



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APPEAL NO. 35 OF 2016**

**JAMES MARUGA MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in criminal case No.495 of 2014 of the Principal Magistrate's Court at Kangema by Hon. J.O Magori – Principal Magistrate)*

**JUDGMENT**

The appellant, **JAMES MARUGA MWANGI**, was convicted for the offence of robbery contrary to section 296 (2) of the penal Code.

The particulars of the offence were that on 22<sup>ND</sup> December 2014 at Thuita location, Mathioya District of Murang'a County, jointly with others not before court while armed with a panga and sticks robbed **LYDIAH RUGURU KAMAU** of a Nokia mobile phone valued at Kshs.3000/= and cash Kshs. 12800/= and at or immediately before or immediately after the time of the said robbery used actual violence to the said **LYDIAH RUGURU KAMAU**.

He was sentenced to suffer death.

He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by rejecting his defence on allegations that he did not call witnesses to support his defence.
2. That the learned magistrate erred in law and in fact in convicting the appellant when there was no explanation as to how the arresting officers identified him.
3. That the learned magistrate erred in law and in fact in convicting the appellant when the prosecution evidence was contradictory.

The state opposed the appeal through Mr. Njeru, the learned counsel.

Briefly the facts of this case are as follows:

At about 3 am or thereabouts, the complainant was called from outside by a person who identified himself as Kata. When she opened the door, she was using her phone's spotlight. Kata hit her at the eyes with a blow. Kata then told her that they wanted money. They all started assaulting her. She lost consciousness.

In his defence the appellant denied any involvement in the offence. He testified that at the time of the offence he was in Nairobi.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and 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 VRS. REPUBLIC 1972 EA 32**.

The complainant contended that she recognized the voice of the appellant when he called her from outside. She was roused from her sleep by the caller. There was no attempt by the prosecution to test whether when she heard the voice she was fully awake. This was very material aspect of evidence for some people become disoriented when roused from sleep. In the case of **Simon Mbelle vs. Republic 1 KAR 578** the Court of Appeal observed the following in respect of purported voice recognition:

**"In admitting and relying on such evidence necessary care must be taken to ensure the following. (a) The voice that was heard was that of the accused; (b) The witness was familiar with it and recognized it;"**

In the instant case though the complainant said she was familiar with the voice of the appellant, I am hesitant to make a finding that the voice that she heard was that of the appellant. This is because the police recorded that she informed them that she was roused from sleep by James Macharia which she denied during cross examination.

The other evidence that linked the appellant to the robbery was the purported visual recognition at the door.

It is common knowledge that robbers strike with speed. When the complainant testified that she recognized the appellant by using her phone's spotlight, several questions went unanswered. These questions were posed by Lord Widgery in the celebrated case of **Republic. vs. Turnbull [1976] 3 ALLER 549** where he stated as follows:

**"Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. 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 to the police by the witness when first seen by them and his actual appearance?"**

It was the duty of the prosecution to elicit evidence to prove that the purported recognition was free from error. This was not done. It was not safe to rely on the complainant's evidence of the purported recognition.

There were material contradictions between the evidence of the complainant and that of her employer(PW2). During cross examination the complainant testified that she knew the appellant as Kata and did not know him by any other name. It also came to light that the investigation diary indicated that she informed the police that one of her assailants was James Macharia. Beatrice Muthoni Jengo(PW2) testified that the complainant informed her that one of her attackers was James Marugua alias Kata. The trial court ought not to have overlooked these contradictions.

The learned trial magistrate shifted the burden of proof to the appellant. The prosecution had the onus of proving their case without resorting to look at the weakness of the defence. Once an accused person has raised an alibi, the much the trial court can do is to weigh it against the evidence on record. It is not open to the court to decide the same on the evidence the accused has failed to call for this would be tantamount to shifting the burden of proof.

From the foregoing analysis of the evidence on record, I find that the conviction was not safe. The same is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

**DATED at MURANG'A this 24<sup>th</sup> day of June 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**