



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 82 OF 2010**

**(Appeal against the judgment of [MR. B. O. OCHIENG, SRM] dated 1st April 2010 in Criminal Case No.822 of 2008 in the Senior Resident Magistrate's Court at Butere)**

**JOSHUA OCHIENG RAKWEL ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

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

Joshua Ochieng Rakwel, the appellant herein, was charged with two others (who were however acquitted) with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 19th September 2008 at Mundeka village, Kisa West Location in Butere District, the appellant, jointly with others not before the court, while armed with a dangerous weapon, namely an AK47 rifle, robbed Henry Nabiswa Nyongesa and Stephen Juma Akula of a Motor vehicle, Mitsubishi Canter registration No. KAZ 801 G valued at KShs.2.3 million, KSh.350,000/= cash, various shop goods valued at KShs.91,260/= and a Nokia 1200 phone valued at KShs.3000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Henry Nabiswa Nyongesa and Stephen Juma Akula. When the appellant was arraigned before the trial court, he pleaded not guilty to the charge. After full trial, the appellant was convicted of the two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The appellant was sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction and sentence. The thrust of the appellant's appeal challenged his conviction on the evidence of identification. He was aggrieved that he had been convicted on inconsistent, discredited and fabricated evidence of identification. He took issue with the fact that although the identifying witness had adduced conflicting evidence regarding the description of the robber, the trial magistrate had nevertheless gone ahead to convict the appellant on the basis of such evidence. The appellant was aggrieved that he had been convicted on the basis of inadmissible evidence of police identification parade. The appellant faulted the trial magistrate for failing to properly evaluate the totality of the evidence adduced which in actual fact exonerated him from the crime. The appellant was aggrieved that the trial magistrate had relied on the evidence of hearsay and presumption to convict him in the absence of factual evidence. Finally, the appellant was aggrieved that the trial court had not taken into consideration his alibi defence before reaching the decision convicting him. For the above reasons, the appellant urged the court to quash his conviction, set aside the sentence that was imposed upon him and accordingly order that he be set at liberty forthwith.

At the hearing of the appeal, the appellant presented to the court written submissions in support of his

appeal. He also made oral submission in further support of his appeal. He urged the court to consider the totality of the evidence adduced before the trial magistrate court, and his grounds of appeal, and reach determination allowing the appeal. On his part, Mr. Orinda for the opposed the appeal. He submitted that the prosecution had adduced a watertight case against the appellant which established that he was identified by several eye witnesses at the scene of the robbery. He was of the view that the conviction of the appellant was, in the circumstances, safe. He urged the court to dismiss the appeal.

Before giving reasons for our decision, it is imperative that we set out the brief facts of this case. PW3 Jackson Oruko is a businessman who resides at Bukura near Kakamega Township. At the material time PW2 owned a mini-lorry, a Mitsubishi Canter which he used to sell consumer goods within Kakamega and Vihiga Counties. On a typical day, the motor-vehicle (registration No. KAZ 801 G) was loaded with consumer goods at Kakamega. From Kakamega, the motor-vehicle traveled along a set route delivering the said goods to its customers. It was apparent that the said customers, at the material time, paid for the consumer goods sold to them in cash. PW3 employed PW1, Henry Nyongesa as his driver, PW4 Stephen Juma as his salesman and PW7 Stephen Odinga Misiko as his loader. All the three employees travelled at the front cabin of the said motor vehicle on 19<sup>th</sup> September 2008, at around 3.30pm, while the driver and his colleagues were in their normal business run between Butere and Mulwanda, they were stopped by a gang of robbers.

According to PW1, PW4 and PW7, when their vehicle reached a place called Mundeka, they saw a Nissan Sunny Saloon car parked by the road side. The registration number of the Nissan Sunny was No. KAE 221E (it later emerged that he said motor vehicle was actually registration No. 221N) When they were about to reach where the motor vehicle was parked, four men emerged from the motor vehicle and flagged them down. One of the men was armed with a rifle. PW1 testified that the man with the rifle pointed the same at him. He stopped the motor vehicle. In the confusion of the motor vehicle being stopped, and the robbers going to the side of the driver, PW4 and PW7 took the opportunity to slip off the passenger door and disappear into the nearby bushes. The robbers made no attempt to conceal their faces. PW1 was positive that it was the appellant who pointed the gun at him. He gave the physical description similar to the physical characteristics of the appellant in the first report that he made to the police. Similarly too, PW4 and PW7 testified that they were able to positively identify the appellant during the course of the robbery. It is instructive that the entire robbery incident took place in broad day light. The robbers robbed PW1 and PW4 of Ksh 350,000/= cash.

At the time the robbery was taking place, PW5 Boniface Okune Amwori was riding his motorcycle along the same road. He was carrying a pillion passenger, PW6 Daudi Nandwa. PW5 narrated how when he arrived at the scene, he saw the occupants of a small Saloon Motor vehicle emerge from the vehicle and stop the mini-lorry that was being driven by PW1. PW5 testified that he saw one of the men armed with a "long gun" confront the people in the front cabin of the mini-lorry (Canter). When PW5 reached near the scene, he stopped his motorcycle, abandoned it and crawled into a nearby drainage. PW5 then realized that he had dropped his mobile phone. He went back to collect the same. It is at this point that he testified that he clearly identified the appellant as the robber who was armed with the rifle.

PW5 gave the physical description that matched the appellant when he made the first report to the police. Similarly too, PW6 testified that he was able to positively identify the appellant as the robber who was armed with the gun. PW6 testified how, when PW5 crawled away from the scene, he was left standing watching the robbery in progress. He was about ten (10) metres from the scene of the robbery. PW1, PW4, PW5, PW6 and PW7 all confirmed their identification of the appellant in a police identification parade that was conducted by PW8 Chief Inspector Francis Kiprop, the then OCS of Butere Police Station. This identification parade was conducted on 27<sup>th</sup> September 2008, about a week after the robbery incident. Upon the report of the robbery being made, the police swung into action and were able to recover the stolen Motor vehicle which the robbers had driven away from the scene. When the robbers realized that the police were in their hot pursuit, they abandoned the motor-vehicle and scattered in various directions. Because it was already dark, the police abandoned their pursuit after arresting one suspect. (This suspect was later acquitted by the trial magistrate when none of the victims of robbery was able to identify him). The police conducted investigations which led to the arrest of the appellant at Kisumu. The investigations were conducted by PW9, Sergeant Solomon Salu and PW2 Sergeant Maurice

Amwayi.

When the appellant was put to his defence, he testified that he was a taxi operator based at Kisumu. On the material day of the robbery, i.e. 19<sup>th</sup> September 2008, he had borrowed motor vehicle registration No. KAD 221 N, Nissan Sunny from his friend called Robert Ombetsa. He narrated how he was hired by two catholic nuns to ferry them from Kisumu to Sang'alo Girls School. He told the court that when he reached a place called Khumusalaba, as he was returning back to his station, he was robbed of the motor vehicle and abandoned at a cane plantation. He reported the robbery incident to Mutumbu chief camp on 20<sup>th</sup> September 2008. The appellant reiterated that he was a victim of an earlier robbery and was therefore not involved in the subsequent robbery of PW1, PW4 and PW7. He denied any knowledge of the robbery. The thrust of his evidence was that he was a victim of mistaken identity.

This being a first appeal, the duty of this court is clear. In **Njoroge vs Republic [1987] KLR 19** at page 22, the Court of Appeal had this to say;

*“...it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. (see **Pandya v Republic [19570 EA 336, Ruwala v Republic [1957]EA 577**).”*

In the present appeal, after re-evaluating the evidence that was adduced before the trial magistrate's court, and after considering the submissions made before us during the hearing of the appeal, the issue for determination by this court is whether the prosecution established a case against the appellant on the charge of robbery with **violence contrary to Section 296(2) of the Penal Code** to the required standard of proof beyond any reasonable doubt.

As is evident from the facts of this case, the appellant was convicted on the sole evidence of identification. Five witnesses testified that they were able to positively identify the appellant as being the robber who was armed with a rifle during the robbery incident. The robbery took place in broad daylight. According to the identifying witnesses, the robbers made no effort to conceal their identity. The robbery took some time. This time was sufficient to enable the said witnesses (PW1, PW4, PW5, PW6 and PW7) to be positive that they had indeed identified the appellant as the robber who was armed with a gun during the course of the robbery. This court is aware that for it to convict the appellant on the basis of the sole evidence of identification, it should take care to interrogate itself on certain parameters to ensure that the evidence of identification is not fraught with the danger of mistaken identity.

As was pointed out by the Court of Appeal in **Njoroge vs Republic** (supra), the questions this court will ask itself include the following; what are the circumstances in which the identification was made? How long did the witnesses have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witnesses ever seen the accused before? What length of time had elapsed between the original observation and the subsequent identification to the police? Were there any material discrepancies between the description given to police in the initial report and the actual physical appearance of the accused?

In the present appeal, it was evident that the said identifying witnesses were not impeded when they testified that they had identified the appellant. The robbery took place in broad daylight. The circumstances that the robbery took place were such that the said identifying witnesses had a clear view of the appellant and his accomplices. Although there were minor discrepancies in regard to the initial report made to the police regarding the description of the appellant, there was no doubt that the discrepancies were resolved when the said identifying witnesses pointed out the appellant as the armed robber in the police identification parade that was conducted about a week after the robbery incident. Although the witnesses had not seen the appellant prior to the robbery incident, it was evident to the court that their identification of him during the robbery incident was accurate.

Having re-evaluated the submission made by the appellant challenging his identification by the said identifying witnesses, we have no doubt in our mind that the appellant was properly identified as the armed robber during the robbery incident. We formed the view that the prosecution established its case against the appellant on the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The appellant, jointly with others, while armed with a dangerous weapon, namely a rifle (AK 47), threatened violence on PW1, and thereafter robbed him of the Motor vehicle. The appellant also robbed PW4 of KShs.350,000/= cash.

The alibi defence of the appellant did not otherwise dent the strong prosecution case against him. The trial court, correctly in our view, dismissed the appellant's alibi defence as not being worth credit. On re-evaluation of the evidence adduced in this case, we are of the same opinion. The appeal herein lacks merit. It is dismissed. The conviction and the sentence imposed upon the appellant is hereby confirmed.

It is so ordered.

***DATED at KAKAMEGA this 7<sup>th</sup> day of December 2011***

**L. KIMARU**  
**J U D G E**

**B. THURANIRA JADEN**  
**J U D G E**