



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 136 OF 2011**

**LOKALALE EWOI ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(APPEAL ARISING FROM THE DECISION OF HON. T. NZYOKI, SRM IN LODWAR SENIOR  
RESIDENT MAGISTRATE'S COURT IN CRIMINAL CASE NO. 645 OF 2009)*

**J U D G M E N T**

The appellant Lokalale Ewoi was charged with four others with four counts of robbery with violence contrary to Section 296 (2) of the Penal Code and one count of being in possession of firearms without a firearm certificate contrary to Section 4 (2) as read with Section 4 (3) (a) of the Firearms Act Cap 114 Laws of Kenya. In respect of possession of firearms, the appellant was charged alongside one other suspect. The appellant was acquitted on all the other counts save for two counts of robbery for which he was convicted and sentenced to life imprisonment.

Particulars of count two were that on the 26th day of September 2009 at Kadongolo Lagga in Turkana south District, within Rift Valley province, jointly while armed with dangerous weapons namely AK 47 rifles robbed Philip Lochaa of cash Kshs. 250 and a mobile phone make Lion and at the time of such robbery threatened to use violence on the said Philip Lochaa.

Count two had an alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code. Particulars thereof were that on the 27th day of September 2009 at Kasurai area in Turkana South District, within Rift Valley province, otherwise than in the course of stealing, dishonestly retained a mobile phone make Lion, the property of Philip Lochaa knowing it to be stolen property.

Particulars of count three are that on the 26th day of September 2009 at Kadongolo Lagga in Turkana South District within Rift Valley Province jointly while armed with dangerous weapons namely AK 47 rifles robbed Anthony Namachanja cash Kshs. 400 and at the time of such robbery threatened to use violence on the said Anthony Namachanja.

Being dissatisfied with the conviction and sentence, the appellant preferred an appeal against conviction and sentence and raised the following grounds:-

1. *That the Trial Magistrate proceeded with the case using various languages which the appellant could not understand.*
2. *That the Trial Magistrate erred in accepting evidence of exhibits which had been brought from the village through torture.*
3. *That the Trial Magistrate erred in convicting the appellant based on contradictory evidence.*

4. That the Trial Magistrate erred in allowing the Prosecution to bring in witnesses whose statements had not been provided.
5. That there was no identification parade carried out.
6. That the Trial Magistrate erred in law by failing to give benefit of doubt to the appellant on visual identification as there was no identification parade carried out.
7. That the Learned Trial Magistrate erred in law by relying on evidence of dock identification.

Brief facts of the case are that on 26th September 2009 at around 3.00 pm, Pw 1 Anthony Namachanja Wanundu who is a driver working for Nikon Filling Station at Lodwar was transporting fuel tanks from Lodwar town to Lokichar. He was driving motor vehicle registration number KBC 778 Y an Isuzu Lorry. He was in the company of Pw 2 Phillip Lochaa the turn-boy and a mechanic Joseph Ekai Ekitol. When they reached a place called Lokichar Lagga they saw a man emerging from the left side of the bush while they were about 20 metres away. The man pointed a firearm at them. The driver Pw 1 stopped the vehicle. The man then came to the driver's door as other two men went to the turn-boy's door. The man at the driver's door demanded a cell phone and money. Pw 1 removed the Kshs 400 which he had and handed it over to the man. Pw 1 then saw his turn-boy Pw 2 remove a Sim card from his phone and hand over the phone to the other man. As the robbery was going on, a vehicle which was driving from Lokichar town saw what was happening. The driver made a u-turn and drove back to Lokichar. The thugs were forced to flee the scene. Pw 1 then drove to Lokichar Police Patrol Base where he reported the incident. He proceeded to where he was going and thereafter came back. He had left behind his phone contact. That evening, he received a call from the Police informing him that the thugs who robbed them had been arrested.

Pw 1 was later called to Lodwar Police Station where he was shown a mobile phone which had been stolen from the turn-boy (Pw 2) during the robbery. He testified that the appellant is the one who robbed him.

The appeal by the appellant was opposed by Mr. Chelashaw for the state who argued that the appellant was properly identified by Pw 1 and Pw 2 who described his physical features. He further argued that the Area Chief with assistance of villagers followed foot prints which led to the arrest of the appellant. He urged us to affirm the conviction and sentence and dismiss the appellant's appeal.

As a first appellate Court, our duty is to analyze and evaluate the evidence afresh. Our duty as a first appellate Court was stated in the case of **Okeno Vs Republic [1972] EA 32** as follows:-

***“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination [Pandya Vs Republic [1975] EA 366] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions [Shantilal M. Ruwala Vs Republic [1975] EA 570]. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had advantage of hearing and seeing the witnesses, ( see Peters Vs Sunday Post,[1958] EA 424).*”**

We have examined the evidence adduced by all the witnesses. The appellant was solely convicted on the evidence of Pw 1 and Pw 2, the driver and turn-boy of motor vehicle KBC 778 Y. These two witnesses testified that they were informed that those who had robbed them had been arrested. There was no identification parade conducted for the robbery victims to pick out their assailants. The two witnesses that is Pw 1 and Pw 2 were complainants. What the Investigating Officer ought to have done upon the arrest of the appellant was to conduct an identification parade where the witnesses will have participated and pick out their assailants. This was not done. What happened in this case is dock identification. The two complainants testified that it is the appellant who robbed them and that they identified him because he had a gap at the front Lower tooth was missing. It has been held time and again that dock identification is worthless unless preceded by a properly conducted identification parade.

The Trial Magistrate only relied on the alleged identification of the appellant at the scene of the robbery. He said that the robbery occurred in broad daylight and that the conditions were favourable. The Trial Magistrate failed to carefully analyze the evidence of the two witnesses. Pw 2 testified that when they saw a man armed with a firearm, the driver Pw 1 screamed and was so terrified. He asked Pw 2 what they should do. According to the evidence of Pw 1 they saw this armed man while at a distance of 20 metres. When finally the armed man came to where the vehicle had stopped, he ordered them not to look up. The driver removed Kshs. 400 and gave him. The turn-boy was ordered to drop his phone on the ground. He did this after removing the Sim card. This was to ensure that there was no eye contact between the robber and the victims. It is therefore not possible that Pw 1 and Pw 2 would have been able to see the missing Lower and upper teeth of the appellant.

The Trial Magistrate in trying to justify the identification of the appellant wrote in his judgment that the two that is Pw 1 and Pw 2 were able to see a missing tooth in the upper and Lower side. Evidence on record shows that it is only Pw 1 who during cross-examination said that the appellant had a missing tooth on the upper and Lower sides. Neither Pw 1 nor Pw 2 gave description of the person who robbed them to any person in authority. It is therefore clear that Pw 1 was trying to say what he saw of the appellant when he was in the dock. The Trial Magistrate should not have accepted that as evidence of identification particularly when no identification parade was conducted.

The manner in which the appellant was arrested is also worrying. There were attempts to link him to some two firearms and a mobile phone which one of the victims of the robbery lost but this could not work out. The Trial Magistrate himself was aware that there was no evidence at all linking the appellant to the two AK Rifles and mobile phone.

Pw 3 Josephine Akiru Ekal an Acting Chief of Lokichar location was the one behind the arrest of the appellant and the other 4 co-accused who were acquitted. She testified that on 26/09/2009. she received information at around 2.00 pm that a motor vehicle crew had been robbed. She went and reported the matter at Lokichar Police Patrol Base. She was accompanied by four Police Officers and some Kenya Police Reservists to the scene. They followed foot prints which led them to Kapese area where some people started running away. A chase ensued and 4 were arrested. The four were escorted to Lokichar Police Patrol Base. During her testimony in Court, she said that she could not identify any of those arrested before Court. She testified that one Ariong and Lokalale Ewoi the appellant herein, led them to a place called Kadongolo where two AK 47 rifles were recovered from the house of a woman in a manyatta. She testified that two mobile phones were also recovered from the house. These were a Lion mobile and Nokia. This witness did not say how the recovery was made. She did not say who led them to the recovery. She could not even identify the appellant. The woman from whose house the firearms were recovered and mobile phones was never arrested or recorded a statement. The Acting Chief could not remember how or when the items were recovered. This led the Trial Magistrate to observe in his judgment that Pw 3 was of poor and short memory. He therefore did not rely on the evidence of alleged recovery. Pw 5 Cpl. Moses Nakua was with Pw 3 when they arrested some three suspects who were 3rd, 4th and 5th accused in the Lower Court. He testified that it is the 3rd, 4th and 5th accused persons who mentioned the names of 1st accused the appellant herein and 2nd accused. This witness however said that he was not involved in the arrest of the appellant and the 2nd accused and that he did not know how the AK 47 rifles and the two phones were recovered. he said that the appellant and the 2nd accused were brought to Lokichar Police Patrol Base by Pw 3 and PC Hassan Galgalo. Pc Hassan Galgalo did not testify and as Pw 3 could not remember who she arrested, there was therefore no evidence to connect the appellant to the Lion mobile phone identified by Pw 2 to be his as well as the two AK rifles.

Pw 7 PC Paul Koech the Investigating Officer was not involved in the arrest or recovery of the exhibits. He said that he only charged the appellant and the others based on statements recorded by witnesses.

Pw 5 Cpl Moses Nakua who accompanied Pw 3 area Acting Chief testified that they found the suspects whom they arrested drinking busaa. It would appear that the suspects attempt to run away was not because they had been involved in a robbery but were found taking busaa which is at times regarded as an illegal drink despite the repeal of the Act which had illegalized it.

For the reasons given hereinabove in this judgment, we find that the conviction and sentence of the appellant was not proper. We quash the conviction and set aside the sentence. The appellant should be set free forthwith unless otherwise lawfully held.

**Dated, signed and delivered at Kitale on this ,.5th..... day of December, 2013.**

**J. R. KARANJA**

**JUDGE**

**E. OBAGA**

**JUDGE**

**In the presence of:**

**Appellant:** .....

**Respondent:** .....

**Court Clerk:** .....