



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 305 of 2011.**

**FRANCIS MWAURA NDUNGU.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

*(An appeal from the original conviction and sentence in Chief Magistrate's court at Makadara Cr. Case No. 3457 of 2009 delivered by Hon. T. Murigi, PM on 11<sup>th</sup> November 2011).*

**JUDGMENT**

**Background.**

The Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 19<sup>th</sup> August, 2009 at South B in Industrial Area within Nairobi province jointly with others not before court being armed with a dangerous or offensive weapon namely a knife robbed Kingioku Ndemange of his cash KShs. 200/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Kingioku Ndemange.

The Appellant was found guilty, convicted and sentenced to suffer death. He was however dissatisfied with both the conviction and sentence as a result of which he has lodged the present appeal. In his amended grounds of appeal, he was dissatisfied that he was not properly identified, that crucial witnesses were not called and that his defence was not considered.

**Submissions**

The Appellant relied on written submissions filed on 27<sup>th</sup> November, 2017. In summary, he submitted that the learned trial magistrate erred by directing herself that his identification was by way of recognition, an assertion that was not supported by the evidence adduced. He submitted that the said learned magistrate held that both PW1 and PW2 knew him prior to the incident yet the witnesses themselves testified that they did not know him. That therefore his conviction on account that he was positively identified was not based on any cogent evidence. Further that even if he was arrested by members of the public, he was a case of mistaken identity.

In addition, the Appellant took issue with the fact that crucial witnesses were not called. He cited the members of public who arrested him stating that the failure to call them meant that the prosecution could not link him to the offence.

Finally, the Appellant submitted that his defence was not considered which, if it had been, the court would have arrived at a different verdict. He pleaded with the court to allow his appeal.

Learned State Counsel, Ms. Sigei opposed the appeal. She submitted that the prosecution proved their case beyond a reasonable doubt. On identification of the Appellant, she submitted that he was arrested by members of the public on the same date of the offence after which the complainant identified him. Thus, the issue that he was a victim of mistaken identity could not arise. She was also of the view that the Appellant's defence was considered but was dismissed for lacking in merit.

**Evidence**

The prosecution's case was that the complainant was accosted by three men, one of whom was armed with a knife. On the material date on 19<sup>th</sup> August, 2009 at about 3.15 a.m., he was walking towards a petrol station near The Mater Hospital. The three men harried towards him. They then walked in between a vehicle as they got near him. The one armed with a knife cut his neck and a left finger leaving him bleeding profusely from the neck. He raised alarm by screaming. Members of the public responded and one Dr. Muli informed a Mr. Nderitu what had

happened. Dr. Muli took him to South B Hospital where he was treated and discharged. He was later informed by Mr. Nderitu that the attackers had been arrested at Mariguini Village. After his treatment he went to the village where he found two men arrested by members of the public. He identified the Appellant as one of the robbers. Consequently, the other man who was apprehended was released.

**PW2, James Mwangi Nduati** was an eye witness. His testimony was that he was a mechanic at South B. He testified that at about 3.00 p.m. while at the garage he heard someone screaming asking why some people had cut him. He testified that the three men ran towards the slum but he approached PW1 who was bleeding heavily. He identified the Appellant as one of the attackers after arrest by members of the public. He accompanied other members of the public to take the Appellant to Industrial Area Police Station.

**PW3, Lilian Nabeya Nakora** testified that she was the wife to PW1. She claimed to have seen PW1 pass by the scene of the attack and being held and pushed to a school fence by three young men. She also testified that she witnessed one of the men cut PW1 on the neck and was able to identify the Appellant as the attacker. **PW4, Dr. Kamau** of Police surgeon examined PW1 on 21<sup>st</sup> August, 2009 and filled his P3 form. He assessed the degree of injury as harm. He adduced the P3 form as evidence. **PW5, CPL Edward Mau** of Industrial Area Police Station investigated the case. He summed up the evidence of prosecution witnesses, recorded necessary statements and preferred the charge against the Appellant. He also identified and produced as evidence PW1's blood stained shirt which he was wearing on the material date.

After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn statement in defence. He stated that he was a hand cart pusher within south B Estate. On the material date he worked till 5.00 p.m. when he left for home. It is there that he found PW1's wife with a group of about fifteen street boys. They had arrested one person who was tied up. They started beating him up but other members of the public intervened. Shortly afterwards, the complainant came and identified him as the person who had robbed him. PW1's wife demanded 500/= to have him set free but since he did not have the money he was escorted to the police station where he was charged.

### **Determination**

After considering the evidence and the respective submissions I have concluded that the issues that arise for determination are whether the Appellant was properly identified and whether the case was proved beyond a reasonable doubt.

On identification, the Appellant contended that he was a case of mistaken identity. This was because contrary to the trial court's holding that PW1 and PW2 identified him by recognition, their testimony was that they did not know him prior to the incident. Furthermore, they were not present at the time of his arrest. In addition, he was not arrested at the locus but in a slum far from the scene. PW1 testified that after he was robbed and injured he gave chase alongside members of the public before meeting one Mr. Muli who took him to hospital. PW2 testified that he heard someone screaming "why have you cut me" which peaked his curiosity and he went to observe what was happening at which point he saw the man who was screaming holding his chin and people were gathering around him. He went to see what had happened and found the man bleeding heavily. The man was then taken to hospital by a good Samaritan. His evidence clearly contradicts the complainant's that he chased after the robbers or that members of the public chased after the robbers. His evidence was also interesting in that he insisted that the Appellant cut the complainant, an act which he did not witness as he only saw the aftermath of the cutting.

With regards to PW3 she did testify that she knew the Appellant before the day in which case her identification of the Appellant would be by recognition.

I am cognizant of the finding by the Court of Appeal in **Kavete and Others v. Republic CA Criminal Appeal No. 63 of 1986(UR)** that:

***"...where the evidence is based on identification the court should closely examine the circumstances in which the identification by each witness came to be made..."***

I have already poked holes in the testimony of PW2. The evidence of PW3 also stood out considerably. In her examination in chief she gave evidence that was meant to obscure any relationship between her and the complainant which seemed to intimate that she was a bystander who just observed the whole affair. The fact that she was his wife only emerged during cross examination. Another questionable part of her testimony was with regard to the complainant's injury. She testified that after the robbers took off people gathered around the complainant and a man took him to hospital. In cross examination she elaborated and testified it was one of the complainant's friends. This turn of events leaves a lot to be desired as it defeats logic to contend that the complainant's wife was so unperturbed by his injuries, which PW2 testified were bleeding heavily, that she did not notice who took the Appellant to receive treatment.

There was also a material contradiction with respect to how the Appellant was arrested. PW1 and 2 testified that he was arrested alongside another. PW3 on the other testified that when the Appellant was identified after his arrest he was alone and reiterated this fact in cross examination. In light of the inconsistency, the court must clearly question the evidentiary value of her evidence. My view is that she merely testified so as to aid the prosecution found a case against the Appellant.

On the arrest of the Appellant, it is clear that this was done by a mob. The same occurred in a slum whose location in relation to the *locus in situ* was not clear from the evidence. What is clear is that he was arrested alongside another. According to PW2, the other man was released after the Appellant informed them that he was not with him. This clearly calls into question the basis of the arrest and strongly suggests that the arrest was based on suspicion which can never be a ground for conviction.

The Appellant did also contend that the prosecution failed to call crucial witnesses. He questioned the failure to call as witnesses members of the mob that arrested the Appellant. I concur with the Appellant that the failure to call these potential witnesses greatly weakened the prosecution case because other witnesses failed to illuminate how the Appellant was arrested and the circumstances that led to the arrest. It does not follow that merely because he was arrested moments after the robbery he was guilty. I am inclined that he could have fallen to a case of mistaken identity.

The upshot of my observations is that the prosecution case was riddled with contradictions and inconsistencies. There was also no sufficient evidence linking the Appellant to the offence for want of a positive identification. Consequently, I find that the appeal is meritorious. I quash the conviction, set aside the death sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

**Dated and Delivered at Nairobi This 15<sup>th</sup> February, 2018.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. Appellant present in person.***
- 2. Miss Atina for the Respondent.***