



No. 2929

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 9 OF 2011

JOHN MARWA MWITA ..... APPELLANT

**-VERSUS-**

REPUBLIC ..... RESPONDENT

JUDGMENT

***(Being an appeal of the Original Conviction and Sentence of the Senior Resident Magistrate's Court at Kilgoris Hon. B. O Ochieng in Criminal Case No. 794 of 2009 dated on 25<sup>th</sup> February, 2011)***

**John Marwa Mwita**, was charged before the Senior Resident Magistrate's Kilgoris Court, with 4 counts of robbery with violence contrary to section 296(2) of the **Penal Code**. The particulars of the 1<sup>st</sup> count were that on the 14<sup>th</sup> November, 2009 at Nyakenga village within Transmara district of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely guns, bows and arrows, simis, rungus robbed Thomas Mwita Munanka one mobile phone make Tencan valued at kshs. 7,500/= and cash kshs. 13,000/= all valued at 20,500/= and at or immediately before or immediately after the time of such robbery used actual violence on the said **Thomas Mwita Munanka**.

On the 2<sup>nd</sup> count, the particulars were that on 14<sup>th</sup> November, 2009 at Nyakenga village within Transmara District of the Rift valley province jointly with others not before the court while armed with dangerous weapons namely guns, bows and arrows, simis, rungus robbed **Protus Chacha Masia** one Nokia mobile phone valued at kshs. 3,000/=, one pair of safari boots valued at kshs. 2,000/= and cash 47,400/= all valued at kshs. 52,400/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Protus Chacha Masia**.

On the 3<sup>rd</sup> count, it was alleged that on the same day and place and in similar fashion robbed **Baberi Kehore** one Nokia mobile phone valued at kshs. 3,500/= and cash, kshs. 35,000/=all valued at kshs. 38,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Baberi Kehore**.

Finally, the particulars of the 4<sup>th</sup> count were similar to those of counts 1, 2 and 3 above save that this time around they robbed **Joseph Maigara Pocho** cash kshs. 2,000/= and at or immediately before or immediately after the time of such robbery killed the said **Joseph Maigara Pocho**.

The appellant denied all counts and he was tried. PW1 **Mwita Thomas Munanka** testified that on 14<sup>th</sup> November, 2009 he met people clad in Maasai clothes. He was riding a motor bike. They were armed with bows and arrows. Some of them wore Administration Police uniforms. He was stopped and ordered to lie down. He was shot at and injured on the front of his nose while down. They took kshs. 13,000/= from him and a phone.

Another motorcyclist came with passengers. The trio were also ordered to stop and were stripped. They took his trouser and because he was a Kisii they ordered him to leave the area with his motorbike. He recognized the appellant among the robbers. After one week, he met the appellant at Lolgorian and identified him. He had not disguised himself at all during the robbery.

PW2, **Protus Chacha** was a pillion passenger on PW1's motorcycle. He was also beaten up severely by the same robbers. He stated that another motorcyclist was shot dead in the process. He later picked the appellant in an identification parade. He lost kshs. 47,700/= to the robbers.

PW3, NO. 67221 PCPL **Mohammed Hokicha** received the report from the PW1 who had seen the appellant in Lolgorian market a week later. PW1 pointed the appellant to him and he arrested him. An identification parade was subsequently conducted by inspector **Alfred Ndiema**, (PW4). This was after 4 days and PW2 picked out the appellant.

PW5 **Rahab Nkure** filled the medical report for PW1. He found that PW1 was hit by a blunt object. He classified the degree of injury as harm.

Appellant denied the charges. In his defence, he gave a detailed account of what transpired on 14<sup>th</sup> November, 2009. That he was with a brother called **Nyathi**. They proceeded to Lolgorian market to buy cattle. As they walked their cattle home, they became tired and could not walk anymore. After sometime they managed to get the cattle to walk again. On the way they heard something that sounded like gun shots. There was restlessness over tribal politics in the area. They heard rumours of an attack at a bridge. People had been attacked and killed and motorcycles stolen. There was tension between Maasais and Kurias. The appellant met with someone who informed him that he was a police officer and requested him to assist him with investigations. He was arrested and frog marched to the police station. At the station he was branded a suspect in the robbery with violence that had occurred earlier and was ordered to produce the gun. He denied the allegation and was placed in the cells. He was later charged with the four counts of robbery with violence. He called, **Girth Matinde**, DW2 as a witness. He simply corroborated his testimony.

The learned magistrate having evaluated the evidence on record, found that the prosecution had proved its case against the appellant in respect of counts I, II and IV to the required standard. He accordingly convicted him and thereafter sentenced him to death as mandatorily provided for under the law.

The appellant was aggrieved by the conviction and sentence aforesaid. Hence he preferred the instant appeal on four grounds; that the evidence of identification was doubtful, prosecution evidence was full of contradictions and inconsistencies, identification parade was conducted contrary to force standing orders and in the absence of a first report.

When the appeal came before us for hearing on 28<sup>th</sup> July, 2011, **Mr. Gitonga**, learned state counsel conceded the same on the grounds that there were serious misdirections amounting to errors of law on the part of the learned magistrate. The identification of the appellant was not beyond reproach. The trial magistrate too erred in advancing the theory that between 6 and 7 a.m in that area, there is normally sufficient light to enable parties to identify each other.

In response the appellant concurred with the submissions of the learned state counsel and said no more. We have considered and re-evaluated the evidence tendered before the trial court afresh as required of us as a first appellate court.

From the judgment of the learned magistrate the conviction of the appellant turned on the evidence of identification. The complainant in count I, (PW1) testified that he did not know the appellant prior to the incident. Yet no police identification parade was conducted. PW1 only identified the appellant in court which amounted to a mere dock identification. It has been held severally that dock identification is of little evidential value. See for instance **Kiarie –vs- Republic (1985) E. A 213**.

Further even on those counts in which the appellant was purportedly picked in an identification parade,

that evidence is not reliable on the basis that there was no first report made to the police giving the description of the appellant. The credibility of this evidence is further compounded or weakened by contradictions and or inconsistencies between the evidence of PW1 and PW2 with regard to what the appellant was actually wearing and armed with. Whereas PW1 said that the appellant wore whitish jacket and Khakish trouser, PW2 on his part claimed that he wore police uniform. Again whereas PW1 stated that the appellant carried bows and arrows PW2 saw it differently. He had a gun. This cannot be the evidence of two people who witnessed the same event or incident. These contradictions can in our view be attributed to the fact that, there was no light at the scene of crime that would have enabled these witnesses to see the appellant properly so as to positively identify him.

The learned magistrate seems to have appreciated the difficulties encountered by these witnesses during the robbery as regards the identification of the appellant. He stated quite correctly in his judgment that the incident occurred between 6.00a.m and 7.00a.m. That it was not clear how those witnesses saw the appellant and what light if at all was used. But thereafter, the learned magistrate gravely erred or fell into error when he held “...***It is not clear what conditions this was but I take judicial notice that 6.00a.m to 7.00a.m is in the morning and in most cases there is ample light and all senses are usually on enough to identify...***”. This being a criminal trial, there is no room for speculation and theories which are unsupported by evidence and or record. The appellant was charged with serious offences for if convicted was liable to be sentenced to death. Indeed he was so sentenced It thus behoved the magistrate to proceed carefully and act on the evidence on record and not advance fanciful theories as to how the appellant could have been identified by way of taking judicial notice. Either there was light or not. It was upto the prosecution to adduce such evidence. If there was no light then the witnesses could not have identified the appellant. On the other hand, if the prosecution felt that between 6.00a.m and 7.00a.m, there will ordinarily be daylight and senses usually on, it was upto them to sell it to the learned magistrate. Since the prosecution did not, it was not open for the learned magistrate to take such route on his own.

Finally, we note that the case was presided over by two different magistrates at different times. **Oganyo, PM** took the evidence of PW1, 2, 3 and 4 whereas **Ochieng, SRM** presided over the evidence of PW5, 6, the defence, crafted and delivered the judgment. However, the transition from **Hon. Oganyo** to **Hon. Ochieng** does not seem to have gone on in accordance with the strict and mandatory provisions of section 200 of the **Criminal Procedure Code**. It was not sufficient or enough for the incoming magistrate to simply note “***case to proceed under section 200 Criminal Procedure Code***”. It behoves the magistrate taking over a criminal case to remind the accused of his rights under that section of the law. That requirement is couched in mandatory terms. The record must itself show compliance. In the absence of such record, the assumption is that there was non-compliance, thereby rendering the proceedings irregular and a nullity.

In the upshot we are in agreement with the reasons advanced by **Mr. Gitonga** in conceding to the appeal. The appeal is allowed, conviction quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

**Judgment dated, signed and delivered** at Kisii this 23<sup>rd</sup> day of September, 2011.

**ASIKE-MAKHANDIA**  
**JUDGE**

**RUTH NEKOYE SITATI**  
**JUDGE**