



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 171 & 172 of 2007**

**GEORGE OTTMAX OTEINO.....1<sup>ST</sup> APPELLANT**

**SIMON YELE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**GEORGE OTTMAX OTIENO** and **SIMON YELE**, the appellants, were charged with robbery with violence contrary to **Section 196(2)** of the **Penal Code**. It was alleged that on 8<sup>th</sup> April 2005 at Ngecha Farm in Nakuru District of Rift Valley Province jointly with another not before court and while armed with dangerous weapons namely, rungus and iron bars they robbed Joseph Kipyegon Kirui of cash Kshs.150/- and a bicycle all valued at Kshs.3,550/- and at or immediately before or immediately after the time of such robbery they used personal violence to the said Joseph Kipyegon Kirui. They pleaded not guilty to the charge but after trial before the Senior Resident Magistrate at Nakuru they were convicted and sentenced to death. They have appealed against both the conviction and sentence.

In supporting the conviction Mr. Gumo, Assistant Deputy Director of Public Prosecutions submitted that the appellant's conviction is safe as it was based on recognition, as opposed to mere identification, the complainant having known both the appellants before. He further submitted that the appellants subjected the complainant to severe torture for about 20 minutes during which he was able to see them well. He urged us to dismiss the appeal in its entirety.

We have considered these submissions. The appellants' conviction is based on the sole identification evidence of the complainant, PW1. That witness claimed that the offence was committed at about 7.00 p.m. when it was still bright for him to see his assailants. In cross examination, however, he said that the offence was committed "between 7.00 p.m. proceeding to about 7.30 p.m." He also claimed that he was able to identify the voice of Simon Yele whom he had known before when he commanded him to "toka inje".

It is trite law that if the evidence relied upon to implicate an accused person is entirely of identification, that evidence should be watertight before it can found a conviction - *Enos Mbanja Vs Republic*, Criminal Appeal No. 231 of 2004 (CA -Nairobi). When that evidence is from a single identifying witness, the court has to regard it with great caution especially when it is shown that the conditions favouring a correct identification were difficult - *Ogeto Vs Republic* [2004] 2 KLR 14.

We are uncomfortable with the appellants' conviction based on the sole identification of PW1. The record shows that that witness had drunk changaa with the appellants for quite sometime and must therefore have been inebriated. He said he was hit on his left eye but was able to see the appellants as his assailants with his right eye. That is not possible. Having been hit on his left eye he was definitely in pain. The natural reaction of anybody in such a situation is to close both eyes. The complainant with pain on his left eye could not have seen anybody with the right eye. Whereas voice identification is best at night - *Njeri Vs Republic* [1981] KLR 156 at P.159. In the pain in which he was we are also in doubt that he was able to identify the words "toka inje" only as having been spoken by the appellant, Simon Yele.

We are satisfied that at 7.30 p.m. when the offence was committed with no source of light the drunken state in which the complainant was coupled with the pain he had on his left eye he could not have been able to identify anyone. There having arisen a brawl in the drinking den any of the people with whom the complainant and the appellants were could have hit the complainant. It appears that the complainant just assumed that the people he had quarreled with are the ones who hit him. Taking all these factors into account we find that the appellants' identification is in doubt. Consequently we allow this appeal, quash the conviction and set aside the sentence. The appellants shall be set free forthwith unless otherwise lawfully held.

**DATED and delivered this 3<sup>rd</sup> day of December, 2009.**

**D. K. MARAGA**

**JUDGE.**

**M. G.MUGO**

**JUDGE.**