REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 205 OF 2009

JIMALE MOHAMED YUSUF alias AFYA NDOGO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 22 of 2009 in the Resident Magistrate's court at Wajir – A. Ingutya (SRM) on 31/3/2009)

JUDGMENT

1. This is an appeal against conviction and sentence in **Cr. Case no. 22 of 2009**, by Hon. A. Ingutya, Senior Resident Magistrate as he then was, for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.

2. It had been alleged that on 16th day of January 2009 at around 2300 hrs at Wajir township in Wajir District within the North Eastern Province, together with others not before court, they robbed Paul Mutinda Mutua Mwaka of cash Kshs.4,000/=, Mobile Phone make Nokia 1200 valued at Kshs.2,500/=, Equity ATM Card and National Identity card. That at the time of such robbery they used personal violence against the said Paul Mutinda Mutua Mwaka.

3. The appellant having been sentenced to suffer death in the manner prescribed by law, filed an appeal based on ten grounds in which, in sum he contended that he was convicted against the weight of the evidence. The learned state counsel, Miss Aluda opposed the appeal on grounds that the case was of recognition and not identification, and that there was sufficient light where the offence occurred. She therefore urged the court to dismiss the appeal.

4. In re-evaluating the evidence afresh to reach our own conclusions as was our mandate as the first appellate court, we carefully directed ourselves regarding the conditions prevailing at the time of identification and the circumstances under which **PW1** and **PW2** said they had identified the appellant, to test them for possibility of error. We warned ourselves on the dangers inherent in placing reliance on the evidence of identification as a basis for conviction even if that identification is based on recognition. That is more so in a case such as this where the

circumstances of identification were difficult.

5. Upon re-evaluation of the evidence we found that this appeal must succeed for two reasons. The first reason is that the evidence is at variance with the charge sheet on a material fact which is not curable under **Section 382** of the **Criminal Procedure Code**. The prosecution sought to rely on two of the three sets of circumstances upon which they may rely to prove their case under **Section 296 Criminal Procedure Code**. Robbery with violence under **Section 296(2)** of the **Penal Code** is proved if:

> ***"the offender is armed with any dangerous or offensive weapon or instrument,***
>
> ***or is in company with one or more other person or persons,***
>
> ***or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

6. On the first set of circumstances, there was no dispute that the assailants were not armed, neither was it stated so in the charge sheet. There is therefore no need to belabour the evidence along this line. The second set of circumstances upon which the offence of robbery with violence may be proved was satisfied since there were four assailants.

The problem arose when the charge sheet specifically set out as particulars, of this offence, the third set of circumstances by stating that:

> **"At the time of such robbery they used personal violence against the said Paul Mutinda Mutua Mwaka."**

7. The complainant on the other hand testified in his cross-examination that he was not assaulted in any way, not even by way of a slap during the robbery. Whereas he did not hand over his property willingly to the assailants it was not proved that violence was directed at his person or anyone around him to effect the robbery.

8. More important for consideration was the question of identification. It was not clear what manner of lighting existed at the scene of the robbery. **PW1** stated that it was a normal bulb at Ngamia Club which enabled him to identify his assailants at Baraza Park, a distance of 50 metres away according to his own estimation. **PW2** on the other hand said that the light came from a florescent tube in a school some 20 metres away. **PW1** also stated that he had walked for some 20 minutes from Ngamia Club to the scene of robbery and that he did not recognize any of his assailants.

9. **PW4** found the report of the robbery in the Occurrence Book on 12th January 2009 and there was no indication that the name or description of the assailant was included in that report. **PW3** arrested the appellant on 12th January 2009 because of a report that he and others were seated near Twiga bar and **"looked like they were up to some mischief."** When the police ordered them to disperse the others obeyed while the appellant stood his ground and was therefore arrested. There was no indication at this point that he was being sought in connection with the robbery at Baraza Park. In this circumstance an identification parade was necessary in respect of **PW1**.

10. According to the appellant, all he recalls about this matter was that there was a quarrel between his friend and the complainant over **PW2**, whom the appellant states was his friend's girlfriend but had been found in the complainant's company at the bar. The appellant denied the offence.

11. In evaluating the evidence of identification, we guided ourselves by the Court of Appeal decisions in the renowned cases of **KARANJA & ANOR V. REPUBLIC [2004] 2KLR pg 10**, and **ABDALLA BIN WENDO AND ANOTHER VS. REPUBLIC (1954) 20 EACA.** Applying the principles in the above cases, we came to the conclusion that in view of the circumstances

obtaining at the time of the robbery, it was doubtful that **PW1** and **PW2** correctly and conclusively identified the appellant, as one of the robbers.

12. We note that nothing was recovered from the appellant at the time of arrest, and he was not arrested at the scene of the robbery. In the result we find that the evidence of identification was not safe or sufficient to sustain a conviction.

We therefore quash the conviction entered against the appellant and set aside the sentence imposed upon him. We order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this 29th day of August 2013.

F. A. OCHIENG **L. A. ACHODE**

JUDGE **JUDGE**