



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU

**Criminal Appeal 193 of 2006**

(From original conviction and sentence in Criminal Case No. 2309 of 2005 of the Senior

Resident Magistrate's Court at Molo – Kirui {S.R.M})

JOHN MWEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

The appellant was charged with **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. The particulars of offence state that on the 26<sup>th</sup> day of November 2004 at Muchorwe Farm Molo in Nakuru District of the Rift Valley Province jointly with another not before court while armed with dangerous weapon namely (a) panga the appellant robbed Edward Kimwe of cash Kshs 5,100/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Edward Kimwe. The appellant was tried before Hon. Kirui Senior Resident Magistrate, Molo wherein the State called only two witnesses, the complainant, **Edward Kimwe [PW1]** and the arresting officer **PC Peter Wendot**. He was convicted on the robbery charge and sentenced to suffer death. Aggrieved by both the conviction and sentence the appellant preferred this appeal citing five grounds which, consolidated and summarized are as follows:

- 1. That the appellant was erroneously convicted on the basis of evidence of identification by PW1 whereas the conditions surrounding such identification were unfavourable, the same having been done at night.*
- 2. That considering the evidence tendered by the prosecution the findings and decisions were against the weight of the evidence tendered leading the court to pass a harsh and excessive sentence.*
- 3. The prosecution did not prove the charge beyond doubt as required by law and that the appellant's defence was erroneously rejected without valid reasons being given for so doing.*

On 3<sup>rd</sup> March 2009 supplementary petition was filed on behalf of the appellant bringing in a further ground as follows:

*“That the learned trial magistrate erred in law by convicting the appellant and sentencing him to death notwithstanding the fact that the appellant's constitutional rights as enshrined in Section 72(3) of the*

*constitution had been violated in that the appellant was arrested on 13<sup>th</sup> December 2004 and was detained in police custody until 28<sup>th</sup> October, 2005 when he was arraigned in court, (a period of more than 10 months and 16 days)."*

At the hearing of the appeal counsel for the appellant **Mr Karanja Mbugua** submitted only on the additional ground of appeal. As regards whether or not the charge was proved beyond doubt counsel referred this court to written arguments and authorities filed on behalf of his client and left us to re-examine and re-evaluate the evidence tendered and to find that the charge was not proved.

The State represented by learned counsel **Mr. Mugambi** conceded the appeal on grounds that the rights of the appellant under **section 72(3)** of the **Constitution** were clearly violated. He admitted that the appellant was arrested without warrant on 13<sup>th</sup> December 2004 and was kept in custody until 28<sup>th</sup> November 2005 when he was first produced in court and his plea taken. Mr. Mugambi told us that his attempts to obtain an explanation for the delay from the Police were unsuccessful. The police file at the disposal of the state counsel was also silent as to what could have caused the delay in arraigning the appellant after his arrest.

**Section 72(2) of the Constitution** requires that

*"a person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention."*

**Section 72(3)(b)** on the other hand provides that

*a person is arrested or detained upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within 24 hours of his arrest or from the commencement of his detention or within 14 days of his arrest or detention where he is arrested or detained upon reasonable suspicion of having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.*

The appellant was arrested on suspicion of having committed robbery with violence contrary to **section 296(2)** of the **Penal Code**. This being a capital offence punishable by death the maximum period that the prosecution could have taken before bringing him to court was 14 days. The prosecution has not discharged its burden to prove that bringing the accused before court almost one year after his arrest was reasonably justifiable. That being so we find that the appeal succeeds on this ground. We are however not persuaded that an acquittal follows as of right being of the considered view that the remedy for unlawful arrest or detention in the circumstances envisaged under **section 72** of the **Constitution** is one of compensation as provided under **section 72(6)**.

As is required of us, being the first appellate court, we have re-examined and re-evaluated the evidence tendered against the appellant particularly as regards the issue of identification. The trial court based its conviction on the evidence of a single identifying witness – the complainant. His testimony was that on the 26<sup>th</sup> November 2004 at 7.30 p.m. he was at his hotel at Kayole and had just closed shop. He saw someone entering the hotel in the dark. PW1 shone his torch towards the person who was now abusing him. PW1 gave conflicting testimonies as regards his identification of his assailant. Initially he stated that he could not see him properly then changed his story to say that he clearly saw and recognized the person as the appellant. He asked him what he wanted, whereby the appellant abused him calling him an uncircumcised boy. At that time the appellant's cousin called Mucheru came rushing in, kicked PW1 causing him to fall down. The two assailants held PW1 and dragged him along the ground. The appellant took Shs 5,100/= from PW1's pocket. At that time a certain Muchiri came out of his shop and confronted the two assailants. They left and went away. It was PW1's testimony that the appellant's cousin ran

home while the appellant walked to a nearby junction. After the two assailants ran away Mr. Muchiri closed and locked the gate. Soon afterwards the appellant and his cousin came back armed with a panga and a hoe. The cousin was carrying the weapons while the appellant was unarmed. According to PW1 the two men jumped over the gate intending to attack PW1 and Muchiri but the latter locked themselves in a butchery within the compound. Muchiri blew his whistle and the appellant and his cousin jumped over the fence and walked away while insulting PW1 and his companion. PW1 and his colleague reported the matter to the Police the following day. The appellant was arrested but his cousin disappeared. PW2, the arresting officer (Peter Wendot) testified that it was PW1 who led the police to arrest the appellant. On the issue of identification the learned counsel for the appellant cited several authorities which we have duly considered. They all flow from the celebrated decision of **Abdalla Bin Wendo vs. R [1953] 20 EACA page 166** wherein it was held as follows:

***“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or a jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”***

PW1 stated clearly that he was accosted at night. He said that he used his torch to illuminate his attacker. He also said that there was a lamp. He did not attempt to state the intensity of the light with which he identified his attackers. The attack was in a double sequence in that after the persons he identified as the appellant and his cousin left to their homes two other persons came and jumped over the gate, one of them armed. The complainant and his neighbor Muchiri locked themselves inside a butchery and while there Muchiri blew a whistle and the two intruders fled. PW1 did not state with clarity by what means he was able to identify the intruders as the same ones who had attacked him earlier on. Given the fact that it was a dark night and also that PW1 and his neighbor locked themselves up in a butchery there is doubt as to whether his identification of his attackers was positive.

Under cross-examination PW1 said he did not know the appellant but used to see him. Under re-examination he stated that he knew the appellant before that day. We find that his evidence of identification is contradictory in material respects and not sufficient to justify the conviction. Perhaps the prosecution ought to have called PW1’s colleague, Muchiri, whom he said was a neighbor, to corroborate PW1’s testimony. In convicting the appellant the learned trial magistrate relied solely on the evidence of PW1 without warning himself of the danger of basing a conviction upon it. He dismissed the appellant’s defence while believing PW1’s evidence, despite having noted that the evidence of the said Muchiri was probably vital to the case. We are persuaded that the evidence adduced at the trial was unsafe and the conviction cannot stand, being based solely on the evidence of a single-identifying witness when the circumstances surrounding such identification were quite unfavourable.

For the above reasons we hereby allow the appeal, quash the conviction and set aside the death sentence. The appellant is hereby set at liberty and shall be released from prison forthwith unless he is otherwise lawfully held.

**Dated signed and delivered at Nakuru this 13<sup>th</sup> day of November, 2009**

**M. G. MUGO**

**JUDGE**

**W. OUKO**

**JUDGE**