IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, LAKHA & OWUOR, JJ.A.)
CRIMINAL APPEAL NO. 24 OF 2000

BETWEEN

PAUL ETOLE ..... 1ST APPELLANT

REUBEN OMBIMA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Conviction and Sentence of the High Court of Kenya at Nairobi (Justice Osiemo, Etyang, JJ.) dated 5th May, 1999

in

H.C.CR.A. NO. 931/932 OF 1998)
****

JUDGMENT OF THE COURT

On 23 June 1998 at the Senior Resident Magistrate's Court at Vihiga, the appellants **Paul Etole, the first appellant herein (the second accused at the trial) and Reuben Ombima, the second appellant herein (the first accused at the trial) were** convicted of Robbery with Violence contrary to ***section 296 (2)*** of the **Penal Code** and sentenced to the mandatory sentence of death. They both appealed against conviction to the superior court which on 5 May 1999 dismissed their appeals. They now appeal to this Court against their convictions.

By an order of the superior court of 22 April 1999 their appeals were consolidated.

The facts of the case are simple. The complainant having closed his shop was carrying the money of his employer in a nylon bag. A group of about six people armed with pangas and rungus emerged from a bush and attacked him. He was injured and the assailants took away K.Shs.18,000/= which he had and one packet of milk and one loaf of bread. It was about 9:00 p.m. It was dark. Three witnesses gave evidence in support of the complainant's version and they all made a visual identification on the basis that there was moonlight which assisted them all in recognising the accused persons. We have carefully considered and evaluated a fresh and exhaustively the evidence adduced at the trial.

We are satisfied that there was no evidence at all against the first appellant to implicate him with the robbery. Mr. Bwonwonga, assistant D.P.P., for the respondent, was constrained to concede (in our view properly) that the evidence against the first appellant was, to say the least, shaky to sustain the conviction. We agree. The conviction against him is accordingly quashed, sentence set aside and we order that he be

set at liberty forthwith unless otherwise lawfully held.

The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger. In the present case, neither of the two Courts below demonstrated any caution. This is a serious nondirection on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis a vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error.

As was said by this Court in **Charles O. Maitanyi v. Republic Criminal Appeal 6 of 1986 (unreported):**

> ***"Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect a re all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?"***

As we observed earlier, there was no real testing in this case. Had the evidence been thoroughly tested and analysed, we cannot feel sure that the lower courts would have inevitably convicted. We therefore find in the absence of any other evidence to support the correctness of the identification that the conviction cannot be supported.

In the result, in our judgment, the quality of the identification evidence in this case was very poor and that there was no evidence of the nature to which we have referred which can be said to support the correctness of the identification. It follows, in our judgment, that there was a serious non-direction by both the lower courts. In these circumstances, we have no doubt that the second appellant's conviction was both unsafe and unsatisfactory. His conviction is also quashed, sentence set aside and we order that he also be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 9th day of February, 2001.

J.E. GICHERU

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR