



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**Criminal Appeal 28 of 2008**

**BONIFACE SANDE MAGERO ..... APPELLANT**

~VRS~

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant Boniface Magero Sande was charged and convicted of the offence of attempted robbery contrary to section 297 (2) of the Penal Code by Busia Principal Magistrate. In his grounds of appeal, he challenges the evidence of identification as unreliable and inadequate and averred that the evidence of the key witnesses was riddled with contradictions.

The complainant (PW1) and his wife PW3 were attacked in their house at Mudoma Village, Funyula Division of Busia District on 24/04/2006 around 9.30 p.m. The two were sleeping when they heard a knock at the door. Some people at the door identified themselves as police officers and demanded that the door be opened. When their request was turned down, one of them started removing grass from the roof of the house and then cut the door made of reeds with a panga, thereby making an opening through the door, the assailants inserted a panga and waved it back and forth at the complainant. PW3 pulled the panga and threw it under the bed. She also snatched the torch from the assailants and came with a gun. They made entry in the house and one of them snatched the torch from PW1. The assailants short once or twice while in the house. They demanded money Ksh.7,000/= cash being church offering which they believed PW1 was keeping. PW1 was injured during the struggle. He was ordered to take the two assailants to his mother's house who testified as PW4 where they robbed her of cash. The lower court acquitted the Appellant on that count and convicted him on count II. On 26/9/2006 the Appellant was arrested in a bar at Funyula and a parade held where PW1 and his wife, PW3 identified him as one of the assailants.

The Appellant also filed written submissions in this case which we have perused and addressed our minds on the issues raised.

PW1 and PW3 were asleep when the assailants struck. They had put off the lamp as they went to bed and did not put it on again. It was dark in the house. At first they struggled with the two assailants at the door as the assailants attempted to break the door and gain entry. One of the assailants put a panga through an opening on the door. PW2 pulled it from inside. One of them put a torch through the same opening which PW2 snatched. The size of the opening was not described and it is through this opening that the torch was flashed towards the inside by one of the assailants. PW1 and PW2 said they saw the Appellant at that juncture and identified him with the light of their torch. When the assailants finally gained entry, PW1 said he flashed the same torch at them and identified the appellant. When he flashed it once, he was ordered to put it off which he obeyed. At the time the assailants gained entry PW1 had a panga cut on the face. He was further assaulted when the assailants entered the house. He said one of them hit him with the gun which he described as an A.K 47 rifle. The issue which arises is whether the prevailing conditions were conducive to identification. Without the description of the nature and extent of the opening made on the door, it is doubtful that the witnesses saw the assailants when they (assailants) flashed their own torch at the witnesses who were still inside the house. The torch light was facing the witnesses and not the assailants. Inside the house PW1 said he flashed the same torch PW3 had snatched from the assailants at them. He was ordered to put it off which he obeyed. By that time, PW1 said he had already identified the Appellant. The size or the strength of the torch was not described in order to assess the intensity of the light. We find that the conditions were not conducive for identification and that the light used was not reliable.

The Appellant had a scar on the left arm which PW3 said helped her to identify him during the parade. She said she had bit him during the robbery. This was five (5) months after the incident. Accused argued in his evidence that medical evidence to show the cause of the scar ought to have been adduced. We entirely agree that the prosecution had this opportunity to call medical evidence on the cause and age of the scar. A scar caused by a human bite is different from one caused by a panga cut or any other thing. This further casts doubt on the identification during the parade.

The Appellant was arrested in a bar on the instructions of the O.C.S., Busia five (5) months later. The O.C.S did not testify to explain why he ordered the said arrest and how he connected the Appellant with the offence. He was in the

company of other people on the bar table who were also arrested and later released. There are all possibilities that the Appellant was arrested for another offence and later charged with an offence based on the five (5) months old incident. There was no evidence to explain delay in his arrest or to explain whether investigations were still on course and that the suspect could not be traced.

At the time of reporting the incident to the police, no names were given because none was available. The P.3 form gives history of the complainant having been attacked by unknown persons.

The accused in his defence admitted that he was arrested in a bar. He was remanded for ten (10) days before the parade was conducted and later charged with the two charges in the lower court. He denied the offence and called his wife (DW2) as a witness to say he was at home on the date of the robbery.

It is our finding that the accused was not satisfactorily identified by the key witnesses. The discrepancies and the gaps in the prosecution's case as highlighted herein cannot be disregarded. There was no nexus between the arrest and the commission of the offence.

We hereby allow this appeal and quash the conviction of the lower court. The sentence is also set aside. The appellant to be released forthwith unless otherwise lawfully held.

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**F. N. CHITEMI**

**SAID CHITEMBWE**

**JUDGE**

**JUDGE**

*Dated, Delivered and Signed at Bungoma*

*This 14th day of July 2009 in the presence of the appellant and the state counsel Mr. Onderi.*