



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 43 OF 2015**

**MOHAMED AHMED NOOR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**( From the conviction and sentence in Mandera SP magistrates**

**Criminal Case No 525 of 2014- CA Mutai PM).**

**JUDGMENT**

The appellant was charged in the magistrate court at Mandera With 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 19<sup>th</sup> November, 2014 at Mandera township in Mandera East Sub County within Mandera county jointly with another not before court robbed Catherine Kaario Baario of cash Ksh. 12,000 and mobile phone make Nokia ASHA 200 valued at Ksh. 7,000 and at the time of such robbery used actual violence against the said Catherin Kaario Baario.

He pleaded not guilty of the charge. After a full trial, he was convicted of the offence and sentenced to death through hanging.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial grounds of appeal on 24<sup>th</sup> July, 2015. However before the appeal was heard , he filed amended grounds of appeal as well as written submissions. His amended grounds of appeal are as follows.

1. The trial magistrate erred by convicting him while relying on purported identification while there was no first report giving his description and also based on identification parade which did not adhere to the force standing orders under section 46.
2. The magistrate erred when he convicted him while failing to find that the entries in the charge sheet and the evidence had used is at great valiance
3. The trial magistrate erred in convicting him by failing to find that the allegations against him were never proved as required under section 107 of the Evidence Act CAP 80.
4. The trial magistrate erred when he dismissed his reasonable defence.

At the hearing of appeal, the appellant relied on his amended petition of appeal and written submissions.

I have perused and considered the written submissions. He added that though it was on record that he was charged on court on 25<sup>th</sup> August 2014, the trial court referred to the 19<sup>th</sup> November, 2014. He said that this issue of variance of dates should be clarified.

Learned Prosecution Counsel Mr. Okemwa opposed the appeal. He stated that the prosecution called six witnesses to prove their case. Counsel submitted that all the elements of robbery with violence were proved against the appellant. According to counsel the incident occurred in broad day light at 10.00 am and the appellant was in a company of another. Counsel emphasized that the complainant described how the appellant was dressed. She also stated that in the struggle the appellant put his hand in the complainants mouth and she bit his finger thus injuring him. Those injuries were still fresh when the identification parade was conducted. Counsel submitted thus that there was adequate corroborative evidence to support the conviction.

On sentence, counsel submitted that the sentence was not unconstitutional and relied on case of JOSEPH NJUGUNA MWAURA AND OTHERS –VS- REPUBLIC(2013)Eklr, which was decided by the Court of Appeal.

In response to the Prosecuting Counsel's submissions, the appellant stated that nobody would use a panga in day broad light to rob another. The appellant complained that all relevant witnesses of prosecution witnesses were police officers and none of them was at the scene.

This is a first appeal. As a first appellate court, I am required to reevaluate all the evidence on record and come to my own conclusions and inferences. See the case of OKENO V/S- REPUBLIC (1972) EA 32.

I have reevaluated the evidence on record. The appellant has raised a number of grounds of appeal. The prosecution called six witnesses, and the appellant gave a sworn defence statement and was cross examined.

According to the prosecution, the incident occurred in broad light when the complainant was walking in Mandera town towards an mpesa shop carrying money and a mobile phone which were robbed.

The complainant was PW1 and stated that two young men approached her, held her, struggled and snatched the money Ksh. 21,000 and the mobile phone. In the course of the struggle the appellant accidentally put his fore hand in to her mouth when attempting to prevent her screams, and in the process she bit his finger. The two young men then escaped and the complainant went to hospital.

It was evidence of a single identifying witness. A fact may be proved by the evidence of a single witness, however when it relates to the identification of an accused person the court is required to take great care to avoid mistaken identity. –see OLUOCH-VS-REPUBLIC(1985)KLR547.

In the present case, though PW1 the complainant stated that she could describe the assailant who had an injury to the finger, the person to whom she first made that description was not called to testify, as PW5 CPL Lucas Juma was merely handed over the matter by DCIO Mr.Gabriel Nyaga. PW5 talked with the complainant on 20<sup>th</sup> of November, 2014. This witness did not state the date on which the complainant told him that the assailant had a mark on the finger.

The appellant was arrested on 21<sup>st</sup> November, 2014 by among others PC Jared Omusugu PW3 for a totally different offence. He was arrested with another who was later released. It was said by this police officer that the appellant admitted having robbed a brown lady on 19<sup>th</sup> of November. The arrest of the appellant was not connected with the present offence.

In my view, he alleged confession by the appellant to PW3 is not admissible evidence, as it was without caution as required by law, nor was it made to a police officer of the rank of inspector or above. In

addition the investigating officer PW5 does not mention anything to do with a confession or admission by the appellant.

An identification parade was conducted by PW4 CPL Colins Shikuku. Other than that parade having been wrongly conducted by a Corporal, the evidence on record was that the appellant was the only person with had an injury in the hand. As such the people who participated in the parade were not of similar appearance in respect to that injury, which the complainant PW1 was looking for. Thus other than being irregular, the identification parade was of no evidential value.

Having considered the totality of the evidence here in, and the fact that the appellant gave strong sworn testimony in his defence, I find that the evidence of the identification of the appellant by a single witness PW1 was far from removing the possibility of mistake. It is quite possible that the appellant was charged merely because he had an injury on his finger. That evidence is not sufficient identification of the person who robbed the complainant.

I find that the prosecution failed to prove their case against the appellant beyond reasonable doubt. I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forth with unless otherwise lawfully held.

**Dated and delivered at Garissa on 25th day of April 2017.**

**Gorge Dulu**

**Judge**