



REPUBLIC OF KENYA

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 206 of 2008**

***LESIIT & KASANGO, J.J***

**WILSON KIMATHI KIRIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal against the judgment of Hon. P. N. Gesora S.P.M in Chuka Criminal Case No. 1533 of 2008***

***delivered on 30<sup>th</sup> October 2009)***

**JUDGMENT**

The accused person in this case was charged with one count of robbery with violence contrary to Section 296(2) and with another count of shop breaking and stealing contrary to section 306(a) of the Penal Code. The appellant and his co-accused were convicted of the offence of robbery with violence and both sentenced to suffer death. The appellant's co-accused Edward Mugendi Mugao filed an appeal against the lower courts conviction and sentence High Court Meru Criminal Appeal No. 207 of 2008 but when the appeal came for hearing he was reported to have died in custody and we accordingly marked his appeal as having abated. The appellant was aggrieved by the conviction and therefore filed this appeal he raises two grounds of appeal challenging the conviction on the basis of the evidence of identification by a single witness, the failure that the prosecution to avail vital witnesses in the case, the fact the learned magistrate overlooked the defective charge and also unfairly dismissed his sworn defence.

The facts of the case are that on the material night the complainant, Njagi Kimathi, was sleeping at home with his expectant wife when thugs struck. Njagi testified that when he heard the thieves, he gave his wife Ksh. 55,000/- to give to the thieves, he said that he hid himself in the ceiling. It was at 3.30 am when the thugs broke into his house. Njagi said that he could see the robbers through a hole in the ceiling, and that he was able to recognize the appellant and his co accused by means of torch light from torches which the thieves were holding.

There is a 2<sup>nd</sup> complainant, PW2, Justus, who said that on the 25<sup>th</sup> of September 2005 he closed his shop at 7 pm at 9 am. The following morning he found his shop had been broken into and some money, 18 sticks of cigarettes, a jumper and a cap stolen. He had no idea who had committed the offence. The appellant was arrested by PW 3, PC. Busolo, in company with PW 4 PC Kirui. He was arrested in connection with another offence. His co-accused was arrested in January the following year and both of them charged with this offence. The appellant in his sworn defence denied any involvement in the offenses charged. He also raised doubts as to the correctness of the identification through a hole in the

ceiling.

Mr. Kimathi for the state opposed this appeal and urged that the evidence of identification was good and should be upheld.

We have carefully considered the evidence which was adduced by the prosecution and the defence during the trial. We have subjected this evidence to a fresh evaluation and analysis as expected of a first appellate court see **OKENO VRS REPUBLIC 19(EA) 32.**

The appellant was convicted on the basis of evidence of identification of a single witness. Regarding identification by a single witness the court of appeal had this to say in the case of **CHARLES O MAITANYI VS REPUBLIC(1985) 2 KAR 75**

**It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve.**

**That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into. In days gone by, there could have been a careful inquiry into these matters by the committing Magistrates, State Counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care the evidence of a single witness?"**

We considered the conditions of the lighting at the time that the complainant claims that he saw and identified the appellant. The complainant was hiding in the ceiling of his house. He says that he was looking at the robbers through a hole in the ceiling. The size of that hole was not described neither its position in the ceiling given. The complainant did not describe whether he had a full and clear view of the assailants or which part of the body he saw. The other important point is that the light that enable the complainant to identify his assailants was not described. All the Appellant said was that he saw them by the help of torch light from torches which the thugs were having. The complainant did not say that the assailants were either beaming each other or themselves with the torches they were holding. Given the factors we have mentioned it was difficult for us to perceive exactly how the complainant saw his attacker in the night in question. We find that the conditions of light at the scene of this incident and the position from which the complainant alleges he saw his attackers were difficult for a correct identification. We are therefore not satisfied that the complainant made a correct identification of the people who broke into his house and robbed him of the money. We find that the conviction was unsafe and should not be allowed to stand. We accordingly allow the appellants appeal quash the conviction and set aside the sentence of death. The appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED,SIGNED AND DELIVERED THIS 29TH DAY OF OCTOBER 2010

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

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