



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.155 OF 2017**

*(An Appeal arising out of the conviction and sentence of E. Kanyiri - SRM delivered on 28<sup>th</sup> July 2017 in Makadara CMC. CR. Case No.2465 of 2015)*

**CHARLES MBOGO NAGILA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Charles Mbogo Nagila was charged with two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 25<sup>th</sup> July 2015 at Kariobangi North Estate in Nairobi County, the Appellant, jointly with others not before court, while armed with a dangerous weapon namely a pistol robbed Naomi Njoki Muchoki and Collins Onyango of Kshs.4,350/-, Kshs.5,000/- and a Samsung mobile phone, and at the time of the said robbery, used actual violence to the said Naomi Njoki Muchoki (1<sup>st</sup> complainant) and Collins Onyango (2<sup>nd</sup> complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on both counts. He was sentenced to death in respect of the 1<sup>st</sup> count. The death sentence in respect of the 2<sup>nd</sup> count was kept in abeyance. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court challenging the said conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal. He was aggrieved that he had been convicted on the basis of contradictory evidence of prosecution witnesses. He faulted the trial court for relying on the evidence of identification to convict him yet the same was not free from possibility of error or mistaken identity. The Appellant took issue with the manner in which the trial court treated the evidence of his arrest, which in his view, ought to have raised reasonable doubt as to his alleged involvement in the robbery. The Appellant was finally aggrieved that his defence had not been taken into consideration before the trial court reached the impugned decision finding him guilty of the offence. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, the Appellant, through his counsel Mr. Chesang filed written submission in support of his appeal. Ms. Kimiri for the State also filed written submission urging the court to allow the appeal since the evidence adduced by the prosecution witnesses raised reasonable doubt that the Appellant was properly identified by the victims of the robbery. Mr. Chesang, in his oral submission, reiterated the contents of written submission and urged the court to find that the evidence of

identification that was adduced by the prosecution witnesses was not upto scratch and should therefore not have formed a basis for the conviction of the Appellant. Ms. Akunja for the State conceded to the appeal for the reason that the evidence of identification by prosecution witnesses raised reasonable doubt that the Appellant was properly identified on the night of the robbery.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its determination, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See **Njoroge –vs- Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the two charges of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made before this court, both oral and written. It was clear from the judgment of the trial court that the court convicted the Appellant on the basis of the evidence of identification. The trial court recognized the dangers of convicting the Appellant based on the sole evidence of identification that was made especially in the circumstances that were not conducive for positive identification. The trial court cited the leading cases of **R –vs- Turnbull [1977] QB 224** and **Wamunga –vs- Republic [1989] KLR 424**). The Court of Appeal in **James Murigu Karumba –vs- Republic [2016] eKLR** held thus in regard to the evidence of identification:

***“It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In Wamunga –vs- R [1989] KLR 424 this court held at page 426 that,***

***“Where the only evidence against a defendant is the evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully 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 a conviction.”***

In the present appeal, the two complainants in the case testified that they were accosted by two robbers who posed as customers at the lodging where they were working. The complainant testified that it was about 10.30 p.m. on 25<sup>th</sup> July 2015 when the two robbers gained entry into the lodging, after which they subdued them, before robbing them of cash totaling Kshs.9,350/- and taking off with the 1<sup>st</sup> complainant’s (Naomi) mobile phone. The complainants testified that during the entire robbery, the security light at the reception brightly lit the scene of crime. They interacted with the robbers at close quarters. They were able to register their identity. However, it was clear from the complainants’ testimony that they did not give their description of the robbers in the first report that they made to Kariobangi Police Station on the particular night. This was a fatal flaw to the prosecution’s chances of relying on the evidence of identification later in the event that the robbers were arrested.

In the present appeal, the 2<sup>nd</sup> complainant testified that on 7<sup>th</sup> August 2015 while he was walking within Kariobangi Estate, he met with the Appellant. He told the court that he recognized the Appellant as one of the robbers that robbed them about two weeks earlier. He raised alarm. Members of the public came to his aid and escorted the Appellant to Kariobangi Police Station where he was re-arrested by PW3 PC Francis Iliku. The case was investigated by PC James Githua who, after concluding his investigations, formed an opinion that a case had been made for the Appellant to be charged with the offences that he was convicted.

When the Appellant was put on his defence, he denied committing the offences. He denied being at the scene of the robbery when it was alleged that he robbed the complainants. He told the court that he was arrested after 2<sup>nd</sup> complainant made false allegations that he had robbed them on the material night. The Appellant attributed this animosity to the breakdown of the love affair that he previously had with the 1<sup>st</sup> complainant.

From the evidence adduced, it was clear to this court that the evidence of identification that was adduced by the prosecution witnesses was not sufficient to secure the conviction of the Appellant. As stated earlier in this judgment, before a court of law can convict on the evidence of identification, it must satisfy itself that the evidence of identification is watertight so as to exclude the possibility of mistaken identity. In the present appeal, the complainant did not give the description of the robbers in the first report that they made to the police. It was not clear how the complainants were able to be certain that it was the Appellant who was one of the robbers that robbed them. It was not clear from their evidence how long the robbery took place. Even though the complainants claimed that they interacted face to face with the robbers (in this case the Appellant), it was not clear from their evidence what facial or physical features of the Appellant that enabled them to be positive that they had distinguished and identified him as one of the robbers.

This court cannot rule out the possibility that in the hectic circumstances of the robbery, especially noting that a pistol had been brandished on the complainants, that the complainants were terrorized and could have been mistaken that they had identified the Appellant as one of the robbers. This court is not convinced, to the required standard of proof beyond any reasonable doubt, that the evidence adduced by the complainants pointed out to the Appellant as the robber on the basis of that evidence of identification. In **Maitanyi –vs- Republic [1986] KLR 198**, the Court of Appeal held that where the evidence of identification was made in difficult circumstances, the court is required to consider whether the prosecution adduced other evidence to corroborate the evidence of identification. In the present appeal, no other evidence was adduced to support the prosecution's evidence of identification.

In the premises therefore, this court holds that the prosecution failed to establish the charges of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** that were brought against the Appellant. The submission by Mr. Chesang that the evidence of identification adduced by the complainants could not rule out that there could be a possibility of error or mistaken identity has merit. The State, correctly in the view of this court, conceded to the appeal. The Appellant's appeal against conviction and sentence is allowed. The Appellant is acquitted of both charges. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE 2018**

**L. KIMARU**

**JUDGE**