



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 144 OF 2009**

***(From Original Conviction and Sentence in Criminal Case No. 279 of 2008 of the Chief Magistrate's Court at Mombasa – R. Makungu, SRM)***

**DENNIS WANDERA ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged before the Mbsa Chief Magistrate's Court with the offence of Robbery with Violence. After trial, he was convicted as charged and was sentenced to suffer death.
2. He has now appealed against conviction and sentence. This is the first appellant Court. As such we shall submit the evidence of trial Court to an exhaustive examination and we shall weigh the conflicting evidence in order to draw our own conclusion. In doing so we shall be mindful that we have not had the trial Court's advantage of seeing the demeanour of the witnesses. See **OKENO - VS- REPUBLIC [1972]EA.**
3. Paulo Opele Joseph (Paulo) at 7.30pm on 25th January 2008 was on his way home at Changamwe Mwanjoshi Estate. He was coming from his place of work at Moi International Airport. When he reached the Highridge corner he met a man walking towards the opposite direction. When they passed each other and were about 5 steps from each other three other men who were hiding in the bush appeared. The three men raised their pangas to Paulo and as he tried to walk backwards the first man cut him with a panga on the head, hands and legs. The first man ordered him to face the ground and once again cut him on the head. The men took his mobile phone. They continued to assault him until he lost consciousness. He stated that he was able to identify two men in that group. One of the men that he identified was the Appellant. This is what he said-

***“At the scene there was light from the Airport security lights. The first man I met with is someone who lives at our same (sic) estate. I was able to recognize the person. There was light from the Airport. Security light which enabled me to see the accused person (Appellant) clearly.”***

4. Paulo was taken to hospital by his father. His father Joseph Mumia Warangai (Joseph) in evidence stated that he asked Paulo whether he knew his attackers and Paulo responded by mentioning the Appellants name alongside another person. According to Joseph the Appellant was well known to his family.

5. The Appellant in his defence gave unsworn testimony denying the offence. He further stated that he could not recall where he was on the day in question.
6. The offence occurred at 7.30pm the prosecution evidence was that the Appellant was recognized by means of security lights from the Airport. The prosecution however did not lead evidence of the distance between those security lights and the scene of robbery. Paulo in his evidence stated that he walked away from the Airport and met with the first man who he recognized as the Appellant at a place he called Highridge. No evidence was led by the prosecution with regard to the distance between the Airport and Highridge. Similarly, there was no evidence of the intensity of the light or of the approximate time that Paulo had in observing the first man. Such inquiry is imperative when the circumstances of visual identification are difficult. The Court of Appeal in the case **MAITANYI -VS- REPUBLIC (1986) KLR 198** set out the steps of inquiry that should be undertaken when the identification is under difficult circumstances. The Court in that case held as follows-

***“1. Although it is trite law that a fact may be proved by the***

***testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.***

2. ***When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.***
  3. ***The Court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.***
  4. ***Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”***
7. We also refer to the case **NYERI HC CRIM. APPEAL NO. 265 OF 2004 JACOB IRUNGU KIRUGA -VS- REPUBLIC** where the caution of relying on identification and recognition was discussed as follows-

***“It is recognized that evidence of visual identification in criminal cases can bring about a miscarriage of justice if it is not carefully tested. In KIARIE –VS- REPUBLIC (1984)KLR 739. The Court of Appeal observed that where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. In the same case, the Court stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken. Lastly, although recognition is more reliable than identification of a stranger, such evidence of recognition should be tested carefully seeing that mistaken recognition of close relatives and friends are sometimes made (see ANJONONI AND OTHERS –VS- REPUBLIC (1980)KLR 59 AND WAMUNGA –VS- REPUBLIC (1989)KLR 424.”***

8. Having considered the trial Court's evidence we find that we are unable to state that the recognition of the Appellant by Paulo was water tight to exclude error. We entertain doubt in view of the prosecution's failure to lead evidence on the light and how long Paulo was able to observe the first man he met. We are of the view that robbers such as those who accosted Paulo could not have chosen to spring the attack at a place that was well lit. It is for that reason that we find that the prosecution failed to meet the criminal standards of proof and the doubt that we entertain shall be to the benefit of the Appellant.
9. We therefore allow the Appellants appeal against conviction and sentence. We do order that the Appellant's conviction be quashed and his sentence be set aside. We also order that the Appellant be set free unless he is otherwise lawfully held.

*Dated and delivered at Mombasa this 27<sup>th</sup> day of November, 2013.*

**MARY KASANGO**

**M. MUYA**

**JUDGE**

**JUDGE**