



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CRIMINAL APPEAL NO. 31 OF 2019**

**MWITA JOSEPH MWITA *alias* ORIA SOMALI.....APPELLANT**

**-versus-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. L. N. Mesa Principal Magistrate's in Kehancha Criminal Case No. 619 of 2017 delivered on 24/01/2019)***

**JUDGMENT**

1. The Appellant herein, *Mwita Joseph Mwita alias Oria Somali*, was charged with *robbery with violence* and an alternative count of *handling stolen goods*.
2. The particulars of the charge of robbery with violence were as follows: -

*On 5<sup>th</sup> day of September 2017, at around 21.30 hours along Ntimaru/Kehancha road, at Makararangwe, Matara location, Kuria East Sub-County, within Migori County, robbed JACOB CHEGERE MAGAIGWA a boda boda rider, a motor cycle reg. no. KMDT 468R make TVS, Model star red in colour valued at Kshs. 92,000/= (Ninety-Two Thousands shillings only) and immediately before and after used violence against JACOB CHEGERE MAGAIGWA.*

3. The Appellant denied the charges and he was tried with a total of five witnesses tendering evidence in support of the prosecution's case. **PW1** was the complainant. He was one *Jacob Chegere Magaigwa* (hereinafter referred to as '**Jacob**'). **PW2** was the owner of the motor cycle registration number KMDT 486R which was in possession of the complainant during the robbery. He was *Maigara James Igayi* (hereinafter referred to as '**James**'). A Clinical Officer stationed at Kegonga Sub-County Hospital produced the complainant's P3 Form testified as **PW3**. I will hereinafter refer to him as '**the Clinical Officer**'. **No. 110488 PC Rogers Masengo** (hereinafter referred to as '**PC Rogers**') who was stationed at Nyamutiro Police Post received the appellant from some GSU Officers and testified as **PW4**. The Investigating Officer who testified as **PW5** was one **No. 67595 Corp. William Ogeto Onuko** (hereinafter referred to as '**Corporal William**') attached at Ntimaru Police Station.
4. At the close of the prosecution's case the Appellant was placed on his defence and gave sworn defence. He but denied robbing Jacob as alleged. He instead testified on how he was arrested and charged with offences he knew nothing about. The Appellant did not call any witness.
5. By a judgment rendered on 24/01/2019 the Appellant was found guilty of robbery with violence and accordingly convicted. He was sentenced to suffer death.
6. Dissatisfied with the conviction and sentence the Appellant lodged an appeal upon grant of leave by this Court. He contended that he was not properly identified as the assailant and that the offence was not proved. He prayed that his appeal be allowed.
7. The State opposed the appeal and contended that the charge was rightly proved and the Appellant placed at the scene of crime as the assailant. It was submitted that the defence was rightly considered and rejected. The State further submitted that the sentence was constitutional as mitigations were considered. This Court was called upon to uphold the conviction and sentence and to dismiss the appeal.
8. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. In discharging the foregone duty, I have carefully read and understood the proceedings and judgment of the trial court as well as this appeal. I will endeavor to deal with the following issues: -

- (a) **Whether the Appellant was the assailant;**
- (b) **Whether the offence was proved as required in law; and**
- (c) **The sentence.**

I will consider each of the above issues singly.

**(a) Whether the Appellant was the assailant:**

10. The Appellant vehemently denied any involvement in the alleged robbery. To be able to sufficiently deal with this issue I will recap the background of the matter.

11. Jacob was a *boda boda* rider. He operated a motor cycle registration number KMDT 468R make TVS, Model star, red in colour (hereinafter referred to as '**the motor cycle**'). The motor cycle was owned by James. On 05/09/2017 at around 8:30pm Jacob was outside Urembo Bar in Ntitaru Centre waiting to ferry passengers. He was then approached by one customer who came from the said bar. The customer requested to be taken to Makararangwe area. Jacob negotiated with the customer on the fare and eventually they agreed at KShs. 100/=. The customer wore a blue coat jacket and was hooded. The customer also had a bag on his back. According to Jacob the place outside the bar was well lit with security lights and he clearly saw his customer's face. Jacob however had not seen the customer before.

12. Jacob set out as agreed with his customer. On reaching Makararangwe Centre the customer told Jacob that he was alighting just passed the Centre. Jacob finally stopped at where the customer told him to stop. Jacob was suddenly attacked. He was repeatedly hit with a club on his head. The customer-cum-assailant asked Jacob if he knew him. Jacob was robbed of KShs. 400/= which was his day's earnings. Jacob raised alarm as the assailant sped off with the motor cycle and his money. As people gathered at the scene Jacob lost consciousness. Jacob later came back to his senses at a Clinic in Marotora.

13. James was called by one *Chacha* (not a witness) and informed of the attack on Jacob. As James was on his way to Ntitaru Police Station to lodge a report he met Jacob on the way. He was bleeding profusely and appeared confused. James took Jacob to a nearby clinic. James then proceeded to and reported the matter at Ntitaru Police Station.

14. As it was highly suspected that the motor cycle could have been taken to Tanzania, the police issued James with a letter to take to the Tanzanian police. On 24/09/2017 James was called by the Tanzanian police and informed that the motor cycle had been recovered. James proceeded to Nyasincha Police Station in Tanzania where he identified the motor cycle which he owned and had given to Jacob. James was also informed that the one who had been arrested with the motor cycle was in police custody.

15. James called some GSU officers from Makararangwe camp in Kenya who proceeded to Tanzania and recovered the motor cycle. The police also took custody of the suspect. They all proceeded to Nyamutiro Police Post where PC Rogers received the motor cycle and took custody of the suspect. PC Rogers then took the suspect and the motor cycle to Ntitaru Police Station where he handed over to Corporal William.

16. Corporal William took over the investigations. He recorded statements and later charged the appellant before court.

17. The foregone is the background of this matter. It is under those circumstances which this Court must review the evidence and ascertain whether the appellant was the assailant in issue.

18. In dealing with the issue of the identification of the appellant, the trial court was guided by the Court of Appeal in **Muiruri & Others vs. Republic (2002) 1 KLR 274**. I have read the decision. It is a binding decision on this Court. The said decision dealt with *inter alia* instances of single witness identification. The Court of Appeal however emphasized '*the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction.*'

19. The care to be taken has as well been dealt with by the Court of Appeal in several other decisions. For instance, in **Wamunga vs Republic (1989) KLR 426** the Court stated as under: -

***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 it the basis of conviction.***

20. In **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** the Court of Appeal held that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

21. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

***... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be***

***made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

22. Further guidance may be borrowed from the Court of Appeal in **Kisumu Criminal Appeal No. 143 of 2015 Joel Opwala Waburiri & Another v. Republic (2019) eKLR**. The decision was rendered on 21/11/2019. The facts of that case were that some residents in Ekeru village in Mumias were attacked and held hostage overnight by robbers. They were taken from home to home in their village as the robbers committed more robberies. The ordeal took so long and the residents were used to lure home owners to open for them. The robbers and the victims interacted so closely and for a whole night. Some of the victims recognized the robbers as their neighbours and even picked them out in identification parades.

23. The Appellants in that appeal were identified as part of the robbers. They were the ones who were identified at the parade and who were well known to the victims. The trial court convicted them and their appeal was disallowed by the High Court. In allowing the second appeal the Court of Appeal stated as follows: -

***Going through the evidence that we have recapped none of the witnesses called by the prosecution gave a description of the attackers to police when reports were made. As we have seen the whole ordeal took many hours; actually almost the whole night. Some of the witnesses after being robbed were abducted and taken to various homes where they were used to lure home owners to open so that they could also be terrorized and robbed.***

***It has been the law in criminal jurisprudence in this country as elsewhere that a witness should be asked to give description of the accused and the prosecution should then arrange for a fair identification parade. That was what was held by this Court as way back as 1987 in the case of Gabriel Kamau Njoroge v Republic [1987] eKLR. A fair identification parade cannot be conducted if the identifying witness has not on first report stated that he could identify the accused and or given a description of the accused - see Roria v Republic [1967] EA 583. The witness ability to identify the accused can only be tested after he has given such a description or stated he would recognize the accused - see the case of Republic v Mohammed Bin Allui [1942] 9 EACA 72; Rex v Shabani Bin Donald [1940] 7 EACA 60. In the old English case of Republic v Turnbull [1976] 3 ALL ER 549 (which was cited by the trial magistrate) on the issue of identification it was stated that the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way e.g by passing traffic or a press of people. Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused actual appearance?***

***So it has been held by this Court in many cases that it is not asking too much that the witness is asked to give a description of eh accused and the prosecution to arrange for a fair identification parade.***

***In the instant case probably because they were heavily brutalized by the attackers and probably fearing for repercussions if they gave description of the attackers to the police, the witnesses feared to do so and withheld the information they had on identity of the attackers to police and only gave the names later. This will however not do in a criminal prosecution. .... Witnesses testified in court that their attackers were their neighbours but they did not give names or description to the police. We think that had the High Court considered these issues on reevaluation of the record the learned judges would have reached a different decision. The identification of the appellants at poorly organized identification parades which did not comply with Force Standing Orders rendered the identification worthless and without proper identification, the prosecution case had no legs at ll.***

***Considering the whole matter, we think that the conviction of the appellants was not safe. It is for this reason that we have reached the conclusion that the appeal has merit and hereby succeeds. We set aside conviction of the appellants and quash the sentences imposed and order that the appellants shall be set free forthwith unless otherwise lawfully held.***

24. In this case Jacob stated that he saw the assailant for the first time on the night of terror. He did not know his name either and he only came to know of the name after the appellant was arrested. However, PW5 stated that Jacob told him that he was attacked by a pillion passenger whom he knew by face and by a nickname of Worja at the time Jacob made his first report. From the record the appellant called for the first OB report but the trial court ordered that the appellant be instead supplied with an investigating diary. Respectfully, that may not have been the most appropriate order in the circumstances.

25. Be that as it may, there is need to revisit the events outside the Urembo bar. There is no indication on the time Jacob and the customer took in negotiating and agreeing on the fare. The customer was also hooded. Although Jacob stated that he saw the face of the customer by the aid of some security lights which were bright there was need to state where Jacob was in respect to the lights. Was the customer facing the security lights as he walked to and talked with Jacob? If the customer was hooded, then how did Jacob clearly see his face? Is it possible that when Jacob was informed that the appellant was found with the motor cycle then he deemed him as the attacker?

26. There are many unanswered questions in this matter. Had the police availed all the necessary witnesses including those who found and arrested the appellant with the motor cycle then that would have really strengthened the prosecution's case.

27. A careful review of the evidence reveals many gaps such that the decision in in **Muiruri & Others vs. Republic** (supra) may respectfully not be applicable in this case. I must find that this was a case which really called for the conduct of an identification parade. Whereas not all

instances of dock identification are worthless, the evidence herein makes it unsafe to base a conviction on the dock identification.

28. Going by the foregone and in view of the facts in this case, it comes out that it is unsafe to uphold the conviction on the identification evidence on record. I now find and hold that the identification of the appellant as the assailant was not without error. The evidence dictated for the otherwise finding. The prosecution therefore failed to connect the Appellant with the commission of the crime.

29. Having found that the conviction cannot stand, there is really no need of dealing with the other grounds of appeal. The upshot is that the appeal is allowed, the conviction quashed and the sentence set-aside. The Appellant shall forthwith be released unless otherwise lawfully held.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 22<sup>nd</sup> day of May, 2020.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mwita Joseph Mwita alias Oria Somali, the Appellant in person.**

**Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.**

**Evelyne Nyauke – Court Assistant**