



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CRIMINAL APPEAL 175 OF 2010**  
**WELLINGTON KANALA OTANGA ..... APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

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

The appellant was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that the appellant on the 18th day of February 2008 at Esirabe area in Emuhaya District within Western Province, jointly with others not before court and while armed with dangerous weapons namely pistols robbed **JAMES ANDAFU** cash KShs.501,600/= and a motor vehicle registration KAR 639 S Isuzu Pick-up valued at KShs.1.6 million shillings. All to the total value of KShs.2,101.600/= and at immediately before or immediately after time of such robbery threatened to use personal violence to the said **JAMES ANDAFU**. He was convicted of the charges and sentenced to suffer death.

The appellant filed his petition of appeal on 2nd September 2010 and listed nine grounds of appeal. He further, with the leave of the court, filed five supplementary grounds of appeal. The grounds of appeal can be stated to be as follows:-

1. *The evidence on identification was not sufficient and circumstances at the scene were difficult.*
2. *Prosecution evidence was contradictory, insufficient and fabricated*
3. *The stolen items were not recovered from the appellant*
4. *No medical evidence was produced*
5. *The identification parade was not properly conducted*
6. *The appellant's alibi defense was not considered.*

The appellant filed written submissions which expounded on the grounds of appeal.

Mr. Orinda, state counsel, submitted that the conviction was not safe. The evidence is based on identification after the appellant was tracked from a phone number by the assistance of a lady who was

not called to testify. The phone number allegedly belonged to the victim of the robbery, but that evidence is not clear. A staff from the issuer of telephone line, Safaricom, was not called to testify and that made the conviction as unsafe.

Before the trial, PW1 was the complainant. His evidence is that on the 18th of February 2008 at around 8.30 p.m. he was with a driver travelling in motor vehicle registration number KAR 639 S Isuzu Pick-up along Emusutswi – Kima road. While on the way, a saloon motor vehicle, drove near them and its occupants drew pistols and forced PW1's driver to stop the vehicle. They were thrown out and robbed of the car. PW1 had KShs.501,600/= in the vehicle and the money was also stolen. His two mobile phones were also stolen.

The matter was reported to the police and the vehicle was recovered shortly near Ebusiloli Secondary School. On 7th July 2008, PW1 was called to the Vihiga police station where an identification parade was done. PW1 managed to identify the appellant. PW2 Inspector Hassan Pole conducted the identification parade where PW1 identified the appellant.

**PW3, P.C. AGGREY MUNGASIA** was the investigating officer. On the 18th of February 2008 he was at the Vihiga Police station when he went to the scene of the robbery. Together with other police officers, PW3 recorded the stolen vehicle registration number KAR 639 S a white Pick-up. PW1 informed him that he had been robbed of his cell phone and PW3 took the telephone number to Safaricom Limited who traced the number. On 30<sup>th</sup> June 2008 he received date from Safaricom Ltd. That indicated the history of the telephone line. PW3 enlisted the series of an informer and on 1<sup>st</sup> July 2008 the appellant was arrested. The appellant was found in possession of a motor vehicle sale agreement dated 15<sup>th</sup> April 2008 between himself and a third party for KShs.35,000/=. He later charged the appellant with the offence of robbery with violence.

The appellant was put on his defence. In his sworn testimony, the appellant stated that he is a mechanic based at Luanda market. He also buys second hand vehicles, repairs them and later sells the vehicles. On the 1<sup>st</sup> of July 2008 he went to Kisumu to pay a motor vehicle insurance. While on his way back at about 6.00 p.m. the public vehicle he was travelling in was stopped by police officers and was taken to Maseno police station. The police asked the occupants why they had not put on their seat belts and they were fined KShs.3000/= each. The appellant had no money and he was put in the cells. He was later moved to Vihiga Police station and on the 9<sup>th</sup> July 2008, an identification parade was done and someone identified him.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. Was the appellant positively identified by PW1?

The trial magistrate held the evidence on how the appellant was tracked on a mobile telephone number was not convincing. He dismissed that part of evidence and according to the trial court, that evidence did not connect the appellant to the commission of the crime. The appellant was however convicted on the evidence of identification.

It is the evidence of PW1 that the robbers told them to stop otherwise they would shoot and kill them. The driver of the vehicle PW1 was travelling in, was pushed outside. PW1 was robbed and he was also pushed out of the vehicle. The robbers then drove off with his vehicle. PW1 further testified that he was surprised when he was shown a gun. He stated during cross-examination as follows:-

*"I saw death when I saw people with guns."* According to PW1, the appellant pulled the driver of his vehicle out and he sat on the driver's seat. PW1 was seated on the passenger's seat. The trial magistrate held that PW1 was with the appellant for sometime during the robbery incident and found that PW1 properly identified the appellant.

PW1 did not state how long the robbery incident lasted. In his evidence, he stated that he saw death when he was shown the gun. That can be taken to mean that he was scared. It is not PW1's evidence that

while he was being robbed by people who were holding guns, he was simply looking at them and could be able to identify them properly. The driver who was with PW1 was not called to testify. The trial court correctly held that the evidence on usage of the phone stolen from the complainant by the appellant, the appellant was not found with the stolen phone but it was alleged that his phone number at times used that stolen phone.

Given the circumstances under which the robbery took place, we do find that PW1 could not be able to positively identify his robbers. Although the robbery occurred during the day, still the circumstances were not conducive for positive identification. PW2 who conducted the Identification parade testified that he got the other participants from the cells, it is highly doubtful that people arrested in a given day or week and held together in one cell can be identical or similar in their looks. We do find that the parade conducted by PW2 was not proper. PW2 did not indicate in the parade form that PW1 was the identifying witness. The trial court held that that anomaly did not prejudice the appellant. Since the identification parade was the basis for the conviction, there was no reason as to why PW2 could not fill in the identification parade form properly. After the parade was done, the appellant's comments as stated in the parade form was that the witness had earlier seen him and that the witness knew him very well.

The standard of proof in a criminal case is that of beyond reasonable doubt. According to PW1, the robbery occurred in February 2008. The identification parade was done in July 2008, almost five months later. There is no evidence that the appellant had any distinct feature that enable PW1 to keep on remembering him. Given the circumstances under which the robbery took place, we do find that the prosecution did not prove its case beyond reasonable doubt. The identification of the appellant by PW1 is doubtful. We find the appeal to be merited and the same is allowed. The appellant shall be set at liberty unless otherwise lawfully held. We do further order that all the items recovered from the appellant and either produced as exhibits or retained by the police be released to the appellant.

**Delivered, dated and signed at Kakamega this 28<sup>th</sup> day of June 2012**

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**SAID J. CHITEMBWE**

**J U D G E**

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**B. THURANIRA JADEN**

**J U D G E**