**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO.50 OF 2015**

**LAAS LENGIMA.................................................APPELLANT**

**VERSUS**

**REPUBLIC......................................................RESPONDENT**

***( From the original conviction and sentence in criminal case***

***No.1 of 2013 of the Chief Magistrate's Court at Isiolo***

***by Hon. J.M Irura – Ag. Principal Magistrate)***

**JUDGMENT**

**LAAS LENGIMA,** the appellant was charged with six counts of robbery with violence contrary to section 296 (2) of the Penal Code. He was charge with another offence of being in possession of a firearm contrary to section 89(1) of the Penal Code and also charged with an offence of resisting arrest contrary to section 253 of the Penal Code.

The particulars of the offences were that on 13th January 2013 along Isiolo Marsabit highway jointly with others not before court while armed with an AK 47 rifle, robbed some six complainants of their property and at or immediately after the time of such robbery wounded some of the complainants and in the process killed Jamal Kassim Mughe.

On 5th June 2013 at Ipus livestock market he resisted lawful arrest.

The appellant were found guilty of the offences and sentenced to suffer death in respect of robbery. The sentences in count 7& 8 were to remain in abeyance. He now appeals against both conviction and sentence.

The appellant was represented by M/s Thibaru, learned counsel. She raised three supplementary grounds of appeal as follows:

> 1. That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellants was not positively identified.
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> 2.That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.

3. That the learned trial magistrate erred in law and in fact by convicting the appellant on insufficient evidence.

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

The facts of the prosecution case were briefly as follows:

The complainants were travelling in a lorry. When they were between Archer's post and Sereolipi, they were attacked by some three robbers who were armed with a gun. One of the travellers passed on while others were wounded in the process of the robbery.

In his defence the appellant denied involvement in the offences and pleaded an alibi.

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.**

This is a case which revolve around the issue of identification. Lord Widgery, CJ in the celebrated case **REPUBLIC vs. TURNBULL [1976] 3 All ER 549**

> **First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.**
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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. 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.**

I have quoted extensively for this case has been followed by our superior courts. So far, it is the best authority on issues of identification and recognition. I will first of all address the issue of identification at the scene.

The evidence of Joseph Mugambi Akula (PW3) is that they arrived at Sereolipi at about 6 AM and that it was still dark. He said one could see but not very far. He saw some three men. Two of them were armed with guns. His next statement that he first saw them from a distance of 1 Km is clearly contradictory. If it was still dark and in his own words he could not see far, how come again that he was able to see from

such a distance? This is what he must have testified to for the original record reads the same. When he was called to attend an identification parade he was able to identify the appellant for he was the one who robbed him of a mobile phone and was armed with an AK 47 rifle at the time of the robbery. He said he was able to identify him due to his ears and stature. During cross examination he conceded that he did not record that he was robbed of his mobile phone. He attributed this to pain. He still did not record this in his second statement.

Jeremiah Nkunja (PW4) testified that the robbery took about 10 minutes. Later at an identification parade he was able to identify the appellant from his swollen earlobes.

The evidence of George Lipaliwal Lemarkato (PW6) is that on 13 .1.2013 after the robbery, they started to follow some foot prints that took them to a manyatta, where some morans were. One of the morans on seeing them ran away. He left behind a firearm. The morans who were left behind are the ones who told them the name of the moran who had fled. They also gave them his description. He also added that they were able to identify his ears as he ran away. This he said was from a distance of 50 meters. although this is what P.C John Irungu (PW8) testified to, I find that this contention is not possible. One is not able to appreciate the earlobes of another from behind. In this case the distance from the fleeing suspect complicated the matter. It is clear from the evidence of PW6 that a description had been given to them. What they purported to have seen about the fleeing suspect is what they had been told. They simply rehashed it.

It was evident that the victims of the robbery were not in a position to identify any of their attackers because of the amount of light at the time, the short duration they were with the robbers and the obvious shock. This explains why none of them gave the description to the police at the earliest opportunity. To rely on such mode of purported identification is very dangerous.

The failure to call the morans who identified the fleeing moran as the appellant was fatal to the prosecution case. It was incumbent for such witnesses to be called and have their evidence tested.

Before an identification parade is conducted, it is important for a witness to describe the culprit he alleges he can be able to identify. This was stressed by the court of appeal in the case of **AJODE V. REPUBLIC [**GICHERU CJ, O’KUBASU JA& ONYANGO OTIENO AG.JA**] [2004] 2 KLR 81**, 86 observed as follows:

**It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade (see case of *Gabriel Kamau Njoroge V* Republic (1928-88) 1 KAR 1134).**

It amounts to be an exercise in futility to conduct such an identification parade without a check list from the witnesses. The description by the witnesses is the one that gives the possible idea as to what the culprit should look like and who to pick as members of the parade.

For any identification parade to be meaningful, the members of the parade should be as near as possible have similar features, be of the same stature and complexion. In the instant case this was not the position. The witnesses testified that the members of the parade was so different.

I make a finding that the identification parade was not conducted as is required. It was prejudicial to the appellant.

The learned trial magistrate ought to have sentenced the appellant in only one count of robbery and order the sentence in the other five counts to be in abeyance as she did with count seven and eight.

Before a charge of resisting arrest can be established, it is the duty of the prosecution to prove that an accused person was informed that he was under arrest, after the arresting officers have identified themselves to him. In this case the evidence is not clear whether this was done or not. The appellant ought to have been given the benefit of doubts.

The upshot of the foregoing analysis is that the appeal must succeed. The conviction on all the eight counts is quashed and the sentence set aside. The appellant is set at liberty unless if lawfully held.

**DATED at Meru this 19th day of December, 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**