



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL APPEAL NO. 60 OF 2016**

**FREDRICK OUMA ODUO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against Judgment, Conviction and Sentence imposed in Criminal Case Number 1228 of 2014 in the Principal Magistrate's court at Winam delivered by B. Kasavuli S.R.M. on 13.10.16).*

**JUDGMENT**

**The trial**

The Appellant herein **FREDRICK OUMA ODUOR** has filed this appeal against his conviction and sentence on a charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The particulars of the offence were that:-

***“On the 21st August 2014 at Auji village in Kisumu East District within Kisumu County jointly with another not before court while armed with a dangerous weapon namely a pistol robbed Daniel Ochieng Ajuoga of his motor cycle Reg. No. KMDE 325H make Bajaj Boxer 150 valued at Kshs. 160,000/- and immediately before the time of such robbery used personal violence against the said Daniel Ochieng Ajuoga***

The appellant was alternatively charged with handling stolen goods contrary to section 322(2) of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence were that:-

***On the 21st August 2014 at Akala area in Siaya District within Siaya County, otherwise than in the course of stealing dishonestly motor cycle Reg. No. KMDE 325H make Bajaj Boxer 150 knowing or having reason to believe it to be stolen property***

The prosecution called a total of five (5) witnesses in support of their case. The brief facts were that at about midnight on 27th August 2014, Daniel Ochieng Ajuoga, a motor cycle rider was called to pick a customer from Gudka area and take him to Nyamasaria. That upon picking the customer, appellant herein, whom he had met on three other occasions, he said he wanted to pick another man from Auji area and upon getting there; appellant who was armed with something like a pistol and the other man robbed him of motor cycle Reg. No. KMDE 325H red in color. That he reported the matter to the police, and the following day, he was informed that the motor cycle had been recovered and detained at Akala police station after it was involved in an accident with a rider who had disappeared after he was released to collect ownership documents. That he saw the motor cycle and identified it as the one that had been

robbed from him.

PW2 CPL Patrick Ndombi who received the initial report told court that complainant reported that he was robbed of motor cycle Reg. No. KMDE 325H by a certain man called Daudi. That the following day; he went with complainant to Akala police station where complainant identified his motor cycle, and the appellant, who was in custody as the one that had robbed him. PW5 Boaz Owino, the chairman of Akala Boda Boda Association stated that he was at the bus stage with his colleagues when he detained motor cycle Reg. No. KMDE 325H red in color from a strange man whom he released to get ownership documents of the motor cycle because he suspected it was stolen. Upon appellant's arrest; the witness identified him as the one from whom he had recovered the motor cycle. PW4 PC Mulongo recalled that on 21st August 2014, she received motor cycle Reg. No. KMDE 325H red in color from PW5 who reported that he had recovered it from a strange man.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. On 13.10.16, the learned trial magistrate delivered his judgment in which he convicted the appellant and after listening to his mitigation, sentenced him to suffer death.

### **The appeal**

Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In his grounds of appeal filed on 27th October 2016, the appellant raised seven (7) grounds which can be summarized into four grounds to wit:-

**(i) THAT the charge sheet is defective**

**(ii) THAT the prosecution case was not proved beyond reasonable doubt**

**(iii) THAT the trial court erroneously convicted him on contradictory and uncorroborated evidence**

**(iv) THAT his defence was not given due consideration**

### **Analysis and Determination**

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC [1972] E.A.32**, where it held that:-

***“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”***

In dealing with this appeal, I have in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and I have given allowance for that. I have perused the written submissions of the appellant and I note that he has raised three (3) grounds of Appeal to wit:-

- Failure by prosecution to conduct an identification parade
- Contradictory evidence
- Onus of proof

The appeal was opposed by the state. In support of the aforesaid grounds of appeal, the appellant tendered written submissions. I have carefully read the written submissions and considered oral submissions by the appellant and on behalf of the state.

The appellant submitted that the prosecution did not conduct an identification parade and did not tender evidence concerning his arrest. He further submitted that recovery of the motor cycle was not

corroborated. Ms. Nyamosi, learned counsel for the state submitted that an identification parade was not necessary since the complainant had testified that he knew the appellant whom he had transported on his motor cycle three times.

The record indeed shows that the complainant had stated that he had recognized his assailant whom he had carried him on his motor cycle three times before the robbery. In his initial report immediately after the robbery, complainant informed the **investigating officer**, PW2 CPL Patrick Ndombi, that he was robbed by a certain man called “Daudi”. The appellant herein is **Fredrick Ouma Oduor**. **I have perused the entire evidence by the complainant and nowhere does he state that the appellant is also known as Daudi. On the other hand, the investigating officer did not explain the relationship between accused and “Daudi” that had allegedly robbed the complainant.**

The appellant faulted the prosecution’s failure to call the arresting officer to explain how he was arrested. On this issue, I can do no more than reiterate what was stated by the Court of Appeal in the case of **EDWIN WAFULA KEYA –VS- REPUBLIC** [2005] eKLR where the Court, dealing with a similar situation, stated thus:-

***“----- . None of the officers who arrested the appellant was brought to testify and explain why they had arrested the appellant some two months after the robbery. Was the appellant arrested because the officers had been given the description ‘light-skinned and tall’----- . True, the appellant was identified at an identification parade conducted by Chief Inspector Alfred Etyang on 22nd February, 2001 but we note that this was nearly two months after the robbery and the prosecution totally failed to explain what it was that led police officers to arrest the appellant. In the circumstances of this case we think that at least one of the arresting officers ought to have been called to testify and that was the stand the Court took in the case of JAMES MUCHENE KAMBO VS. REPUBLIC, Criminal Appeal No. 68 of 2003 (unreported) where the robbery took place on 15th April, 1995, and Kambo was arrested on 16th May, 1995; there was nothing to show how the officer who arrested him had been able to connect him with the offence of 15th April, 1995 and the arresting officer failed to come and testify. ----”***

The court further stated

***“..... that there is no law to the effect that in every case the arresting officer must come and testify. Such cases are confirmed to their peculiar facts and circumstances. In our view, the failure to call all or any of the three police officers who arrested the appellant some two months after the offence left an unbridgeable gap in the prosecution case.....”***

In the two cases cited, the question was how the arresting officers were able to connect the persons they arrested with the offences. That is the position in the appeal now under consideration. The complainant in this case said he knew the appellant well and immediately gave his name “DAUDI” to the police. Further to the foregoing; evidence by PW5 Boaz Owino that he recovered the motor cycle in question from the appellant was not corroborated since his colleagues who were with him during the recovery were not called as witnesses. The officer who arrested the appellant did not come to explain how he had connected him with the name “DAUDI” or with the person from whom the motor cycle was recovered. I am not to be understood to be saying that in each and every case, the arresting officer must come and testify. Each situation must be considered and determined on its own circumstances. The appellant said he was called to meet a man at a certain place and that it was while he was chatting with the said man that he was arrested. He denied being involved in the robbery and the prosecution was under a duty to leave no loose ends which can lead to reasonable doubt being raised.

The evidence of the arresting officer would have been necessary in view of the unbridgeable gap in the prosecution case. I am thus satisfied that failure by the prosecution to call the said witnesses to testify weakened the prosecution case and it prejudiced the appellant.

In the case of **Wamunga –vs- R.** [1989] KLR 424 the Court of Appeal while dealing with the complexities of an identification of an assailant stated as follows;-

***“It is trite law that where the only evidence against a defendant is evidence of identification of 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 a conviction”.***

In the case of *George Bundi M’Rimberia – v- R, Criminal Appeal No. 352 of 2006*, it was stated that

***a more serious aspect arises when a witness fails to mention the name of an assailant at the earliest opportunity as this can weaken the evidence. It is our considered view that failure by A to properly mention in her statement to the police the name of the appellant weakened her evidence of identification through recognition.***

In the present case, the case is not weakened by failure of the complainant to name the assailant but by the fact that the appellant has not been identified as the named assailant. The complainant’s evidence concerning the assailant is contradictory and unsafe to sustain a conviction.

From the foregoing, it is clear to this court that the evidence of recognition by PWI could not be safely relied upon. I find that the prosecution failed to discharge its burden of proof and thus, the learned trial magistrate erred in convicting and sentencing the appellant. Accordingly, I set aside the judgment and quash the appellant’s conviction and sentence and unless otherwise lawfully held, order that the he shall be released and set free forthwith.

**DATED, SIGNED AND DELIVERED THIS 30TH DAY OF MARCH 2017 .**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Clerk

Appellant

For the State