



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL APPEAL NO. 572 OF 2008**

**CHARLES MAINA MUCHIRI.....APPELLANT**

**VERSUS**

***(From the original conviction and sentence in Criminal Case No. 7642 of 2005 of the Chief Magistrate's Court at Kibera by Mrs. Wasilwa - Principal Magistrate***

**JUDGEMENT**

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 are that on the 6<sup>th</sup> day of August 2005 at Karen Langata, within Nairobi Area Province, jointly with others not before court while armed with dangerous weapons namely pangas, bow and arrows robbed Mfrs. Hellena Cheserem – Nokia cell phones make 9210(1) valued at Kshs.46,000/=, Nokia 7610 valued at Kshs.38,000, Nokia 3100 valued at Kshs.10,000, Nokia 1100 valued at Kshs.5,000/=, Alcatel 311 valued at Kshs.5,000/=, Alcatel Easy valued at Kshs.3,000/=, three hundred safaricom scratch cards S/Nos875000-87799 of Kshs.250 denominations valued at Kshs.75,000/=, computer flat monitor make LG valued at Kshs.25,000/=, to digital camera make Olympus and Pentax Espio S/No.115V-2707506127, cash Kshs.400,000/= and a motor vehicle registration No.KAH 985 N Make Subaru Leon all valued at Kshs.2.5 million and at or immediately before or immediately after the time of such robbery, used actual violence to Mrs. Hellena Cheserem.

In count 2 he was charged with handling stolen goods contrary to section 332(2) of the Penal Code. The particulars are that on the 6<sup>th</sup> day of August 2005 at Karen Langata, within Nairobi Area Province, jointly with others not before court, otherwise than in the course of stealing dishonestly undertook the disposal of safaricom scratch cards S/Nos.87599-87730 and 87732 of Kshs.250/= each knowing or having reasons to believe to be stolen goods or unlawfully obtained.

The prosecution called six witnesses to prove the charges against the appellant. The appellant gave unsworn testimony and denied the charges that were leveled against him by the prosecution. After full trial he was convicted in count one and sentenced to death. The appellant is aggrieved by the decision of the trial court hence this appeal.

The appeal was argued by Mr. Gathera advocate who submitted that the appellant was wrongly convicted since the offence was committed in August 2005 while the appellant was arrested three months after the incident. He contended that PW1, the victim, said that she did not see a person with Rastafarian hair at the time she was robbed. The appellant was placed in line of people with Rastafarian hair style. It is

contended that four of the robbers were wearing hoods at the time of the robbery. Mr. Gathera submitted that the trial court placed a lot of reliance on the Identification parade which was unsafe. He stated that the identification parade cannot form a basis of proper conviction. He contended that there is no evidence to show that the appellant had a long conversation with the complainant for his voice to be recognized. It is the evidence of the complainant that four months later she recognized the voice of the appellant as the one who attacked her on the material day.

Mr. Gathera also contended that the evidence of a single identifying witness must be supported by other evidence. It is not enough to rely on the evidence of a single witness in convicting an accused person. On the issue of some calling cards stolen from the complainant found on the appellant, it was submitted that the prosecution failed to call a witness to connect the appellant to the said cards. It was contended that if a witness is known to exist and he fails to appear, it is clear that his evidence would be adverse to the party who fail to call him.

Mr. Karuri learned State counsel opposed the appeal and supported a conviction against appellant. On identification, it was submitted that there was sufficient light in the house of the complainant. And that the evidence of PW2 and PW3 corroborated the evidence of the complainant. On the identification parade it was contended that the complainant easily identified the appellant after asking him to talk.

PW5 conducted the identification parade and said that five members had dreadlocks at the time of the identification parade. The appellant signed the parade form showing that he was satisfied with the parade conducted by PW5. In short it is the position of the State that the trial court analyzed the whole evidence and rightly convicted the appellant.

This is a first appeal and it is our duty to re-evaluate and analyze the evidence afresh in order to determine whether the conviction arises from the evidence tendered by the prosecution. From the charge sheet it is clear that the robbery took place on 6<sup>th</sup> August 2005. The charge was registered before court on 8<sup>th</sup> November 2005. The report of the robbery was received by PW2 CI Simon Nyabochwa the OCS Riruta Police Station. In his evidence he stated that a lady by the name Hellen Cheserem reported that she had been robbed by four men armed with bows and arrows. He said that the complainant informed him that the thieves were below the age of 35 and she could identify them as they took time in her house.

The basis of the prosecution case is that on 3<sup>rd</sup> November 2005 the appellant was identified by PW1 in a parade conducted by PW5. According to PW5 there were three witnesses who were supposed to participate in the identification parade and the accused person. The appellant stood between No.5 and 6 and he was identified by the complainant. It is contended that the appellant had dreadlocks similar to some of the members who participated in the identification parade. According to the complainant (PW1) three of the attackers had big head gears. She stated that she did not see rastas but assumed they had rastas since they were wearing head gears. It is therefore clear the basis of the appellant's conviction is the identification of complainant in an identification parade carried out by PW5.

In our view where the only evidence against an accused person is of identification or recognition, a trial court is required to examine the whole evidence carefully in order to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely and correctly make such evidence a basis of a conviction. No doubt the attackers were strangers to the victims and the attack was unexpected. In this case, the appellant was arrested and charged because it was alleged that some scratch cards belonging to the complainant were traced to him.

According to PW6 some of the subscribers who had fed the stolen scratch cards was a number found with the appellant. There is no evidence showing the number that was allegedly found with appellant did belong to him. The appellant gave a reasonable explanation that he was a taxi man operating within Koinange Street and that occasionally some of the girls from Florida club would use his phone. In essence the only evidence connecting the appellant to the alleged robbery, is the evidence tendered by PW1 and PW5. In the case of **Abdalla Bin Wendoh & another versus Republic** it was held;

**“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony**

of a single witness but this rule 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 condition favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the evidence of a single witness, can safely be accepted as free from the possibility of error.”

On the issue of whether PW5 organized a proper identification, we think we should reproduce what the Court of Appeal stated in **Criminal Appeal No.332 of 2008 Calvin Peter Omondi versus Republic**;

**“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See *R v Mwangi s/o Manaa* (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis *Njihia v Republic* [1986] KLR 422 where the court stated at page 424:-**

***“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”***

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:-

***“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail:-***

***(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;***

***(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified.”***

Evidence of an identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and analysis. In this case PW5 who conducted the identification parade stated that there were only five persons with dreadlocks at the time the parade was conducted. The evidence of the complainant is also that the robbers were in a headgear. We do not know whether headgear signify dreadlocks or Rastafarian hairdo. According to the complainant she assumed the reason why they had a big headgear was because they were Rastafarians. The law is that a person cannot be convicted on the basis of conjecture and assumptions. In the absence of any other evidence, there is nothing connecting the appellant to the robbery that was committed against the complainant.

Having re-evaluated the whole evidence afresh, we think the prosecution did not prove its case beyond reasonable doubt. We also think that there are material doubts which should be resolved in favour of the appellant. As stated, the only evidence linking the appellant to the subject robbery was the identification parade conducted by PW5. We think that the parade was faulty because all the eight participants were not of the same height and/or description. It is also clear that the descriptions given by PW1 at the time the first report was made, did not make the appellant as the only possible person to fit those descriptions. In the circumstances, we think the appellant did not participate in the robbery under our determination. We allow his appeal, quash the appellant's conviction and set aside the sentence of death imposed on him. We order for his immediate release unless lawfully held.

Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of February, 2011.

**KHAMINWA**  
**JUDGE**

**M. WARSAME**  
**JUDGE**