**REPUBLIC OF KENYA**

**HIGH COURT APPELLATE SIDE NAIROBI**

**CRIMINAL APPEAL NO 598 OF 1979**

**JOHN WAITHAKA CHEGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant was charged with, and convicted of, capital robbery, it being alleged (and held) that he, and two others who were not before the Court, robbed the complainant, a woman called Isabella, of Shs 180 using violence upon her to secure the money.

The prosecution case was that the complainant and her barman or salesman, a man called Ndungu, were going towards her home at about 10 o'clock on the night of 3rd December 1978 (the one holding a torch and the other a lamp) when three men, armed and holding torches, came from the bush and attacked them. Ndungu was hit on his head and the complainant was hit on her wrist and on the back of her head with a *panga,* after which the money was taken from within her brassiere. Ndungu had, and blew, a whistle; and the complainant screamed. Her husband who lived no great distance away, went to where they were. The complainant, who knew the appellant, then gave him the appellant's name and address. Ndungu also knew the appellant and gave his name to him. The police were notified and went to the appellant's house to arrest him, but he was not to be found. On 21st April 1979, ie almost five months later, the complainant's husband saw him in a local bar and had him arrested.

The appellant's case was that the evidence against him could not be true because he was elsewhere when the robbery was said to have been carried out. He did not suggest that Ndungu was deliberately untruthful in naming him as he did, and it is to be taken that (at the least) he was saying that he was mistaken. But he said that the complainant gave her evidence because of a grudge which she bore him. She bore it for two reasons: because in April 1978 her husband beat her in his presence and on 7th July, ie about five months before the robbery, she complained that he (ie the appellant) had accused her of infidelity, saying that he "should be tied with rope" and taken to the police. Whether this meant no more than that she hoped that the appellant would be arrested or that she would see him hanged, is unclear. She bore him a grudge. In any event, the appellant said "In December 1978, I went home to Njoro".

The magistrate believed the prosecution evidence, and rejected the defence. There are six grounds of appeal. We shall not set them out, but we answer them as follows. (1) The conditions favouring identification were not unfavourable. The complainant's evidence under cross-examination was, "I saw

you well and properly. I screamed calling your name. I knew you before that". Ndungu's evidence under cross-examination was:

There was the light of my lamp and the complainant's torchlight. I have known you before. You were living in the same village. I saw you first when you cut me and then cut the complainant. You emerged from a nearby bush at the junction. I saw you well and properly.

It is true that the case against the appellant depended entirely upon visual identification at night by torchlight; but the trial magistrate had this in mind and we are concerned with a case of recognition by two witnesses.

One always needs to approach the issue of visual identification with great care and caution, and we have done that; but we are satisfied beyond reasonable doubt that the complainant and Ndungu made no error in saying that the appellant was one of the robbers. It may be observed that they did not seek to say that they could identify two people whom they did not know. As for which witness was first hit, the record could better have been a little clearer, but the evidence of the two witnesses is not necessarily discrepential and it makes no odds if it is, for the discrepancy only goes to detail. However, from the record, we do not think that there was a discrepancy. The complainant said that after she was hit she did not see who took her money.

(2) There was enough time.

(3) The medical evidence was of no great value and all that the magistrate said about it was that the doctor had confirmed the complainant's injuries and classified them. The result of the case is no different if the doctor's evidence is not taken into account against the appellant.

(4) We have dealt with it.

(5) The magistrate had all the evidence in mind when he made his findings.

The allegation of a grudge in respect of the complainant was for rejection. It seems odd that it should exist because the appellant happened to witness a beating, and the complaint would have had to think very quickly in the suddenness of the moment to realise that she had been given the chance to fulfil her threat or desire made known some months before. As for Ndungu, no reason emerges for him falsely to have made up evidence against the appellant.

(6) There is no basis for this; see *Dismas Wanyonyi v The Republic* (unreported). There was not only the *panga* but three men.

*Appeal dismissed.*

**Dated and delivered at Nairobi this 2nd day of October 1979.**

**E.TREVELYAN**

**JUDGE.**

**S.K SACHDEVA**

**JUDGE.**