



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 29 OF 2016 ALSO REFERRED TO AS GARISSA CRIMINAL  
APPEAL NO. 56 OF 2014**

*(From original conviction and sentence in criminal case No. 564*

*of 2005 of the Chief Magistrate's court at Garissa – S. M. Kibunja SPM).*

**ABDI NOOR ALI ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

I will start by putting on record that this is an old matter as the trial was conducted in Garissa Magistrate's court Criminal Case No. 564 of 2005 and judgment delivered on 1<sup>st</sup> February 2007. The delay in bringing this appeal to Garissa was caused by the fact that the initial appeal was filed in Meru High Court and, at one point, this court was informed that the Meru file could not be traced after the original file from the Garissa magistrate's court had already been forwarded to Meru. The Meru High Court file was later forwarded to Garissa together with the original trial court file by a letter from the Deputy Registrar of Meru High Court dated 23<sup>rd</sup> March 2016 and that was the time this appeal was fixed for hearing.

The appellant was tried in the Magistrate's court at Garissa with 6 counts of robbery with violence contrary to section 296 (2) of the Penal Code and one count of attempted robbery with violence contrary to Section 297 (2) of the Penal Code.

He denied all the charges. After a full trial, he was convicted by the trial court but without stating whether he was convicted of all the 7 counts or some of them, the trial court went ahead to sentence to hang as provided for by the law, with no indication that any sentence was held in abeyance.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. His petition of appeal was filed by C.P. Onono and Company Advocates on the following grounds:-

1. Evidence touching on identification of the appellant was unreliable and contradictory.
2. Learned trial magistrate erred by not giving due weight to the evidence on record which gives substance to the suspicion that the prosecution witness may have been coached.
3. The learned trial magistrate erred by not considering the possibility that the prosecution witnesses may have been mistaken in the alleged identification of the robber.

4. The learned trial magistrate erred by not wondering, to the benefit of the appellant, why at the time of arrest the appellant was simply resting under a tree and had neither gun nor a single item of the items allegedly stolen from the prosecution witnesses.

5. The learned trial magistrate erred by ignoring the significance of the fact that when arrested the appellant had a substantial cash amount of his own which none of the prosecution witnesses claimed ownership of and possession of which he could account for and did account for in his defence.

6. The trial magistrate erred by ignoring, to the detriment of the appellant, the significance of the place of arrest, circumstances of arrest as well the conduct of the appellant at the time of arrest.

7. The learned trial magistrate erred by failing to give the appellant the benefit of the doubt which he was clearly entitled to.

8. That generally the conviction was against the weight of evidence available.

The appellant also filed written submissions to the appeal. At the hearing of the appeal, the appellant orally highlighted his submissions in person. He emphasized that he was not positively identified and that he was arrested in possession of money which he earned from the sale of camels. He stated that his Identity Card and his money were taken by the police and that he was found in possession of no gun.

Mr. Okemwa for the State stated that though the appellant was charged with 8 counts, count 7 and 8 did not have any particular of offence. In addition, identification evidence was not satisfactory. He also stated that there were a number of contradictions in the evidence of the prosecution witnesses. Counsel submitted also that the issue of loss of Kshs 23,300/- by the appellant was captured in the judgment of the trial court, and left the matter to this court to decide.

In brief, the facts of the case are that on the 19<sup>th</sup> of March 2005 and 20<sup>th</sup> March 2005, a number of people were robbed by a person armed with a rifle along the Garissa Fafi road. The incident occurred during the day. The assailant however disappeared into the bush.

On the 26<sup>th</sup> March 2005, some elders in Liya area saw the appellant resting under a tree after police had alerted them that there was a shifter in the area. They arrested the appellant and handed him over to the police. He was searched and found in possession of Kshs. 23,300/-, and Identity Card and a voters card which were taken by the police. An identification parade was later conducted on 29<sup>th</sup> March 2005 and two of the complainants pointed at the appellant as the robber because he had a scar on the head and a deformed leg. The appellant was thus charged with the offences.

In his defence he denied the offence and said that the money he was found with came from the sale of camels.

This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences – see the case of ***Okeno -vs- Republic [1972] EA 32.***

I have re-evaluated the evidence on record. The burden is always on the prosecution in a criminal case to prove an accused person guilty beyond any reasonable doubt. An accused person does not have a burden to prove his or her innocence. See the English case of ***Woolmington Vs. DPP [1935] AC 462.***

Having considered the evidence, I find that none of the victims informed the police that he or she could identify the culprits if they saw him. Though the incident occurred in broad day light, the victims appear to have been terribly scared. None of them attempted to give to the police a prior description of the culprit. The appellant was arrested days after the incident by members of the public while seated under a tree unarmed. The arrest did not thus connect the appellant to the offences.

Though two prosecution witnesses stated that they identified the appellant in an identification parade, in

my view the identification was not positive. They said that they identified him because he had a scar on the face and a deformed leg. However, there is no evidence that the members of the identification parade were of similar appearance ie that they had a scar on the face and a deformed leg. It cannot thus be said that the people at the identification parade were of similar appearance to that of the appellant. Therefore in my view the identification parade was an exercise of futility as the participants were not of similar appearance as required by law.

The appellant also gave sworn defence testimony and called one witness. He gave an account of the money which was found in his possession. He said that he sold his family camels and that explanation was believable. He called a witness who supported the version of the appellant about the sale of the camels as well as the repurchase of the said camels by the family members. Even if the appellant had done a mistake of selling the family camels, that was a separate family issue and could not connect him to the serious charges for which he was convicted and sentenced.

In convicting the appellant the trial magistrate stated that the evidence of PW3, PW4, PW5, PW6 and PW7 together with PW1, and PW2 corroborated each other. Indeed, all these witnesses were the alleged victims of the robbery. Though they were robbed by a person carrying a rifle which was a dangerous weapon, none of the said witnesses claimed in evidence that he or she was able to identify the culprit. They only agreed that they were robbed by an armed person. Therefore they do not connect the appellant with the offence, and therefore there was no corroborative evidence connecting the appellant to the offences.

The learned magistrate also did not weigh the prosecution case against the defence story to find which version is believable or not believable. The learned magistrate merely dismissed the appellant's defence by saying that even if the appellant sold camels, he could not be removed from the scene. There was no evidence that the appellant was at the scene of the robbery. He was arrested under a tree some days later. This finding of the trial court was thus a mis direction on the part of the magistrate.

In addition to the above errors, the magistrate did not comply with the requirements of the law on the convictions as set out under section 169 (2) of the Criminal Procedure Code (Cap. 75). The magistrate should have stated whether the appellant was convicted on some or all the counts. He should also have stated on which count he sentenced him to suffer death, and on which count the sentence was suspended. This was a grave error that created confusion and miscarriage of justice.

As regards the complaint of the appellant about his money, it is clear from the record that the money recovered from him was produced in court as an exhibit through PW14 Snr. Sergeant Jude Mule who produced Kshs 23,300/=, an Identity Card and a voters card as P. exhibit 2, 3, and 4. Therefore those exhibits should be in court, and if the appellant wishes to claim them, he should claim them from the court.

To conclude I find that the prosecution did not prove any of the charges against the appellant beyond reasonable doubt. I thus allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Garissa this 23rd day of November 2016.**

**GEORGE DULU**

**JUDGE**