REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 68 OF 2008

1. OLIPA AMUNYUNZO

2.GABRIEL IBEI EKESA.....APPELLANTS

VERSUS

REPUBLIC ……RESPONDENT

(From the original conviction and sentence in criminal case No.394 of 2008 of the Chief Magistrate's Court at Busia by Hon. E.O Obaga– Senior Resident Magistrate)

JUDGMENT

The appellants **OLIPA AMUNYUNZO** and GABRIEL **IBEI EKESA**, were convicted for the offence of robbery contrary to section 296(1) of the Penal Code.

The particulars of the offence were that on 25th April 2008 at **Okatikok** village **Nambale** location in Busia District of the Western Province, jointly with others not before court, while armed with pangas and clubs, robbed SEPEPE **ONYENGO** of a bicycle make Radger valued at Kshs. 5200/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said **SEPEPE ONYENGO.**

Both appellants were sentenced to suffer death. They have appealed against both conviction and sentence.

The appellants were in person. They raised several grounds of appeal which I have summarized as follows:

1. That the learned trial magistrate erred in law and in fact by failing to appreciate that the complainant did not mention them in his first report in the police occurrence book.

2. That the learned trial magistrate erred in law and in fact by failing to appreciate that the complainant reported his matter after they were arrested.

3. That the learned trial magistrate erred in law and in fact by relying on the evidence of a single witness without corroboration.

4. That the learned trial magistrate erred in law and in fact by failing to appreciate that no exhibits were recovered on them.

The State opposed the appeal through Mr. Owiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

At about 8 p.m the complainant was going home on a bicycle from his business premises. He met four men who ordered him to alight from his bicycle. They robbed him of his bicycle. He recognized both appellants with the help of light from his spotlight.

Both appellants denied any involvement in the robbery.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

The issue as to whether the complainant mentioned the appellants in his report to the police was not raised during trial and the learned trial magistrate did not have evidence at his disposal to make a finding whether he (the complainant) gave their names to the police at the earliest opportunity or not. Indeed the appellants did not challenge the evidence of **P.C Evans Banana** (PW5) when he testified that the complainant reported the incident before the arrest of the appellants. I accordingly dismiss the first and the second grounds of appeal.

It is trite law that a fact may be proved by the evidence of a single witness subject to some exceptions recognized in law.

In the case of **KIILU & ANOTHER Vs. REPUBLIC [2005] 1 KLR 174** the Court of Appeal held:

> ***Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.***
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> The alleged robbery took place at night when the complainant was riding his bicycle home. Given the circumstances in which the robbery took place, I will endeavour to find if the purported recognition was free from error. I will be guided by the celebrated decision of Lord Widgery in the case of **REGINA Vs. TURNBULL & OTHERS - [1976] 3 ALL ER 549** where he observed as follows:
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> ***Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example 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 o the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.***
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> ***Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but,***

even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

In the instant case, **SEPEPE OYENGO** (PW2) was not interrogated sufficiently to inform the court whether he was still riding his bicycle or had alighted at the time of the purported recognition, what duration he had observed the people he said he recognized, whether he directed the spotlight on their faces or not et cetra. Without such evidence being elicited, it is not safe to assume that his purported recognition was flawless. We all know that a robbery experience is usually nasty and the circumstances in which it is perpetrated is anything but friendly. It was not safe to convict the appellants on the basis of the evidence of the complainant without corroboration.

The appellants were charged under section 296(1) which provides:

Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

The learned trial magistrate erred in sentencing the appellants to death yet the section 296(1) of the Penal Code carries a maximum of fourteen years imprisonment. This is an illegal sentence.

From the foregoing analysis of evidence on record, I quash the conviction and set aside the sentence. Each appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 22nd day of June, 2017.

KIARIE WAWERU KIARIE

JUDGE