



## CRIMINAL

Ø Identification

### REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL CASE NO. 106 OF 2005

GEORGE KINOTI MARANGU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Being an appeal against the judgment of Mr. J.R. Karanja C.M. in Meru Criminal Case No. 382 of 2004 delivered on 15<sup>th</sup> June 2005)*

## JUDGMENT

The appellant was charged with five counts of robbery with violence contrary to section 296 (2) of the Penal Code. He was also charged with two alternative counts of the offence of handling stolen goods contrary to section 322 (2) of the Penal Code. After trial, before the lower court, he was convicted on the five counts of the robbery which were reduced to simple robbery contrary to section 296 (1) of the Penal Code. The appellant's appeal is against conviction and sentence. The Court of Appeal in considering the duty of the first appellant court in the case **Robert Onchiri Ogeto Vs. Republic** Criminal Appeal No. 1 of 2004 had this to say:-

***“This is a first appeal and the court has a duty to reconsider the evidence which was before the superior court; evaluate the evidence and draw its own conclusions giving due allowance for the fact that it has neither seen nor heard the witnesses – see Okeno Vs. Republic [1972] EA 32, Ngui Vs. Republic [1984] KLR 729 and Njoroge Vs. Republic KLR 197. Nevertheless, a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on misapprehension of the evidence, or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision – Chemagong Vs. Republic [1984] KLR 611; Kiarie Vs. Republic [1984] KLR 739.”***

The prosecution called a total of 6 witnesses. PW1, 2, 3 and 4 gave evidence of having been stopped as they traveled in a motor vehicle registration number KAP 680G. They were stopped by armed gun men after the armed men shot in the air. The evidence of those who gave a semblance of identification evidence has to be borne in mind in the light of the appellant's defence. We chose to begin by considering the appellant's defence because having analyzed the whole case we find that the appellant presented a very plausible defence. The appellant's defence was essentially one of *alibi*. He was on the material date at the family retail shop at Isiolo where he used to assist his mother. His presence there up to 7 pm was confirmed by DW1 who waited for the appellant's father at that shop until that time. DW1 was a landlord of a plot in Isiolo which the appellant's father was the caretaker. On the material day, DW1 had gone

to that shop looking for the appellant's father with a view to getting the rent for his plot from the appellant's father. It is obvious that DW1 was a person who knew the appellant very well. That being so, we find it unusual that he was not subjected to much cross examination to confirm certain issues of the prosecution's case. For example, we are intrigued by the fact that PW2 and five described the appellant as a person who had long hair. PW2 described the hair as, "Somali type of hair." PW5 even said:-

***"He (appellant) had rasta hair during the robbery. He had no such hair during the parade."***

DW1 being someone who knew the appellant would have settled the issue of the hair of the appellant. The prosecution however did not question him on that issue. The robbery as far as we can tell from the prosecution's evidence took place in a fleeting moment. The time of the robbery was said to be morning hours but it was misty and it was raining. The windscreen wipers of the vehicle were operating and even though it was morning hours the lights of the vehicle were on. It is in those circumstances that the appellant was identified by PW1, 2, 3 and 5. The proceedings indicate that the identification parade was mounted in respect of the appellant but no evidence was adduced in this regard by the police officer who carried out the identification parade. Failure to adduce evidence of that identification parade lends credence to the defence of the appellant when he said that he was wrongly charged with the offence and that the prosecution witnesses were allowed to observe him at Isiolo police station before he was taken to be part of the identification parade at Meru Police Station. Learned counsel for the appellant Mr. C. Kariuki presented well argued submissions in support of the appellant's appeal. He supported his argument with authorities which have been of invaluable assistance to us in preparation of this appeal. We shall however but only refer to one of those authorities **Abdalla Bin Wendo Vs. Republic** [1953] 20 EACA 166 where part of the holding is pertinent to our present case. The court stated:-

***".....On identification issues, a witness may be honest yet mistaken, and may make erroneous assumption particularly if he believes that what he thinks is likely to be true."***

That statement is very apt to this appeal. The errors in the identification of the appellant by the prosecution witnesses is very apparent. In view of the inconsistencies that we noted in the prosecution's case, we are of the view that a case was not made against the appellant. We are of the view that it is not essential for us to go through each inconsistency in this judgment but it suffices to say that those inconsistencies make us doubtful in the guilt of the appellant of the charges he faced in the lower court. The prosecution in this case failed to prove a case on the required criminal standards. There were just too many loose ends in the evidence. The learned state counsel Mr. Kimathi did not support the conviction of the appellant. In the end, we believe that we have made it clear that the appellant's appeal is merited. We therefore hereby allow the appellant's appeal and in so doing the conviction of the lower court is hereby quashed and the sentence against the appellant is set aside. We order that the appellant be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 29<sup>th</sup> day of October 2010.

**LESIIT, J.**  
**JUDGE**

**KASANGO, M.**  
**JUDGE**

Read, signed and delivered at Meru this 29<sup>th</sup> day of October, 2010.

In The Presence Of:

Kirimi/Mwonjaru ..... Court Clerks  
Appellant ..... Present

Mr. Kimathi ..... For the State

LESIT, J.  
JUDGE

KASANGO, M.  
JUDGE