



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO**

**Criminal Appeal 21 & 22 of 2007**

1. Criminal Law
2. Criminal Appeal – Two judge Ang’awa, Mugo JJ
3. Subject of Subordinate Court Case:-
  - a) Robbery with violence contrary to section 296(2) of the penal code.

**Particulars of offence**

*On 5<sup>th</sup> February, 2006 at KCC Ndanai Murram road in Bureti District of the Rift Valley Province, jointly with others not before court while armed with offensive weapon namely a rope robbed Richard Kosgei of motor vehicle KAU 290Q Toyota Corolla DX station Wagon valued at Kshs. 650,000/= and at or immediately before or immediately after the time of such robbery wounded the said Richard Kosgei*

- b) **Plea**  
Accused No. 1 (*appellant No. 2*)  
George Maina Otiso (*Cr. 22/07*) not guilty  
Accused No. 2 (*appellant No.1*)  
Joseph Momanyi Mogaka (*Cr. 21/07*) not guilty
- c) Trail before magistrate.  
Convicted and sentenced to death

4. Appeal
  - a) **Appeals**– consolidated.

**Facts**

- b) i) Complainant – taxi driver was hired by three persons from Kapkatet to Sotik on 5<sup>th</sup> April, 2006 at 7.00p.m
- ii) Three persons paid 1,000/= but complaint unable to get change.
- iii) At Sotik took them to a bar where they (3) drank and ate.
- iv) Got in vehicle, used rope to strangle driver. Lost consciousness.
- v) Admitted to hospital two days.
- c) 19<sup>th</sup> April, 2006 – two weeks later, owner of bar identified accused No.2 appellant No. 1. Police informed but arrest made 23<sup>rd</sup> April, 2006 seven (7) days later.
- d) Identification parade conducted and identified accused 1 appellant No. 2. Comment was “*seen before parade*”
- e) No identification parade conducted for appellant No. 1 (accused No. 2)

**Arguments**

- i) Issue of identification
- ii) Constitutional rights and count I abandoned.

**State**

- i) Upheld conviction and sentence
- ii) Concedes only one identification parade conducted.

5. Held
  - i) Identification parade
  - ii) No sufficient evidence to link the two appellant to offence

iii) Conviction and sentence quashed and set aside.

6. Case Law

**By Appellant's advocate**

**Identification**

- a) **Benard Mose V R Cr. A. 10/05 Kericho Ang'awa J**
- b) **Kennedy Maina V R Cr.A. 14/05 Nakuru**  
Tunoi, Bosire, Aluoch JJa  
Abandoned by appellant advocate
- c) **R V Kenneth Cr. A. 21/06 (Nyeri) Kasanga J**
- d) **R V Wesley Kipkoech Mutai Cr case 11/05 G.B.M Kariuki**
- e) **James Maina Wanjiru V R (Nakuru) Cr A 30/06 Omolo, Githinji, Otieno JJa**
- f) **Anthony Njeru Kathiari & another V R Cr a. 21 and 23/04 (Nyeri)**  
Omollo, Waki, Deverell.
- g) **Paul Mwangi Murunga V R Cr.A. 35/06**  
Nakuru Cr. A 35/06 Omollo, Otieno JJa descending Githinji Ja

**Authorities by State Counsel – Nil.**

**By Count**

- a) **R V Mwangi S/o Manaa (1936) 3E.A. CA 29**
- b) **Kipwenei Arap Masonik & 2 others V R (1930) 12 KLR 153**
- c) **R V Eria Sebwato (1960) EA 174 U**

7. **Advocates**

T.M.O. Nyaingiri advocate instructed by M/S T.M.O. Nyaingiri & co. advocates for the Appellant.

B.L. Kivihya Senior Principal State Counsel Instructed by the Attorney General for the Republic

**Consolidated**

GEORGE MAINA OTISO ..... APPELLANT NO. 1

***Original Accused No. 2***

JOSEPH MOMANYI MOGAKA ..... APPELLANT NO. 2

***Original accused no. 1***

VERSUS

REPUBLIC .....RESPONDENT

***(From the original conviction and sentence of the Senior Resident Magistrate K. Mogambi ESQ SRM in Criminal Case No. 918/2006 at Kericho delivered on 13<sup>th</sup> April, 2007)***

**JUDGMENT**

**I: Procedure**

1. **Appellants**

George Maina Otiso Appellant No 1 was the original accused No. 2 in the lower courts whilst Joseph Momanyi Mogaka appellant No.2 was the original accused No. 1 in the same courts.

2. Both were charged jointly with the offence of

***Robbery with violence contrary to Section 296(2) of the Penal Code.***

The particulars of offence being

***On the 5<sup>th</sup> April, 2006 at KCC Ndanai Murram road in Bureti District of the Rift Valley Province jointly with others not before the court while armed with offensive weapon namely a rope, robbed Richard Kosgei of motor vehicle registration number KAU 290Q Toyota Corolla DX Station Wagon valued at Kshs. 650,000/= and at***

*or immediately before or immediately after the time of such robbery wounded the said Richard Kosgey.*

3. Both appellants pleaded not guilty to the offence. A trial was held and both were found guilty and convicted after trial. Both were sentenced to Death. On 13<sup>th</sup> April, 2007.
4. On appeal, the two files Cr.A. 21/07 and 22/07 were consolidated for hearing having been filed on 17<sup>th</sup> April, 2007.

## **II: Background**

5. The complainant, PW1 a taxi driver had been hired by three persons unknown to him to travel from Kapkatet to Sotik on the 5<sup>th</sup> April, 2006. The three paid him Kshs. 1,000/= for the fare but wanted change. The complainant had no change. It was agreed when they reached Sotik that they the three would have a meal and there would be change left over for the fare. The complainant obliged. One of the three kept saying he be taken to look for accommodation. It therefore meant that the complainant spent a considerable time with the three. He was accompanied by PW3 who traveled in the same vehicle to Sotik. At the Sotik Hotel the complainant stayed for 20 minutes but PW3 left and went home.
6. The complainant was again asked to drive the three persons, this time he was alone with them whilst in the vehicle one of them tied a rope around his neck and strangled him until blood came out of his eyes. He fainted and lost conscious. He found himself in hospital where he had been admitted for two days.
7. His brother, PW2 received information that the robbery of the vehicle had occurred on 5<sup>th</sup> April, 2006 at 8.00p.m. He immediately reported to the police.
8. The persons concerned with running the hotel/butchery was PW4. He recalls that the complainant came with the one customer, while the others were in the vehicle. They wanted ¼ Kg of meat and he was given Kshs. 1,000/= but he had no change. They went back into the vehicle and drove towards Sotik town at 8.00p.m. He received information that the complainant had been robbed. He visited the complainant in hospital the next day.
9. PW4 then stated on 19<sup>th</sup> April, 2006 a group of persons walked into his hotel business. He recognized original accused No. 2 or appellant No.1. He made a report to the police. What is unclear is that the police made no arrest on 19<sup>th</sup> April, 2006 but on 23<sup>rd</sup> April, 2006. This was two weeks after the incident and one week after identifying accused No.2 original appellant No. 1.
10. An identification parade was then held for accused No. 2 appellant No. 1 that he attended to.
11. Though PW5 was the arresting officer who received a report of two persons involved in the said robbery, and the two were pointed out to him and his colleagues by members of public, he did not state the member of public who pointed the two to him. He mentions the date of information as 19<sup>th</sup> April, 2006.

12. The key witness is PW7 who conducted an identification parade on 23<sup>rd</sup> April, 2006 at 11.00a.m. This parade was one and conducted only as to Joseph Momanyi Mogaka the original accused No. 1, appellant No. 2. The parade was conducted at the police yard for four witnesses who all four identified accused No. 1 appellant No. 2.
13. It was on a summary of the facts alone that the appellant 1 and 2 were placed on their defence. The trial magistrate did not believe their evidence. They were found guilty and convicted.

### **III: Appeal**

14. Being dissatisfied with the conviction and sentence both the appellant appealed on 7<sup>th</sup> April, 2007 against the said conviction and sentence.
15. The advocate for the appellant abandoned the appeal on the constitutional rights of the appellant on being brought to court.
16. The appeal grounds relied on was on the issue of identification. The state recognize only one identification parade was conducted for one appellant but he nonetheless supported conviction and sentence.

### **IV: Opinion**

#### **i) Identification**

17. It is established from the prosecution evidence that the three persons who robbed the complainant on 5<sup>th</sup> April, 2009 disappeared with the vehicle in question. They were not seen thereafter until 19<sup>th</sup> April, 2009 when PW4 saw one of the robbers whom he identified as accused No. 2. George Maina Otiso Appellant No.2 as one of the robbers. As stated earlier this was a lapse of two weeks.
18. PW4 participated in the identification parade for the said accused No. 2/appellant No. 1 but according to PW7 he conducted an identification parade for appellant No. 2 original accused No. 1 Joseph Momanyi Mogaka. All four witnesses identified in the identification parade accused No. 1 appellant No. 2. It is unclear how he was arrested?
19. In the case law of **Roria V R (1967) EA** the court of appeal stated that  
***“a conviction restraining entirely on identity invariably causes a degree of uneasiness .....”***  
  
great care should therefore be taken by the magistrate courts in scrutinizing the evidence of identification (*evidence for magistrate*) (*Philip P. Durand*).
20. The appellant No. 2 original accused No. 1 was not satisfied with the identification parade. The procedure

according to [the Evidence for Magistrate – P. P. Durand] on this point is set out on in the case of:-

**R V Mwangi S/O Manaa**

(1936) 3 EA CA 29

**In brief**

- i) An accused should always be informed he may have his advocate or friend when a parade takes place.
- ii) The investigating officer may be present but he or she is not permitted to carry out the identification parade.
- iii) None of the witnesses are allowed to see the accused before the parade.
- iv) There must be at least eight persons as far as possible of similar age, height, general appearance and class of life.
- v) The accused may stand at any position.
- vi) Exclude every person who has no business there.
- vii) Careful notes be recorded after each witnesses leave and if identification had been made or not.
- viii) Witnesses may ask accused to walk, speak, see him with a hat or not, if so, then all parade members must do likewise.
- ix) The witnesses must touch the person identified.
- x) Accused to be asked if he is satisfied with the parade at its termination.
- xi) There should be no influence. Witnesses should be told instead you will see “a group of people who may or may not contain the suspected person”. NOT “can you see the suspect in the parade?”
- xii) Be fair.

21. In the case of

**Kipwenei Arap Masonik & 2 others V R**

(1930) 12 KLR 153

stated that

***“an identification parade is a matter of opinion expressed by a witness and its value depends on the circumstances under which it is given...”***

This opinion may strengthen the prosecution’s case if there are certain significant feature. Where non exists, its value of the identification parade becomes negligible.

22. The standard of proof must be “water-tight” to justify a conviction **R V Eria Sebwa (1960) EA 174(U)**.

23. In this appeal the identification parade form showed the appellant No. 2 original accused No. 1 stating that the witnesses had in fact seen him before the parade. The place of conducting the parade was changed according to the parade form.

24. The identification parade in our opinion in this case is not “*water-tight*” to warrant the conviction of both appellant. Appellant No. 1 original accused No. 2 has no evidence before us to convict him to this case.
25. The conviction is unsafe it is hereby quashed. The sentence of death is set aside. The two appellants are at liberty unless otherwise lawfully held.

**DATED** this 3<sup>rd</sup> day of December, 2009 at **KERICHO**

.....  
**M.A. ANG’AWA**

**JUDGE**

.....  
**M.G. MUGO**

**JUDGE**

T.M.O. Nyaingiri advocate instructed by M/S T.M.O. Nyaingiri & co. advocates for the Appellant.  
B.L. Kivihya Senior Principal State Counsel Instructed by the Attorney General for the Republic.