REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: F. AZANGALALA AND J.R. KARANJA JJ.

HC.CRIMINAL APPEAL NO. 147 OF 2009

BETWEEN
KUON LURIANG
TOKOTANG ::APPELLANT
AND
REPUBLIC :::RE SPONDENT

[Being an appeal from the Judgment of the Senior Resident Magistrate - H.M. Nyaga, dated 4th September, 2009 – in Criminal Case No. 503 of 2008 at Kabarnet Senior Resident Magistrate's Court]

JUDGMENT

The appellant, **Akwon Tokoyangor Lorring**, Alias **Kakon Lotikoyan Tuwal,** was charged with robbery with violence contrary to section 296(2) of the Penal Code (Cap 63, Laws of Kenya). The particulars of the offence were that on the 21st, March, 2007, at about 12.00 hours at Loruk Trading Centre in Baringo District within the Rift Valley province, the appellant, jointly with another not before the court, while armed with a dangerous weapon namely, a gun, robbed **Rachael Njoki**, (hereinafter **"the complainant"**) of Kshs 2,800/= and at or immediately before or immediately after the time of such robbery wounded the said complainant.

On the conclusion of the evidence of six (6) witnesses and that of the appellant, Learned Senior Resident Magistrate, (**H.M. Nyaga**), found that the prosecution had discharged its burden as required in Law and convicted the appellant of the said charge. After regarding the appellant's mitigation, the Learned Senior Resident Magistrate pronounced the death sentence against the appellant. The appellant was not satisfied with his conviction and sentence and has appealed before us on the main grounds that his identification by the complainant was not positive given the circumstances obtaining at the time and that he was convicted on inadequate evidence.

At the hearing of the appeal, the appellant was not represented as he had been at the trial. He had however, filed written submissions upon which he placed reliance. Those submissions elaborated the above grounds of appeal. **Mr. Oluoch,** the learned Senior Deputy Prosecution counsel who appeared for the State, orally submitted that the appellant was positively identified at the scene and at a subsequent identification parade mounted by the police. In his view, the appeal is without merit and should be dismissed.

As the first appellant Court, it is our duty to analyze, re-evaluate, and re-examine the evidence upon

which the appellant was convicted and arrive at our own independent conclusion bearing in mind that we did not see or hear the witnesses testify and should give allowance for that. (See **Okeno –vrs- Republic [1972] E.A 32 and Ngui –vrs- Republic [1984] E.A 729**)

The prosecution case was that the complainant (P.W.1), a bar proprietor, had closed her business for the day on the material night. She had made Kshs 2,800/= in notes and an unknown amount in coins. She took the Kshs 2,800/= in notes and left the coins in the till as she prepared to retire. With her was Caroline, her employee. She then walked to the door of the bar armed with a torch. When she reached there, she was struck on the left hand with something. She then saw someone standing against the wall. The person wore a dust mask around his mouth and nose. He ordered her to give all the money she had. She did not comply. Instead, she ran back into the bar, locked the door and screamed. Caroline too screamed. Just then, she felt her right leg give way and she fell down. She then realized that her right leg was broken. She limped to the door and opened it letting in the man she had seen earlier demanding money. He again demanded money from her as he pointed a gun to her chest. He took the entire collection for the day and her phone. He left and as he did so, the complainant heard the sound of several footsteps and then a gun shot. After 30 minutes, police officers including P.C. **Alexander Wambua Mutisya,** (P.W.2) from Loruk Police Station arrived at the bar and she made a report of what had happened to them. She testified that she recognized the attacker as the appellant whom she had seen previously at Loruk Centre. She said she recognized him with the aid of light from a hurricane lamp which was on, during the attack.

The complainant received first aid at the bar and was later taken to Moi Teaching and Referral Hospital where she was admitted for four (4) months. On 6th August, 2008, the complainant was invited to attend an identification parade at Kabarnet Police Station which parade was conducted by I.P. **Joseph Chebii** (P.W.4). The appellant testified that she identified the appellant at the said parade.

Moses Suswa, (P.W.5) filled, signed and produced the P.3 form in respect of the injury sustained by the complainant. He classified the injury as grievous harm.

Later, the appellant was arrested by I.P. **Judah Muthee**, (P.W.6) in connection with a different offence and charged with the present offence after being identified by the complainant at the said identification parade. He gave sworn statement setting forth an alibi defence that on the material date of the alleged offence, he was at his home taking care of his animals and only heard about the said robbery like other people in the location. He further testified that he thereafter frequently visited Loruk Centre in the course of his cattle trade but was never arrested. He contended that he was framed because of a dispute he had with a friend of the complaint's husband.

At the conclusion of the trial, the Learned Senior resident Magistrate found that the complainant knew the appellant and recognized him which identification was confirmed when she picked him out at the identification parade.

On our own independent re-examination and re-evaluation of the evidence which was placed before the Learned Senior Resident Magistrate, the following observations have become evident. The prosecution case turned upon the testimony of the complainant who was the only identifying witness. Her evidence was accepted on the basis that she knew the appellant well and could not have been mistaken as to his identity. But was that identification water-tight? The attack happened at around midnight. The only source of light in the bar was a hurricane lamp. The prosecution did not demonstrate the position of the hurricane lamp in the bar visa avis the happenings therein. The size of the bar was not given. The prosecution seemed satisfied with the statement of the complainant that there was sufficient light in the bar. The hurricane lamp being the only source of light, the prosecution should have led evidence as to how bright the light was; how far the appellant was from the lamp; where it was placed in the bar and the approximate size of the bar. Even the size of the lamp should have been stated given that illumination from such a lamp is affected by its size and the area lit.

The complainant herself testified that the attacker wore a dust mask around his mouth and nose. He also had a black coat. The attacker was therefore obviously disguised. The sequence of events as narrated by

the complainant was that before her assailant entered the bar, she was in great pain having been shot on her right leg. The attacker then pointed a gun at her chest as he demanded money from her. Those circumstances were terrifying and could have affected her identification of the attacker.

It is also significant that the appellant was not arrested on the description of the complainant. In her own words:
"Later, I learnt that a suspect had been caught at Kampi Ya Samaki over another offence."

I.P. **Judah Muthee,** (P.W.6) confirmed that testimony. In his own words:-

"In August, 2008 on 5th, I got a call from O.S.C. Marigat Police Station. He alerted me that they had a suspect in custody who had been arrested at Kambi Ya Samaki. The suspect was also wanted in a case of robbery at Loruk which is this one now …."

The arrest of the appellant on an unrelated offence was almost five (5) months after the robbery of the complainant herein. The prosecution led no evidence as to why the appellant, who was known to the complainant so well, was not arrested immediately after the robbery.

We are also puzzled that the prosecution did not find it prudent to call Caroline who was alleged to have been with the complainant when she was robbed. Caroline in our view was an essential witness and her testimony would have buttressed the complainant's identification of the robber. But she was not and no explanation was forthcoming from the prosecution. We therefore draw the inference that if she had been called, her testimony would have been adverse to the prosecution case.

For the above reasons, our conclusion is that the identification of the appellant as the person who robbed the complainant was not positive. We appreciate that the Learned Senior Resident Magistrate warned himself of the danger of convicting the appellant on the evidence of a single identifying witness. But given our above findings, we think it was not save to convict the appellant on that testimony.

We also do not think that the evidence presented at the trial by the prosecution displaced the appellant's defence of alibi. His testimony was sworn and appears to have been accepted by the prosecution. We say so, because the prosecution never sought to discredit the same. No single question was put to the appellant in cross-examination to challenge his defence.

In all those premises, we have come to the conclusion that the appellant was not convicted on sound evidence. We allow his appeal, quash the conviction and set aside the sentence of death imposed upon him. The appellant is set at liberty unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED AT ELDORET THIS
7TH DAY OF SEPTEMBER, 2011.

F. AZANGALALA
JUDGE

J.R. KARANJA
JUDGE

Read in the presence of:-

(1) Kuon Luriang Tokotang, the appellant in person and
(2) Mr. Kabaka for the Republic.

F. AZANGALALA
JUDGE