REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 3 OF 2012

STEPHEN ODHIAMBO OWUOR……..APPELLANT

VERSUS

REPUBLIC ……..…. …RESPONDENT

(*Appeal from original conviction and sentence of the Senior Principal Magistrates Court at Oyugis in Criminal Case No. 327 of 2011 dated 23rd January 2012 by R. Ngetich- S.P.M*).

JUDGMENT

1. The appellant was charged with attempted robbery with violence contrary to **section 297(2)** of the Penal Code. The particulars of the charge were that on 1st September 2009 at Kodada area, Wangchieng Location in Rachuonyo District within Homa-Bay County, the appellant jointly with others not before court while armed with dangerous weapons namely an AK47 Rifle, pangas and rungus attempted to rob Nicholas Kiprono Too of one motor vehicle make Isuzu Bus Registration number KBB 287M christened Komala valued at Kshs. 4.2 million and at the time of such robbery used actual violence to the said Nicholas Kiprono Too. The appellant pleaded not guilty and after hearing 10 prosecution witnesses and the appellant's defence, the trial magistrate considered the evidence and made a finding that the appellant's guilt had been proved beyond reasonable doubt. Consequently the appellant was convicted him and sentenced to death.
2. Being aggrieved by the said conviction and sentence, the appellant filed this appeal. He has listed the following grounds of appeal in his petition :-

i. **“THA T the Learned Trial Magistrate erred in law in failing to observe that there was no way both PW4 and PW 5 with an aid of the vehicle’s head light while inside the vehicle could positively identify some one in front of the vehicle yet PW 1 the driver and PW 3 who were in front failed to identify anybody.**
ii. **THA T the learned trial magistrate erred in law in failing to find out that the identification parade conducted against me was suspicious because it's questionable why the prosecution chose to call only PW 4 and PW 5 but sideline PW 1 and PW 3 who also claimed to be in that alleged vehicle.**
iii. **THAT the trial court erred in law in failing to appropriate that all the ingredients of the attempted robbery were not present because the prosecution failed to show or inform court exactly what I intended to rob from all PW 1, 3, 4 and 5.**
iv. **THA T the trial court failed to appreciate the prosecution's failure to avail in court even a photo of the vehicle I allegedly tried to rob its passengers to prove that allegation.**
v. **THAT the trial court further failed to appreciate the shoddy investigation done by the prosecution since there were no used cartridges collected at the alleged scene of crime since**

there was a claim that a gun was used and one passenger was gunned down.

vi. **THA T the trial magistrate erred in law in denying me my constitutional right to give my mitigation before passing on a sentence to me.**

vii. **THAT the trial court failed to observe that I had already been acquitted over this matter under section 87 (A) for lack of enough of evidence vide CRC File No. 627."**

3. When the appeal came up for hearing before us, the appellant was represented by Mr. Bana, advocate while the State was represented by Mr. Manjale. The two counsels made oral submissions. Briefly the facts of the case were that on 31st August, 2009 at about 2:00a.m, Nicholas Kiprono Too was driving the bus in issue towards Kendu Bay when at a place called Kodada he encountered a vehicle that had blocked the road. He slowed down and that is when a person appeared from the left side and hit the windscreen of the bus with a stone. The same cracked. As he reversed in order to escape another person appeared from the right followed suddenly by about seven people from the left and right one of who had an AK47 rifle. Then there was a gun shot. He was shot on the right hand but his co-driver was fatally wounded. He swerved and drove away from the scene, but he could hear a person shouting. It was after fleeing from the scene that he put on the cabin lights and noted that his co-driver was dead. One of the passengers (PW3) had a gun shot on the leg. They reported the matter to police officers at a road block before proceeding to Matata Hospital where the body of the deceased was taken to the mortuary. The driver and PW3 were also treated. They then went to Oyugis police station where they made a formal report and recorded statements. On 8th August, 2010, almost a year after the attack, the appellant was identified by George Okoth Wanjira (PW4) and Naftaly Ongare Osida at an identification parade conducted by Chief Inspector Karanja – OCS Oyugis. The two witnesses claimed to have identified the appellant during the incident. On his part, the appellant gave sworn evidence. He denied the offence and stated that he was arrested at his home on the 2nd September, 2010 a year after the alleged offence. He contended that he was at home up to the time he was arrested and that he had not heard about the robbery until them. He could not recall where he was on 1st September, 2009 but he described Kodada as a bus stage where they board and alight from vehicles.
4. As the first appellate court we have reconsidered and evaluated the evidence on record afresh and have come to the conclusion that the conviction of the appellant was not safe. The evidence against him hinges on visual identification. Of the ten prosecution witnesses only four were in the bus, and of those four it is only PW4 and PW5 who claimed to have identified the appellant at the scene. They also identified him at an identification parade conducted at Oyugis police station a year later. According to PW4, the driver stopped at the scene for about 7 minutes. The headlights of the bus were bright and he saw a man with a gun on the right side. There was another person to the left of the bus and some others came from the stationary vehicle with clubs and pangas. Two broke the exit window and got in and started robbing passengers. When the driver attempted to move, the gun man on the right hand side fired and the driver, the co-driver and a passenger where shot. He stated that he saw a tall black man who wore a black jacket. As the bus was driven from the scene, the two gangsters jumped out through the door. They were later to discover that the co-driver was dead. He stated that although the windscreen cracked and was cloudy it was clear. He later identified the man he had seen at a parade although at the parade he was wearing a black T-shirt. The man had no special features. It is instructive that this witness did not tell the court what he saw this tall black man in a black jacket doing, neither did he expressly state that he was the gun man. Indeed he did not state where he saw him. PC James Matere (marked as PW8 but who should be PW10) was to later testify that in his statement to the police this witness said that the internal lights of the bus were on and he could clearly see two young men; that one was dark, medium height and wore a black jacket and that the suspects were inside the bus when he saw them. He was emphatic that PW4 had told the police that the suspects entered the bus but the one with the gun did not. He testified that no description of the man with a gun was given but that the appellant was described. He was emphatic that the gangsters who entered the bus could not have been the ones with the gun. Although PW4 denied that he had nothing to do with the appellant's arrest PW10 testified that he contributed to the appellant's arrest. Apart from being vague and evasive in his evidence PW4 sharply contradicted the evidence of PW5 whose testimony was that, of the men he saw, some had jackets and some did not. He testified that he clearly saw the

appellant move to the driver's side with a gun and that he had a long sleeved jacket whose colour was dark. When he identified him at the parade he was wearing a reddish T-shirt. Looked at critically one cannot help but notice the contradiction in the evidence of those two witnesses. It is also instructive that none gave a description of the man they claim to have seen yet they claim to have identified him a year later. The identification parade was itself not of much probative value. At a glance it was well conducted but closer scrutiny will show that the two witnesses were kept in the same place and although the **Force Standing Orders No. 6(iv) (f)** provides that care will be exercised that witnesses do not communicate with each other, we are not told that was the case. It becomes even more critical because according to the witness who conducted the parade, the appellant remained in the same position between members 7 and 8 and the trial court was not told whether the appellant's right to change positions as provided in **Force Standing Orders 6(iv) (e)** was explained to him. It is also interesting that although the officer did not tell the court that the appellant changed his T-shirt during the parade PW4 stated that he had a black T-shirt and PW5 a reddish T-shirt. Could it be that they each identified a different person and how were they able to identify him yet he was not in a jacket as they first saw him and they had not noted any other special features?

5. The guidelines in cases where the case against the accused rests entirely on visual identification are set out as follows in **R. V. Turnbull [1976]3 All ER 549**, an English case which has been severally cited with approval by our own Court of Appeal:

> **"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 mistaken witness can be a convincing one and that a number of such witnesses can 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 made. 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 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 to the police by the witness when fist seen by them and his actual appearance?"** (underlining ours),

6. Mr. Bana cited two authorities. Whereas **Eldoret C/A CRA No. 33 & 34** between **Daniel Simiyu & Antony Wekesa Simiyu vs Republic** may not be very relevant, the second case, **Nakuru C/A CRA No. 64 of 20004** between **Vincent Gathu Mbugua vs Republic** is relevant. There was as in the instant case, two key witnesses who gave different descriptions of the appellant whom they alleged to have identified at the scene. The Court of Appeal while deciding that case stated as follows:

> **"Further it is trite that in such a case like this where the evidence relied upon to implicate an accused person is entirely of identification, that evidence should be water tight to justify a conviction. But what do we find here?**
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> **The main witnesses for the prosecution have contradicted themselves in the basic description of the appellant. The only conclusion, we can derive from their evidence is that they are mistaken about the identity of their assailants."**

It was also held in **Ngoya vs Republic (1985) K.L.R 309** that:

"In accepting evidence of identification the court should take into consideration the circumstances at the time and assess whether or not the same favoured accurate identification."

7. Here as in that case, the offence occurred at night and the witnesses must have been naturally terrified by the firing of the guns and generally confused. The vehicle's windscreen through which PW5 claims to have seen the appellant was cracked and according to the bus driver, he could not identify anybody through it. Moreover, as we have shown, the testimonies of PW4 and PW5 do not point to the same person. One alleges to have seen the appellant inside the bus while the other alleges that he was the gunman who was on the right side of the bus. There was inconsistency in the evidence of PW4 which also was in sharp contradiction with that of PW5. It is our of finding that not only did the circumstances prevailing at the time not favour an accurate identification of the appellant but that the evidence was also not water tight. Had the trial magistrate tested the evidence of identification more carefully, she would not have convicted him. Accordingly the appeal is allowed, the conviction of the appellant quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered at KISII this 30th Day of December 2013

E N MAINA **S.OKONG'O**

JUDGE **JUDGE**

In the presence of:

…….for the appellant

…….for the State

……..Court Clerk.

E. MAINA **S. OKONG'O**

JUDGE **JUDGE**