



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 339 OF 2009**

*(From original conviction and sentence in Criminal Case No.2697 of 2006 of the Chief Magistrate's Court at Nakuru – D. K. MIKOYAN, SRM)*

**JAMES GITHIRI NGETHE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant herein is James Githiri Ngethe. He was convicted of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death. His co-accused was acquitted. He is aggrieved by the said conviction and sentence and preferred this appeal. He was represented by Mr. Simiyu while the State was represented by Mr. Nyakundi.

Mr. Simiyu urged two main grounds of appeal namely, that the magistrate shifted the burden of proof on the appellant and that the lower court failed to warn itself of the dangers of basing a conviction on the evidence of a single identifying witness under difficult circumstances.

Briefly, the case before the lower court was that Christopher Nguro Ndolo (PW1) was asleep in his house with his family about midnight on 18/10/06, when they were attacked by robbers. PW2, Christopher Kibisu, who was the night watchman said that he was attacked by about 8 people who were armed, had torches and injured him before they proceeded to attack those in the house. PW1 who was woken up by the wife managed to shoot one of the robbers and injured him. The robber later died. PW2 told the court that he was able to identify the appellant as the person who assaulted him. The appellant had worked for PW1 as a carpenter for several years there before. PW1 said that the person who was injured later told him that the person who had taken his son's mobile was Njenga from Subukia Valley and he knew that person to be the appellant.

The appellant was later arrested when he went to the police station at Kerengero Police Station in response to a message left with his wife, DW3, by PW4, Cpl Ogutu Jabando, that he was required there. In his sworn defence, the appellant agreed to having worked for the complainant for several years but that a grudge had arisen over one Alice, a friend of the complainant. He denied having been involved in the robbery. He called two witnesses, his wife DW3, and DW4 the person he was working for then but did not know anything about the robbery.

With regard to the issue of identification, learned counsel, Mr. Simiyu submitted that the magistrate did not warn himself of the dangers of relying on evidence of a single identifying witness. The only person who testified to having seen the robbers is PW2, the complainant's watchman. He saw about 8 people flashing torches at him, they introduced themselves as police officers and that PW3, the complainant's wife whistled and that it is at that time that one of the robbers shone his torch at the appellant's face and PW2 was able to see the appellant and then the appellant cut him with a panga. Counsel urged that in cross examination, PW2 admitted that he was not able to identify the robbers due to the lights directed (shone) at him. Counsel also submitted that PW2 did not tell PW1 about having seen the appellant at the scene. Counsel further urged that PW7 denied that the suspect who was injured ever mentioned names of the appellant save for the names of Waciru, Njoki and one Mathenge. Counsel relied on the decisions in **PAUL ETOLE & REVEREND OMBIMA V. REP CA 24/00** and **MARTIN MUGAMBI V. REP; CA 76/07**.

Mr. Nyakundi, in opposing the appeal, said that the appellant and others approached PW2, introduced themselves as policemen and spent considerable time with PW2 and light was shone at the appellant and therefore the appellant was properly identified.

This is what the lower court said about identification:-

**“on the second issue for identification, PW1 Christopher Nguro only heard a name from the injured robber. PW2 Christopher Kibisu strongly pointed at accused 2 (now appellant) as the very one who was not only armed with a panga but also used the panga to injure him. There is no other evidence of identification besides this. ... PW2 Christopher Kibisu who had earlier worked with accused 2 for 5 years made a proper identification. The circumstances surrounding the identification are so favourable. There was source of light at the time PW2 was being questioned by the group of robbers. Initially the guard was not threatened as these were police officers on a mission. Eventually he picked out accused 2 in the group as the one directing the rest. From the above analysis there is prove that the sole evidence of the guard was not mistaken. Being the sole evidence I have also found him a credible witness.”**

We beg to differ from the findings of the trial magistrate. The circumstances under which the watchman (PW2) found himself in were not conducive or favourable to identification. It was about midnight and PW2 said there were no security lights. The court was not told how long the robbers took with PW2 and we find no basis for Mr. Nyakundi's submissions that PW2 had ample time to see the robbers. The magistrate merely observed that there was a source of light and did not disclose which and how much light it provided. PW2 said the robbers had 8 torches which were all lit. Pressed in cross examination, he did admit that it would not have been possible for him to see the appellant as the torches were shone at him. That obviously raised doubt as to whether PW2 was able to see the appellant under those circumstances. Before accepting the evidence of PW2 as the basis of the conviction, the court had a duty to warn itself of the danger of relying on such evidence. The court needed to state other factors that led it to the conclusion that it could rely on such evidence for example the length of time the witnesses had taken with the robbers and the amount of light.

As regards PW1's evidence that the dying suspect told him that Njenga from Subukia Valley had taken the son's phone and PW1 then knew him as the appellant, that cannot amount to identification. PW1 did accept in cross examination that he did not know how many people by name "Njenga" come from Subukia Valley. Besides, the appellant was not known by the name "Njenga."

We find that the conditions which the complainant and PW2 found themselves in did not favour identification and required other evidence, direct or circumstantial pointing at the appellant as one of the robbers. We do find as the court found in **DANIEL WAMBUA'S** case (supra) that the circumstances were not ideal for identification and find the conviction to be unsafe.

The 2<sup>nd</sup> ground of appeal was that the magistrate shifted the burden of proof to the appellant. Counsel urged that the appellant raised in his defence an issue that the offence was committed on 18/11/06 and yet the charge read that it was committed on 18/10/06. The wife and DW4 talked of 18/10/06. In the

judgment, the magistrate found there to have been a contradiction in the defence evidence. The magistrate observed as follows:-

**“...I turn to the evidence of Mary Wangeci. She is the wife to accused 2. According to her evidence she was home with her children and accused**

**2. That is all stated by the wife of accused person. Accused 2 on his part gave no evidence to rebut the assertion that on 18<sup>th</sup> October 2006 he was not the robber seen at the scene.”**

The onus of proof in criminal cases always lies with the prosecution, to prove its case beyond any reasonable doubt and at no stage of the proceedings does it shift to the defence. The defence can only give a reasonable explanation or raise a doubt in the prosecution case but the accused cannot be called upon to rebut the prosecution evidence. The court misdirected itself in finding that the appellant should have adduced evidence to rebut the prosecution evidence.

In the result, we find the conviction herein to be unsafe. We allow the appeal, quash the conviction and order the appellant to be released forthwith, unless otherwise lawfully held.

**DATED and DELIVERED this 14<sup>th</sup> day of February, 2011.**

**R.P.V. WENDOH**  
**JUDGE**

**W. OUKO**  
**JUDGE**

**PRESENT:**

The appellant present in person.  
Mr. Omwega for the State.  
Kennedy – Court Clerk.