



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL APPEAL NO.67 OF 2003**

**STEPHEN ETYANG OSERE.....APPELLANT**

**VERSUS**

**REPUBLIC OF KENYA.....RESPONDENT**

**(From the conviction and sentence of B. Maloba S.R.M. in Busia Criminal Case No.1749 of 2001)**

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

The appellant, Stephen Etyang Osere was originally charged with the offence of Robbery with Violence. He was after a full trial, convicted and sentenced to death on 4.7.2003. He filed this appeal against the conviction and sentence.

We have carefully perused and considered the evidence upon which the conviction was grounded. There is no doubt in our minds that the conviction was based on the identification of the appellant by the complainant through recognition. The complainant testified that he knew the appellant well for many years before he saw him taking part in the robbery against him. The appellant and the complainant are said to have attended the same school several years before.

In his testimony, however, the complainant did not state when he saw the appellant last before the robbery, to enable him easily recall the appellant's face appearance. The complainant's introduction of evidence of recognition of appellant's voice into this case, complicated the case. It raised the issue as to whether the complainant would resort to identifying the appellant by the appellant's voice if he had indeed recognized the appellant by facial features. The evidence raised a serious doubt as to whether the complainant's testimony over facial recognition was truthful and free of any mistake.

In addition there are other crucial aspects of the complainant's evidence which are not credible and raise a

doubt over his evidence. They include the evidence in respect to the kind of light which the complainant used to recognize the appellant. He testified that a tin lamp was burning at the relevant time when the attackers entered his house. The trial court did not investigate the strength and placement of the light which the tin lamp produced. Nor was it established whether the appellant was the one who entered first to offer or otherwise an opportunity to be easily seen.

Furthermore if the complainant indeed recognized the appellant, it would be normal and naturally expected of him to immediately reveal the name of the attacker to those who came to his rescue soon after the attack. More importantly he would have named the attacker to the police or immediate authorities as soon as he reached them to report the robbery. In this case however, the complainant first told the court that he did not mention the name of the appellant right away. He then changed and said that he actually mentioned the name to the people who came to his assistance. Finally he said that he did not mention the name although he knew the appellant, because he first wanted to recover his stolen properties.

On the above issue, the police officer who received the robbery report two days after, also said to say that the appellant's name had been reported to him by the complainant. However the O.B. of the report which was produced in evidence confirmed that no name of the attacker had been given.

We on our part came to the conclusion that the complainant had not given any name of the attackers to anybody until several days later. We make a finding accordingly, that that omission, combined with other discrepancies already discussed above, created a serious doubt as to the identification of the complainant's attackers. This coupled by the fact that the evidence of the complainant was evidence of a sole witness whose evidence was weak and unreliable, lead us to find that the conviction of the appellant was against the weight of evidence. It cannot be sustained.

We accordingly allow the appeal, quash the conviction and set aside the sentence of death against the appellant.

The appellant shall be released from prison forthwith unless otherwise, lawfully, detained therein.

Orders are made accordingly.

Dated and delivered at Busia this 29<sup>th</sup> day of June 2011.

**D.A. ONYANCHA**  
**J U D G E**

**F. MUCHEMI**  
**J U D G E**