REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

(CRIMINAL DIVISION)

CRIMINAL REVISION NUMBER 31 OF 2015

Republic ……..…..……..…Applicant

VERSUS

Walter Otieno Ogalo. …….……..……..Applicant

RULING

In my ruling dated 21st September 2015 I held the view that the intended revision may touch on the sentence imposed upon the accused and cited the provisions of Section **364 (2)** of the Criminal Procedure Code[1] which provides that *"No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence."*

Further, in exercise of my discretion under Section **365** of the Criminal Procedure Code[2] I heard the accused on 11.11.2015. The convict urged the court to allow the sentence to stay.

I have carefully examined the entire records to satisfy myself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings. I find that in the hand written judgement at page **9**, the learned magistrate correctly stated:-

> *"I find this to be a proper case in which I exercise the discretion conferred by the law and reduce the charge to that of robbery contrary to Section **295** as read with section **296 (1)** C.P.C. as herein above.*
>
> *As to whether the offence of robbery with violence has been committed, the finding of this court is that the lesser offence of robbery has been proved….."*

However, at the last page of the judgement the learned at page **11,** the learned magistrate stated *'I find the accused guilty and convicted accordingly"* and did not state the section of the law or offence under which she was convicting, hence the apparent confusion on the sentence that led to the matter being referred to me for revision.

I find it absolutely necessary to point out non-compliance with the provisions of section **169 (2) & (3)** of the Criminal Procedure Code[3] in the lower courts judgement. The said section provides as follows:-

> **(2)** *In the case of a conviction, the judgement shall specify the offence of which, and the section of the Penal Code or other law under which, and the section of the Penal Code or other law under*

which, the accused person is convicted, and the punishment to which he is sentenced.

***(3)** In the case of an acquittal, the judgement shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.*

Clearly, Section **169 (2)** of the Criminal Procedure Code[4] cited above provides that the trial court ought to specify in the judgement the offence of which, and the section of the Penal Code or other law which, the accused person is convicted and the prescribed punishment to which the accused is sentenced. I note that the learned Magistrate did not comply with the above section, even though I hold the view that the said omission is not fatal. In my view it is a requirement under the said section that ought to be complied with.

In my view, the following are the issues for determination in the case, namely:-

i. *Whether the identification was free from error.*
ii. *Whether the evidence adduced was sufficient to support a conviction.*

Identification evidence is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence was committed. It is an established principle that there is a special need for caution before accepting identification evidence. In *Anil Phukan vs State of Assam*[5] it was held as follows:-

> *"A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone"*

A similar position was reiterated by the Court of Appeal of Tanzania in *Ahmad vs The Republic.*[6] Also discussing the same issue, the Court of Appeal of Uganda in *Okwang Peter vs Uganda*[7] held as follows:-

> *"Subject to certain well-known exceptions, it is trite law that a fact may be proved by the 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 in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is 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 possibility of error"*

The Supreme Court of Zambia in *Mwansa vs The People*[8]citing previous decisions had this to say:-

> *"it is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect, where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observations."*

> *"……..The witness should specify by what features or unusual marks if any he alleges to recognize the accused and the circumstances in which the accused was observed, the state of light, the opportunity for observation, the stress of the moment should be carefully canvased."*

In the case of *Charles O. Maitanyi vs Republic*[9], it was held *inter alia* that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care. The court in the said case added as follows:-

> *"……..There is a second line of inquiry which ought to be made and that is whether the*

complainant was able to give some description or identification of his assailants, to those who come to the complainant's aid, or to the police…if the witness received a very strong impression of the features of an assailant; the witness will be able to give some description.."

In *Kariuki Njiru & 7 others vs Republic*[10]**,** the court held *inter alia* that the "*law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."*

In the case of *Wamunga vs Republic*,[11] the court of appeal held as follows:-

"……..Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification."

I must add that the law is not concerned with the number of witnesses called to prove an issue, but with the quality of the evidence submitted. A guilty verdict is permitted only if the evidence is of sufficient quality to convince a court beyond doubt that all the elements of the offence have been proven and that the identification of the accused is both truthful and accurate. With respect to whether the identification is truthful, the court must evaluate the believability of the witness who made the identification.

With respect to whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witnesses' intelligence, and capacity for observation, reasoning and, and determine and satisfy itself as to whether the witness is reliable, and whether the witness had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person. Thus, in evaluating the accuracy of identification, the court ought to consider such factors as lighting conditions under which the witness made his or her observation, distance between the witness and the perpetuator, whether the view was obstructed, whether the witness had an opportunity to see and remember the facial features, body size, hair, skin colour and clothing, period of time the observation was made, direction the witness and the perpetuator were facing and whether the attention of the witness was distracted and if the witness had an opportunity to give the description of the offender before he was arrested and if so, to what extent did the description match those of the accused. The mental and the emotional state of the witness at the time of the offence is also relevant and more important to what extent the said conditions affect the witnesses ability to observe and accurately remember the perpetuator.

The Zambian Supreme Court in the case of *L. Chipulu vs The People*[12]cited with approval the Zambian Court of Appeal decision in the case of *Chimbini vs The People*[13]where the court sais as follows in relating to single identifying witness cases:-

' It is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect; where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observation. Many factors must be taken into account, such as whether it was daytime or night time and, if the latter, the state of the light, the opportunity of the witness to observe the appellant, the circumstances in which the observation was alleged to have been made……'

In *R vs Turnbull and Others*[14] it was authoritatively stated:-

'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 relatives and friends are sometimes made.'

As correctly held in the various cases cited above from several jurisdictions, evidence based on identification in criminal cases can bring about miscarriage of justice and that it is of vital importance that such evidence is examined carefully to minimize this danger. The court must warn itself of the special need for caution before convicting the defendant.

The evidence on record is that the accused was arrested in a Matatatu. No clear evidence was tendered to show how he was identified. No description was given by the witnesses of the alleged assailant that could have been said to fit the accused. No one mentioned the features, clothing or any mark that could have been used to identify him. No identification parade was conducted. I am not persuaded that the evidence adduced in the lower court positively identified the accused and accordingly I find that it was totally unsafe to base the conviction on such evidence. Accordingly I find that the identification was not free from error.

I now turn to the second issue, whether the evidence adduced was sufficient to sustain a conviction. The legal burden of proof in criminal cases never leaves the prosecution's backyard. **Viscount Sankey L.C.** in the celebrated case of **Woolmington vs. DPP**[15] in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

'Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The question that follows is whether the prosecution in this case established its case beyond reasonable doubt. This calls for close scrutiny of the evidence on record and also an examination of the defence advanced by the accused. In **Uganda vs. Sebyala & Others**,[16] the learned Judge citing relevant precedents had this to say:-

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts"

The prosecution case was largely premised on the identification evidence and having found that the evidence of identification was totally unreliable, I also find that the remaining evidence is weak to support the conviction.

Accordingly, I find no basis to allow the conviction and sentence to stand. I hereby quash the conviction and set aside the sentence and order that the accused **Walter Otieno Ogalo** be released forthwith unless otherwise lawfully held.

Dated at Nyeri this **17th** day of **November** 2015.

John M. Mativo

Judge

---

[1] Cap 75, Laws of Kenya

[2] Ibid

[3] Cap 75, Laws of Kenya

[4] Ibid

[5]{1993} AIR 1462

[6] Criminal Appeal No. 154 of 2005, Ramadhani C.J, Munuo JA and Mjasiri J.A

[7] Criminal Appeal No. 104 of 1999

[8] Appeal No. 68 C/2004 {2012} ZMSC 67 (15TH August 2012)

[9] {1988-92} 2 KAR 75

[10] Criminal Appeal no. 6 of 2001 (Unreported)

[11] {1989} KLR 424

[12] {1986} Z.R 73 {SC}

[13] {1973} Z.R. 191

[14] {1976} 3 ALL E. R 549 at page 552

[15] {1935} A.C 462 at page 481

[16]{1969} EA 204