



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE -J)**

**CRIMINAL APPEAL NO. 70 OF 2018**

**BETWEEN**

**DOMNIC OMONDI OPARA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence in Criminal Case Number 292 of 2015 in the Chief Magistrate's Court at Kisumu by Hon. W.K.Onkunya (SRM) on 31<sup>st</sup> May, 2018)**

**JUDGMENT**

**Background**

1. **DOMNIC OMONDI OPARA (Appellant)** has appealed against conviction and sentence on the charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. Appellant jointly with others not before the court was charged with violently robbing one **Victor Ambrose Nyakira** and **Geoffrey Oyieko** ON 23.05.15.

**The prosecution's case**

2. The prosecution called eleven (11) witnesses in support of the charges but I will only summarize the evidence that is the relevant to the charge. **PW1, Geoffrey Oyieko** and **PW4 Victor Ambrose Nyakira** recalled that on the material date, they were at their place of work in a wines and spirits shop at about 11.00 pm when they were attacked by three men one of whom was armed with a G3 rifle and another a pistol who robbed them of phones, cash and an assortment of alcoholic drinks after which the robbers drove off in motor vehicle KBM 932K. It was their evidence that they later identified the Appellant as one of the robbers since he had a mark on his neck and nose.

2. **PW2 Leonida Bosibori Magambo** testified she had given her motor vehicle KBM 932K to one Collins Odhiambo on 15.05.15 and **PW3 Collins Odhiambo** in turn stated that he had given the vehicle to one Kennedy sometimes in 2015. Kenneth stated that he gave the said vehicle to accused who identified himself as Ali Hassan.

3. **PW10 CI ALFRED WAMWERA SHIVEKA** produced an identification parade report prepared by his colleague IP MASAWA OSUNDWA by which the Appellant was identified by the complainants as one of the persons that robbed them.

4. **PW11 SGT PHILIP KUSIMBA**, the investigating officer stated that in the course of investigations, he arrested the Appellant who was identified as the Ali Hassan who had possession of motor vehicle KBM 932K which was allegedly used by the robbers to get away from the scene of the robbery.

**Defence case**

5. In his sworn defence, the Appellant denied the offence. Nonetheless, the trial court found the charge of robbery, proved and by a judgment dated 31<sup>st</sup> May, 2018, the Appellant was convicted and sentenced the Appellants to 20 years' imprisonment.

**The Appeal**

6. The conviction and sentence provoked this appeal. In his petition of appeal and written submissions, Appellant raised the following main grounds of appeal:

1. **The charge was defective**
2. **The prosecution case was not proved**
3. **His defence was not given due consideration**

7. When the appeal came up for hearing on 11.12.19, the Appellant sought to wholly rely on his grounds of appeal and written submissions filed on 10.12.19.

8. Ms. Gathu, learned State Counsel opposed the appeal and submitted that Appellant had been identified as Ali Hassan.

#### **Analysis and Determination**

9. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See **OKENO – VS – REPUBLIC (1972) E.A. 32**).

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the Appellant and for the State.

11. The gravamen of this appeal really turns on the issue of identification of the Appellant by the complainant. The offence was committed at night and hence, the means by which the Appellant was identified becomes critical. According to the complainants, the Appellant was unknown to them before the material date. Both complainants stated that they identified the Appellant by the lighting in the shop and by the fact that he had a scar on his nose and neck.

12. In the case of **Maitanyi vs Republic (1986) KLR 198**, the Court of Appeal stated as follows in relation to identification of assailants at night

**“.....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, are 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.**

13. The learned trial magistrate concluded that the Appellant had been positively identified because the court confirmed that indeed the Appellant had a mark on his neck.

14. The court record discloses that the complainants did not in their first report give the description of the Appellant or any of the other persons that robbed them nor give a description of the lighting prevailing at the scene of crime.

15. From the foregoing, I find that the identification parade was worthless and that the Appellant was identified in the dock.

16. I have considered whether dock identification of the Appellant by complainants suffices. In the case of **GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982 -88) 1 KAR PAGE 1134**, the Court of Appeal held as follows:

**“Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade.”**

17. Consequently, I have come to the conclusion that the dock identification of the Appellant was not sufficient to justify conviction and he ought to have been given the benefit of doubt. (See **Kiarie v Republic [1984] KLR 739**).

18. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

**DELIVERED AND SIGNED IN KISUMU THIS 27<sup>th</sup> DAY OF February 2020**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Amondi/Okodoi**

**Appellant - Present in person**

**For the State - Maureen**