



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

**CRIMINAL APPEAL NO.200 OF 2011**

**BETWEEN**

**RAJAB AMUKOYA ASHIKOMELA.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Being an appeal from original conviction and sentence in Kakamega Chief Magistrate's Criminal Case No.1644 of 2010 delivered by M.I.G. Moranga SRM on 25/08/2011)**

**J U D G M E N T**

**Introduction**

1. The appellant herein was tried, found guilty and convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars thereof being that on the 25<sup>th</sup> day of June 2010 at Kambi Mwanza village along the Kakamega/Webuye tarmac road Kambiri location Kakamega East District within Western province jointly with others not before the Court being armed with an AK 47 rifle and a pair of handcuffs robbed ZABLON BURUDI [of] cash kshs.123600/=, a pair of black shoes, one Nokia 1208 mobile phone and one bar soap all valued at kshs.134549/= and immediately after the time of such robbery beat the said ZABLON BURUDI.

2. In count11, the appellant was charged with [im]personating a Public officer contrary to Section 105 (b) of the Penal Code, the particulars thereof being that on the 25<sup>th</sup> day of June 2010 at Kambi Mwanza village, along Kakamega/Webuye tarmac road, Kambiri location in Kakamega East District within Western province falsely presented himself to a person employed in the Public Service namely a Police officer and assumed to arrest and handcuffed ZABLON BURUDI.

3. The appellant denied both counts and during the ensuing trial at which the Prosecution called 3 witnesses, the appellant was found guilty and convicted on both counts, but sentenced to 25 years in jail. There was no indication by the learned trial Court as to how the 25 year jail term was to be appropriated between the two offences.

**The Appeal**

4. The appellant being aggrieved by both conviction and sentence brought this appeal on the following 7 home-made grounds:-

1) THAT, I pleaded not guilty to the appended charges (sic)

- 2) THAT the trial Magistrate erred in law and facts in convicting me on defective charge sheet.
- 3) THAT the trial Court failed to notice that the investigating officer in [this] case relied on hearsay and rumours as he himself never did investigation.
- 4) THAT the learned trial magistrate erred in law and fact by failing to note that the appellant was not sufficiently served by Prosecution statements before proceeding with the case as stipulated by the new Law.
- 5) THAT the learned trial Magistrate erred in Law and facts by failing to note that the appellant was not fully represented by Counsel and the appellant was not fully conversant to the language used in Court.
- 6) THAT the Court erred in law and facts by arriving at the decision based on believe (sic) and anticipations not considering that even the arresting officer did not testify as a witness.
- 7) THAT the Court erred in law and facts by rejecting my alibi defence which sufficiently created a reasonable amount of doubt as to the strength of the Prosecution case.

5. The appellant therefore prays that the appeal be allowed, the conviction quashed and the sentence of 25 years imprisonment set aside.

6. On this appeal which is a first appeal, this Court is under a duty to re-hear the appellant's case with a view to reaching its own conclusions in the matter and also with a view to determining whether the conclusions reached by the learned trial Court were supported by the Law and the facts. In rehearing this case this Court has to remember that it had no opportunity of either seeing or hearing the witnesses, an opportunity which only the trial Court had. In the case of **Mwangi – vs- Republic [2004] 2KLR 28**, The Court of appeal expressed this duty as follows:

- 1) An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate Court's own decision on the evidence.
- 2) The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.
- 3) It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Courts findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial Court had the advantage of hearing and seeing the witnesses. These principles have also been set out in **Okeno –vs- Republic [1972 EA 32]** and also in **Koech & Another –vs- Republic [2004] 2KLR 322**.

### **The Prosecution's Evidence**

7. The complainant in this case, Zablon Burudi who testified as PW1 told the Court that he was a sugarcane, maize and poultry farmer and that he grew sugarcane for West Kenya Sugar Company. He recalled that on 25/06/2010 at about 9.00a.m., he went to West Kenya Sugar Company to receive a cheque of kshs.123600/= being payment for 4 trailers of sugarcane which he had delivered to the company. At the company premises he was told that his payment had to be processed through Barclays Bank at Kakamega, so at about 11.00am on that same day he presented himself at Barclays Bank Kakamega and was paid the money. After receiving the money he went to a Safaricom shop to register his simcard and also bought a Nokia 1208 worth 2000/= for his daughter. He then walked to Mama Watoto Supermarket where he bought himself a soda and drank it. He also bought 1 kilo of Mumias sugar, 1 kilo of Ketepa tea leaves, 1 packet of Familia Wimbi flour, a big kiwi black shoe polish tin a shoe brush, methylated spirit, cotton wool toilet paper and a bar of soap, all valued at ksh.700/=.

8. After the shopping the complainant (Zablon) went to the bus stage and boarded a vehicle to take him home. He sat next to the conductor on the second row of seats. There was also a neighbour of Zablon's in the same vehicle. Then at around Thomas Estate, he heard noise outside the vehicle and saw that some people were following them in another vehicle. They stopped the vehicle in which Zablon was and the people in the other vehicle, one of whom had an AK 47 rifle and the other had a pair of handcuffs came out. The two people announced that they were Police officers and that they were following a teacher who was travelling in the same vehicle as Zablon. Then they quickly pointed at Zablon and asked him to step out of the vehicle. He did so. They then handcuffed him. They pushed him into the waiting vehicle registration number KBK 152R. Once in the vehicle, Zablon was ordered to lie down on the back seat of the vehicle and was sandwiched by the two "police officers" as the vehicle was driven back towards Kakamega. In the meantime, the two "police officers" frisked him and took away all the money he had plus the mobile phones and other personal effects. That is when Zablon realized that the two "police officers" were actually thugs and he told them "I thought you were police, so you were actually fending for yourselves. Take all that you want".

9. The "police officers" also beat Zablon on the legs using a hammer. He prayed even as they beat him. When it became hot in the vehicle, he removed his coat. The two "police officers" then held him firmly on the face and the neck, but he bit one of them on the wrist. He pleaded with the "police officer" who sat on his right to spare his life and he was given the assurance that no harm could befall him. By this time Zablon could not tell where he was. The "police officer" sitting on Zablon's left asked him to choose life or death. The vehicle then stopped and he was removed from the vehicle they also removed a piece of cloth that they had used to cover him and ordered Zablon to look down as he also removed Zablon's shoes. They then told him to run away, and although he was weak because of the beatings he had to obey. As Zablon ran, he saw two people harvesting sand and asked them for the name of the place and was told the place was Eshisiki. A woman gave Zablon Kshs.50/=. He also discovered there was still ksh.100/= in the pocket of his jacket. He took a motor cycle and went to Kakamega Police station and reported the incident. After making the report the CID officers gave him kshs.75/= to go to Kabras.

10. Zablon also testified that on 05/09/2010, he attended an identification parade which was conducted at Kakamega Police station by Number 216313 Chief Inspector Jacob Mutahi who testified as PW3. He said he identified the "police officer" who had handcuffed him during the robbery. Zablon stated that he was able to identify the said "police officer" by speaking to him and by noting his dark complexion and slim frame. He also said he spoke to him and recognized the voice as the one he heard on the day of the robbery; further that he also asked him to walk and saw that it was the same "police officer" who had handcuffed him and appeared like a nice good Samaritan during the robbery. Zablon also stated that he talked to the "police officer" at the parade and that when the members of the parade were asked to say "Toa Pesa" Zablon was able to recognize the voice of the "police officer." Zablon also said that he could not forget the shape of the face and head of his assailant. That assailant according to Zablon is the appellant.

11. During cross examination, Zablon testified that the attack took place at about 1.00pm and that it was witnessed by among others, the wife of one Jacob Lumbasi. She was a retired teacher but was not called to testify. He also described the clothes the appellant wore on that fateful day; jeans trouser, blue, black shoes and a red, black and whitish striped shirt.

12. Zablon also testified that during the ordeal, and until they covered his face, he had seen the appellant's face. Regarding the parade, Zablon told the Court that the members of the parade were of different heights, size and complexion, though all of them wore no shoes.

13. When Zablon was recalled, he produced for identification: a statement from West Kenya Sugar Co. Ltd – MFI – P1, the various receipts for the purchases he had made while at Mama Watoto Supermarket MFIP2, 3,4, and 5 and the permit to cut cane as MFI P 6.

14. The identification parade was conducted by Chief Inspector Jacob Mutahi PW3 who was the DCIO Mumias – Butere District. PW3 testified that before he conducted the parade, he informed the appellant about his right not to participate in the parade and that after he agreed to participate, Zablon was brought

to where the parade was being conducted in the basement of Kakamega Police station. That the appellant chose to stand between member number 7 and member number 8 and that Zablun was able to identify the appellant by touching him on the shoulder, after which the appellant expressed his satisfaction with the conduct of the parade and then signed the parade form which was produced as exhibit P9.

15. In answer to questions by the appellant, PW3 stated that the parade members were almost of same height and complexion as that of the appellant and that the appellant said he did not require a lawyer or witness to the parade. PW3 also testified that in making up the parade, he considered age, clothes, height and general physique of the members.

16. PW2 was Number 61411 Sgt Maurice Amwayi of CID office, Kakamega, and the investigating officer in this case. He testified that on 25/06/2010, he received a report of the robbery incident herein from Zablun who reported that he had been robbed of kshs.123600/= by a gang of 4 people who were travelling in motor vehicle KBK 152R. After receiving the report PW2 recorded Zablun's statement and thereafter referred him to Kakamega PGH for treatment.

17. PW2 also produced some documents to support the case. These were exhibit P1, P2, P3, P4,P5,P6,P7 and P8 being letters and other documents from Barclays Bank Kakamega and from West Kenya Sugar Co. Ltd. PW2 also stated that during the investigations, he established that the appellant had been arrested. On PW2's request, the appellant was escorted to Kakamega Police station for identification parade which he (PW2) also attended and during which the appellant was identified by touching.

18. During cross examination, PW2 stated that when he saw Zablun Zablun had swollen knees though Zablun never brought back any medical sheet to confirm treatment for the same despite of having been referred to hospital. PW2 also testified that Zablun's first report did not have a description of the appellant. Though his witness statement contained the same.

19. At the close of the Prosecution's case the trial Court ruled that the appellant had a case to answer and after due compliance with Section 211 of the Criminal procedure Code, the appellant was put on his defence.

### **The Defence Case**

20. The appellant gave sworn evidence but did not call any witnesses. He testified that he was 39 years old and was both a farmer and a timber merchant. He stated that he was arrested on 04/09/2010 at about 10.00a.m and taken to Bookers Police station before being transferred to Mumias Police station on 06/09/2010. That on 08/09/2010 he was taken to the Basement at Kakamega Police station for identification parade which he said was not conducted properly. That before the parade, he was taken through the office at Kakamega Police station where he saw Zablun and a little while thereafter, Zablun appeared and identified him. The appellant also testified that when he tried to object to the identification parade, he was threatened with beating by PW3 and therefore that he had to sign the identification form under duress.

21. The appellant also challenged Zablun's testimony with regard to the description of the person who robbed him as being tall, stout and of brown complexion. He said that such description did not fit him. The appellant also wondered why Zablun who claimed to have been robbed during daytime did not call other witnesses to support his claims or even to avail the car that was allegedly used by the appellant and his accomplices. It was the appellant's case that no money was stolen from Zablun and that if the robbery had taken place as alleged, Barclays Bank would have confirmed the same. He also alleged that PW3 did not conduct the identification parade according to the rules.

22. During cross examination, the appellant testified that he did not raise the issue of the irregularity of conducting the parade with PW3 during cross examination of the said PW3. He reiterated that he had seen Zablun at the DCIO's office before the parade was conducted although, according to the appellant Zablun changed into a suit before he appeared at the parade.

## **Judgment of the Trial Court**

23. After carefully considering the evidence that was placed before it, the learned trial Court was satisfied with Zablon's evidence and found that the appellant had been properly identified both during the robbery which took about 2 hours between 1.00pm and 3.00pm when the robbers took him out of the car at Eshisiku. The learned trial Court was also satisfied that Zablon's description of the appellant suited the person the Court saw during the trial. The trial Court was also satisfied that the documentary evidence produced by Zablon was sufficient proof that Zablon was issued with a cheque by West Kenya Sugar Co. Ltd and that the cheque was to be encashed at Barclays Bank Kakamega as stated by Zablon. The trial Court was satisfied that the offence of robbery with violence contrary to Section 296 (2) of the Penal Code was proved beyond reasonable doubt, hence the conviction of the appellant.

## **The Submissions**

24. When this appeal came before us on 03/03/2015. The appellant appeared in person while the State/Respondent was represented by Mr. S. Ngetich. The appellant filed written submissions which we have carefully read through. In addition, the appellant stated that at the time of his arrest he was not found in possession of anything that could have connected him with the robbery. He also submitted that during the first identification parade which was held at Mumias Police station Zablon failed to pick him out and that it was only during the second parade at Kakamega Police station that Zablon picked him out simply because of having seen him at Mumias Police station.

25. The appellant also submitted that the identification parade conducted at Kakamega Police station was not done well for the reason that the members of the parade were not of same height and also added that without his indispensable spectacles Zablon could not have identified him. Finally the appellant submitted that Zablon did not describe his attackers with the first report and as such it cannot be said that he knew who his attackers were.

26. In his response to the appellants submissions Mr. Ngetich submitted with regard to ground 2 that the issue of a defective charge sheet was not raised during the trial and could therefore not be raised at the appeal stage. Further that even if the charge sheet was defective, the same was curable under the provisions of Section 382 of the Criminal Procedure Code. Counsel urged the Court to dismiss the ground. We totally agree with Counsel on this issue.

27. With regard to grounds 3 and 6 in which the appellant alleged that the trial Court based its findings on hearsay evidence and on speculation Mr. Ngetich submitted that the record speaks for itself. As to ground 4 in which the appellant alleged that he was not supplied with witness statement, Counsel submitted that the appellant was represented by Counsel during the trial and the issue of not having been supplied with statements did not therefore arise. Counsel also urged this Court to disallow ground 5 of the petition of appeal since the appellant was represented by Counsel and that the language used during the trial was Kiswahili and English the two languages the appellant told us, he was conversant in.

28. Concerning ground 7 in which the appellant alleged the trial Court did not consider his alibi defence Counsel submitted that the appellants defence did not raise such a defence which could have been considered by the Court.

29. On the other issues raised by the appellant during his oral submissions, and in particular, the appellant's allegation that 2 identification parades were conducted one at Mumias police station and the other at Kakamega Police station, Counsel submitted that if indeed there were 2 parades then the appellant should have put questions to PW3 about the same. Counsel submitted that this allegation by the appellant was an afterthought which should be ignored

30. On whether, or not the appellant was clearly and properly identified by Zablon Counsel submitted that at the commencement of the robbery at 1.00pm on the material day, Zablon had his specs on and clearly saw the appellant and that Zablon's specs broke long after he had clearly identified the appellant and noted on which side of him he sat as the car sped off towards Kakamega, and until he was offloaded at

Eshisiki.

31. Finally Counsel urged the Court to enhance the sentence meted out to the appellant by setting aside the 25 years imprisonment and substituting it with the sentence of death as by law established.

### **Issues for Determination**

32. The central issue in this case is whether the appellant was properly identified. The other issue is whether failure to call the arresting officer in this case was prejudicial to the appellant. The third issue for determination is whether the identification parade at which Zablon picked out the appellant was properly conducted and finally whether the ingredients of the offence of robbery under Section 296 (2) of the Penal Code were proved, and if so, what the proper sentence upon conviction is.

### **Analysis and Findings**

33. On the issue of identification during the alleged robbery, Zablon stated that the vehicle in which he was travelling along with other passengers was stopped at 1.00pm by the appellant and another man who came out of motor vehicle KBK 152R. The attack therefore took place in broad daylight. In part of his evidence in Chief, Zablon stated this:

**“At a place in around Thomas State, I heard noise from outside the vehicle there were people following us with a vehicle. Our vehicle stopped. One had an AK 47 rifle. The other had a pair of handcuff and stopped the vehicle. They said they were police officers and were following a teacher in our vehicle. They quickly pointed at me and asked me to alight from the vehicle. They handcuffed me immediately. The driver of the smaller vehicle, a salon and grey it was KBK 152R remained. The two who arrested me said I had done something at Kakamega. I boarded the vehicle. I was pushed into the vehicle and ordered to lie down on the back of the vehicle. The brown gentleman sat on one end and one the other end immediately the vehicle moved back towards Kakamega direction.”**

34. In our considered view Zablon had ample opportunity to see the “two policemen” clearly. There is no indication that their faces were disguised in any way. In another part of his testimony Zablon stated this regarding the appellant. “I saw the one who was nice like a good” Samaritan. I spoke to him at the parade I saw he had been on the right side. He had handcuffed me when I left the Nissan. The other one was with an AK 47 rifle. As for the accused person, I saw him well. He was dark. The shape of his head, sharp voice and he was slim looking. Even at the parade I asked him to walk while he did and I saw he was the one. I had an opportunity to recognize him. He is the one who had the handcuffs and put on my hand. Another removed the handcuff when they made me alight from the Nissan as the other with a gun held me.”

35. While we are aware of the possible dangers in identifying a stranger as stated in **Odhiambo –vs- Republic [2002] 1KLR 241** and **Wamunga & others –vs- Republic [1989] KLR 424** we are fully satisfied in the instant case that Zablon saw, spoke with and then identified the appellant both when he was being handcuffed, during the trip that took them to Eshisiki area where they made him to alight from the vehicle before removing the handcuffs from him. There was no mistaken identify at all in this case. We therefore find that the appellants complaint that the trial Court relied on hearsay evidence and rumours in convicting him is not correct.

(b) whether failure by the Prosecution to call the arresting officer was prejudicial to the appellant

36. In the case of **Muiruri & 2 others –vs- Republic [2004] 1KLR 274**, the Court of appeal held, *inter alia* that “a Prosecutor is duty-bound to call witnesses necessary to establish the truth in a case. The failure to call the officer who arrested the first accused was a serious omission. Such an omission, in an appropriate case, might lead to the quashing of an otherwise sound conviction but not in this case. The appellants were before the Court, were present when witnesses testified and were given a chance to cross examine witnesses and to testify on their own behalf.”

37. We fully agree with the above. However, the appellant herein was represented by Counsel who put questions to all the witnesses. In any event, we find that the appellant who carried out the robbery in broad daylight was clearly and properly identified by Zablun in such detail that we find no reason to conclude that the Prosecution's failure to call the arresting officers resulted in any miscarriage of justice. We are satisfied with that visual identification of the appellant by Zablun.

(c) whether the identification parade was properly conducted.

38. The submissions of the appellant are that the parade was not properly conducted on two grounds: That he was not given an opportunity to have a witness during the parade and two that Zablun saw him twice, one at Butere police station and next at the office before Zablun was called in to identify him at the basement of Kakamega Police Station. The appellant also alleged that he was made to sign the parade identification form by force and with threats of being beaten if he failed to sign the form. The appellant

also alleged that the members of the identification parade were not of the same height or age or colour. We have ourselves reconsidered the evidence on identification and note that number 61441 Sgt Maurice Amwayi PW2 of CID office at Kakamega was also present at the parade. He is the one who invited Zablun to the parade. It is not clear why PW2 had to attend the parade. Such presence could cause some panic on the part of the appellant since PW2 was the investigating officer. We however do not agree with the appellant that he was forced to sign the identification parade forms as Counsel representing the appellant did not make any such suggestion to the witness during cross examination. We however find some contradiction in the testimony of Zablun and that of PW3 as regards the composition of the parade members. It was not proper for PW3 to put people of different ages, heights and complexion onto the parade.

39. The above findings lead us to the conclusion that the identification parade was not properly conducted but such conclusion notwithstanding we are satisfied that even without the evidence of the identification parade, the appellant was properly and clearly identified by Zablun. In this regard, we are reminded to bear in mind the case of **Wendo –vs Republic [1953] 20 EACA 166.** We are satisfied that Zablun's visual identification of the appellant during the robbery coupled with the dock identification and the facts and circumstances of the case have convinced us beyond doubt that the appellant was the second of the two "police officers" who commanded Zablun to disembark from the Nissan and that he was the one who handcuffed Zablun before the latter was pushed into the vehicle that sped off with him towards Kakamega where Zablun was alleged to have done something wrong.

d) whether the ingredients of the offence of robbery with violence were proved.

40. Under Section 296 (2) of the Penal Code, the offence of robbery with violence is established in any one of the following circumstances:-

I. If the offender is armed with any dangerous or offensive weapon or instruments; or

II. If the offender is in company with one or more other person or persons; or

III. If, at or immediately before or immediately after the time of the robbery, he wounds, beats or uses any other personal violence to any person.

41. In the instant case, there is evidence that the appellant was in the company of one or more persons during the robbery and that apart from the handcuffs they were armed with an AK 47 rifle which by any description is an offensive and dangerous weapon. Although Zablun alleged that he was hammered on the legs, he failed to produce evidence to that effect, but the fact that the appellant committed the robbery while he was in the company of others is sufficient to prove the offence of violent robbery.

(e) The other issues raised by the appellant

42. We have carefully considered the other issues raised by the appellant during the hearing of the appeal

such as contents of the O.B and we find that nothing turns on these issues which we have also covered in the preceding paragraphs of this judgment.

**(f) Should the sentence be enhanced from 25 years imprisonment to one of death**

43. Upon conviction of the appellant the trial Court called for a Probation officers report and also deferred sentence pending a look at relevant authorities on sentence and in particular the now well known case of **Godfrey Ngotho –vs- Republic**. Whereas that case may have been good law then, the same has been overtaken by the more recent 5 Judge Bench Court of appeal decision in the case of **Joseph Njuguna Mwaura & Others –vs- Republic Criminal Appeal No.5 of 2008** until and unless the law is changed the death penalty still remains a legitimate sentence under the Penal Code. Mr. Ngetich urged this Court to enhance the sentence so as to comply with the law. We ourselves have considered the record and find no justification for the sentence imposed by the trial Court in the face of the provisions of Section 296 (2) of the Penal Code. Accordingly we make the following orders:-

- 1) The appellant's appeal on conviction is dismissed.
- 2) The sentence of 25 years imprisonment is quashed and in its place we sentence the appellant to suffer death as by law established. The conviction on Count 11 is left in abeyance.
- 3) Right of appeal within 14 days from the date of this judgment.

42. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 26th day of January 2016.

**RUTH N. SITATI**

**ANTONY C. MRIMA**

**J U D G E**

**J U D G E**

In the presence of:

Present in person Appellant

Mr. Omwenga (present) Respondent

Mr. Okoiti - Court Assistant