Having done so, it did allow for the fact that the trial court heard the witnesses and saw their demeanour and having done so, it also came to the conclusion that the appellant's guilt was proved beyond reasonable doubt.

Danson was attacked in broad daylight by a person he had known for many years and who had even been his tenant for two years. He mentioned his name to Njoroge at the earliest opportunity. It may appear that by the time Njoroge found him on the ground he had not fully become unconscious and was able to tell Njoroge who attacked him. When Njoroge returned with a vehicle, he had fully lost his consciousness and never knew he was being taken to hospital. Even if that aspect is ignored, there is still evidence that he mentioned the appellant's name to Pc David when David went to see him in hospital on 10th October 1999, one day after the incident. This was not a case of identification under difficult conditions. The incident took place at 5.00 p.m. during broad day light. The appellant disappeared soon after the incident and was not seen in the area till 15th February 2000 when he was arrested. The appellant's disappearance after the incident additionally pointed to his guilt. We too agree with the concurrent findings of the two courts below in that regard.

In the result, we find that there is no merit in the entire appeal. We order that it be and is hereby dismissed.

**Dated and delivered at Nairobi this 27th day of July, 2007.**

**S.E.O BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

I certify that this is atrue copy of the original.

**DEPUTY REGISTRAR**