



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 335 of 2005**

**DANIEL KARIUKI NGIGE..... APPELLANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

**J U D G M E N T**

**DANIEL KARIUKI NGIGE**, the appellant, was charged before the subordinate court with robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of offence were that on 14<sup>th</sup> June, 2003 at Kasarani Hunters Estate Nairobi within the Nairobi Area jointly with others not before court while armed with pangas, simis and rungus robbed **EVANS GAKONDE NYABUTO** of cash Kshs.2,000/-, one Panasonic T.V. set, one Panasonic video recorder, one Meko Gas cooker and one Nokia 3330 mobile phone all valued at Kshs.48,000= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **EVANS GAKONDE NYABUTO**. After a full trial, he was convicted of the offence and sentenced to death as provided for by law. Being dissatisfied with the decision of the subordinate court, the appellant has appealed to this court against both conviction and sentence. The appellant also filed written submissions, which he relied upon during the hearing of the appeal.

The learned State Counsel, Ms Gateru, opposed the appeal and supported both the conviction and sentence. Counsel submitted that the prosecution proved all the ingredients of the offence. The offence of robbery with violence was proved as the robbers were more than one person and were armed with weapons. On identification, counsel contended that the appellant was positively identified by P.W.2 who stated that she in fact knew the appellant before. Therefore, the evidence was that the appellant was recognized, which was more reliable than mere identification. Counsel emphasized that there was adequate light from torches and light in the kitchen, to enable P.W.2 positively identify the appellant. Counsel contended that, any apparent contradiction in evidence, was minor and did not affect the prosecution case. Counsel lastly, submitted that the defence of the appellant was considered by the subordinate court and found to have no merits.

In summary, the prosecution case is as follows. At about 4 am on 14/6/2003, **P.W.1 EVANS NYABUTO** and his wife P.W.2 **OLIVER BONARERI OGEMBO**, were sleeping in their house at Kasarani Nairobi. They were in their house with two young children and a house help **JACKLINE MUHONJA P.W.4**. They heard a commotion outside the house, just to discover that it was some people who were attempting to break the door. The people from outside were also calling on them to open the door. P.W.1 and P.W.2 started screaming hoping that neighbours would come to their help. Nobody came to their aid, and because the intruders had almost broken the door, P.W.1 opened the door. Then several people who were carrying torches, entered the house and robbed a mobile phone and cash from P.W.1. They took the T.V. set and video machine from the sitting room. They also went into the kitchen,

where P.W.2 was hiding, and took the cooker. According to P.W.2, she recognized the appellant in the kitchen, from the light from the torches and also because the kitchen did not have curtains. When members of the public started coming, the robbers ran away with all the robbed items. A chase did not help, as the robbers managed to escape with the robbed items. The appellant was arrested several hours afterwards in the afternoon on information given later by P.W.2, that she had recognized him as one of the robbers. A search in his house did not uncover any of the robbed items. He was later charged with the offence.

When the appellant was put on his defence, he gave an unsworn testimony. He also called one witness, his wife. It was the appellant's defence that he was a neighbour of the complainant. He stated that he was a carpenter, and that on the night in question, he slept in his house with his wife D.W.2. He heard screams that night, and even enquired from the watchman about the screams. The said watchman told him that he did not know what the screams were for. After daybreak, he went to work at 7 am. At about 3 pm, some people went to his place of work and called him to go out, only to be told to go to his house. On the way, they met police officers. A search was done in his house, but nothing was recovered. He was then taken to Kasarani and later charged.

He denied going to the house of the complainant. His witness **D.W.2 JOAN WANJIRU** was his wife. It was her testimony that, on the material day of the incident, she slept at her house with the appellant. It was her evidence that they heard screams at night and enquired from the watchman.

The following day, at around 3 pm, some people, including the complainant whom she knew before, came with the appellant. They searched their house but did not recover anything. Those people took the appellant to Kasarani Police Station and later charged him.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt.

This being a first appeal, we are duty bound to re-evaluate the evidence on record afresh and come to our own conclusions and inferences.

We have evaluated the evidence on record. The conviction of the appellant is clearly predicated on the identification or recognition of the appellant by a single identifying witness. Such evidence can be the basis for founding a conviction in a criminal case. However, caution is required before founding a conviction on such evidence of identification by a single witness. Several reported court cases have dealt with the subject situation. Suffice it if we cite the case of **ODHIAMBO -VS- REPUBLIC [2002] I K L R 241** where Chunga CJ, Lakha and Ole Keiuwa JJA held-

***“1. Courts should receive evidence on identification with great circumspection particularly where circumstances are difficult and do not favour accurate identification.*”**

***2. Where evidence of identification rests on a single witness and circumstances of identification are known to be difficult, what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which, the court may reasonably conclude that identification is accurate and free from possibility of error.”***

In our present case, the conditions for positive identification were clearly difficult. It was at night. The lights in the house were not put on. The victims (including P.W.2) must have been scared. The incident took quite short, a duration of only 5 or so minutes. P.W.2 said that she identified the appellant from the light of a torch of one of the robbers.

We observe that the learned magistrate neither cautioned herself nor did she look for additional supporting evidence before relying on the evidence of the single identifying witness to convict the appellant. In our view, that was an error. There was no description of the intensity of the light from the

torch. There was no evidence on the length of time that the light was shone on the appellant to enable P.W.2 to recognize him. There was no evidence that the people who chased the robbers went to the house of the appellant, who was in fact a neighbour, if they indeed knew him to be one of the robbers. There was no evidence that the witness, P.W.2, informed any of the neighbours who came at that time, that she had recognized the appellant as one of the robbers. Nothing was found in the actual or constructive possession of the appellant when he was arrested at about 3 pm. We are of the respectful view that, had the learned magistrate directed her mind to all the above factors, she would not have arrived at the conclusion that the alleged recognition of the appellant was positive and free from the possibility of error. On our part, taking into account the evidence on record, and the circumstances of the case, we are of the view that the identification of the appellant by the single witness, P.W.2, is not free from the possibility of error. It cannot be the basis for founding a conviction. The conviction is not safe and has to be quashed.

The second reason why we will allow the appeal, is that the appellant raised the defence of an alibi. The appellant's duty in raising the alibi defence was merely to create doubt as to his involvement in the said offence. We think that the appellant succeeded in creating the doubt. Not only was there no independent evidence to connect the appellant with the offence, but he also called a witness who supported his alibi story. That witness testified on oath and was cross-examined. There was also no evidence that any of the people who chased the robbers went to the appellant's house that early morning, while the appellant was known to be a next door neighbour. If indeed he was known to be one of the robbers, they should have gone to check at his house. We give the benefit of doubt to the appellant.

Having considered all the evidence on record, we are of the view that the prosecution did not prove the guilt of the appellant beyond any reasonable doubt. We will therefore allow the appeal.

Consequently, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 15<sup>th</sup> day of May, 2008.

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J.B. OJWANG

G.A. DULU

JUDGE

JUDGE

**In the presence of –**

Appellant in person

Ms Gateru for State

Huka/Mwangi - court clerk.