



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL 179 & 180 OF 2005**

**ISAAC ONSATE SUBANO)..... APPELLANTS**

**MUSEVEN NYAKUNDI )**

**VERSUS**

**REPUBLIC ..... RESPONDENTS**

**(From original convictions and sentences of the Senior Resident Magistrate's Court at Nyamira in Criminal Case No.19 of 2005 by L. KOMINGOI, SRM)**

**JUDGMENT**

The appellants were convicted of the offence of robbery contrary to **section 296(1)** of the **Penal Code** and each sentenced to twelve years' imprisonment. They were aggrieved by the said conviction and sentence and each preferred an appeal to this court.

Mr. Nyariki, advocate for the appellants, argued only one ground of appeal. He submitted that the trial court based its conviction of the appellants on improper evidence of identification.

Let me first state briefly the facts and the evidence that was tendered before the trial court. On the 3<sup>rd</sup> day of December, 2004 at Siamani sub-location in Nyamira District, the appellants were alleged to have robbed **Samwel Arisi Agonga, PW1**, of cash Kshs.11, 000/=. PW1 testified that on the material day at about 2.00 a.m. he was asleep in his house. He heard a neighbour by the name **Hellen Momanyi, PW4**, screaming for help. PW1 woke up and went to the road.

The witness alleged that there was bright moonlight and he could see clearly. He found some other neighbours who had also woken up. He learnt that some chicken belonging to PW4 had been stolen. They decided to look for the thieves. On reaching near PW1's home, six people emerged from a certain home. PW1 alleged that he identified the appellants amongst the six people. He was hit on the left leg but he did not know who hit him. PW1 started running away but he fell down after a short distance. He alleged that the two appellants cut him on the left hand and robbed him of Kshs.11, 000/=. Later he recorded a statement at a Police station. He told the police that he identified the appellants whom he alleged to have known for nearly ten years.

**Dismas Momanyi Gisema, PW2**, was a son of PW4. At about 2.00 a.m; he heard his mother screaming. He woke up and went to find out what had happened. He was told that some of their chicken had been stolen. They decided to follow up the thieves. He said that there was bright moonlight. PW2 alleged that he came face to face with the second appellant who cut him with a panga. PW2 said that he

also recognized the second appellant by his voice. PW2 said he did not see the first appellant. The witness stated in cross-examination that the second appellant had covered part of his face.

PW4 testified that she did not recognize any of the people who stole her chicken. As they went around that night looking for the thieves, they found a group of people near a fence. She thought they were her neighbours and told them that her chicken had been stolen. She identified the appellants out of the group of people. The witness added that the appellants and the other people had tied their heads with black polythene bags but their faces were not covered. The appellants and their accomplices started attacking PW4 and the other neighbours. **Richard Onsafe Nyaencha, PW5**, was at the scene but he did not identify any of the appellants although in court he said that he had known them for nearly 25 years.

**Dickson Furaha Nyabero, PW6**, testified that he recognized the first appellant only. **Samson Amisi Nyaencha, PW7**, who was also in the search team on the material night told the court that he did not recognize any of the appellants. **Dominic Kimeli Limo, PW8**, the investigating officer, testified as to how the appellants were arrested following the alleged incident.

In their defence, the first appellant raised the defence of alibi. He said that at the material time he had gone to his cousin's home to help him construct a house. He remained there until 22<sup>nd</sup> December, 2004.

The second appellant also denied any involvement in the alleged incident. The trial court held that there was sufficient moonlight to enable PW1, PW2, PW4 and PW6 identify the appellants.

Mr. Nyariki submitted that the appellants were convicted for a serious offence yet there were unfavourable circumstances for positive identification. The only source of light was moonlight, the offence having been committed at about 2.00 a.m. He cited the case of **JAMES NJUGUNA MWAURA VS REPUBLIC**, Criminal Appeal No.121 of 1985 where the appellant's conviction for the offence of burglary was based upon his identification by moonlight. The Court of Appeal held that the identification could not be considered safe to rest a conviction upon, for such a serious offence and allowed the appeal.

It was doubtful whether the appellants were properly identified. Some of the prosecution witnesses like PW5 and PW7 said they were not able to identify the appellants yet other witnesses like PW1, PW2, PW4 and PW6 testified that they positively identified them. All the material prosecution witnesses testified that the appellants were their neighbours and they had known them for many years. If indeed there were favourable circumstances for a positive identification, there would have been no such contradictions on the part of the prosecution witnesses with respect to identification of the appellants. Such contradictions should have created doubt in the mind of the learned trial magistrate which benefit of doubt should have been given to the appellants.

It is common knowledge that mistakes in identification under difficult circumstances can easily occur. Before a court of law can convict an accused person based on the sole evidence of identification, it must be satisfied that the evidence is watertight and free from the possibility of mistaken identity. This is more so where the purported identification is made in difficult circumstances, see **MAITANYI VS REPUBLIC** [1986] KLR 198 at page 200.

Mr. Kemo, Principal State Counsel, conceded the appeal, and in my view rightly so. He pointed out that the obtaining circumstances were not favourable for a positive identification; and more so given the contradictions by key prosecution witnesses.

For the above reasons, I allow the appeals, quash the convictions and set aside the sentences that were pronounced by the trial court. The appellants are set at liberty unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at KISII this 30<sup>th</sup> day of April, 2008.**

**D. MUSINGA**

**JUDGE**

**Delivered in open court in the presence of:**

**Mr. Kemo for State.**

**Mr. Nyariki for appellants.**

**D. MUSINGA**

**JUDGE**