



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 671 of 2004**

*(From Original Conviction and Sentence in Criminal Case No. 480 of 2004 of the*

*Chief Magistrate's Court at Kibera)*

**MARTIN ODHIAMBO NGESO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant **MARTIN ODHIAMBO NGESO** was charged before the subordinate court with five (5) counts of robbery with violence. All the charges relate to incidents that occurred at Ongata Rongai Township on the night of 9<sup>th</sup> January 2004.

After a full trial he was convicted on two counts that is count 1 and 5 and acquitted of the other counts. He was sentenced to suffer death as provided for by law on each of the two counts. Being dissatisfied with the decision of the learned trial magistrate he has appealed to this court challenging both conviction and sentence, on several grounds. He also filed written submissions.

At the hearing of the appeal the appellant relied on his written submissions.

Learned State Counsel Mr. Makura opposed the appeal. He submitted that the conviction was predicated on identification and the mode of arrest. It was counsel's contention that, though the offences occurred at night, PW1 stated that there was electricity light at the scene and that he saw the appellant clearly. The evidence of PW2 corroborated that of PW1. The appellant was also arrested by PW6 on the same night, after having been pointed out by PW1. This was just a short while after the commission of the offence. Counsel also contended that PW3 stated that he identified the appellant in an identification parade. That evidence of PW3 strengthened the evidence of PW1 and PW2. Counsel contended that there was sufficient evidence to sustain the conviction of the appellant.

Counsel also contended that the learned trial magistrate considered the defence of the appellant and dismissed the same.

In response, the appellant submitted that PW1 did not describe the intensity of light at the scene.

The brief facts are as follows. On the night of 9<sup>th</sup> February 2004 there was a spate of robberies at Ongata Rongai Township in Kajiado District.

At around 9.00 p.m., PW3 AMOS KAHIU KUNGU was working at Hillcrest Bar when two young men came into the bar and asked to be sold cigarettes. After he sold them the cigarettes and gave them

change, one of those young men produced a pistol and told him to give him all the money that he had. There was electricity in the bar. He removed Kshs.800/=. Then the young man who did not have a pistol moved inside and took pilsner beer and satchets of whisky valued at Kshs.1,200/=. The two young men drank the alcohol and told him not to scream. Then they left. The next day, he went to record a statement. There was an identification parade in which he identified the appellant as one of the two young men who had robbed him. He was wearing the same clothes that he wore during the robbery. This was the subject of the 5<sup>th</sup> count.

At around 10.30 p.m. PW4 NJOROGE KIMATA was at a pub when a person entered with a pistol and ordered them to lie down and produce all the money they had and mobile phones. He was not sure whether that person was in the company of others. However, he was robbed of his Kshs.600/=: Motorola mobile phone and a wrist watch. He later reported the incident to the police. This was the subject of count 4.

On the same night at around 11 p.m. PW1 SIMON KINYANJUI NJUGUNA and his mother PW2 ESTHER NJERI NJUGUNA arrived at the gate of their house at Ongata Rongai. PW1 was driving his vehicle KYP 697. His mother was a passenger in the vehicle. At the gate, while waiting for the gate to be opened, someone suddenly snatched the mobile phone of PW1 and pointed a pistol at him. PW1 got hold of the pistol and that man threatened to kill him. PW1 then offered to give that man money from his wallet. He gave that man Kshs.3,000/= and 2 US Dollars. That same man demanded for the handbag of PW2, but PW2 said that there was no money in the hand bag. That man then told them not to scream and went and joined others who were standing nearby. PW1 took his mother to the house and went and reported to the police.

It was PW1's evidence that there was electricity light at the scene of robbery. After 45 minutes he spotted somebody at a butchery and identified him as the man who had robbed him earlier. He saw the man enter a bar, and he telephoned the police to come. He pointed the man to the police in the bar. The man was drinking in the company of two others. When the police told them to surrender, the men took off with the police chasing. The man with the pistol ran brandishing his pistol. The police shot and killed him. That man was found with a pistol and 2 US Dollars, as well as Kshs.1050/=. It was his evidence that he was able to identify the others as he saw the clothes they were wearing. This was the subject of the 1<sup>st</sup> count.

On 10<sup>th</sup> January 2004 PW5 IP HARRISON MUKUNYU conducted an identification parade at Ongata Rongai police station. A witness AMOS KUNGU identified the appellant by touching. Also IBRAHIM LEKARUSHA, who did not testify in court, identified the appellant. A woman JANE METTO could not identify the appellant at the parade.

In his defence, the appellant gave an unsworn testimony. He denied the offence and stated that on 9.1.2004 he went to visit a friend at Rongai. His friend told him to go to a bar for refreshments. Shortly, the police came, arrested him and took him to the police station for an offence he did not know.

We have evaluated the evidence on record as we are required to do in a first appeal – see **OKENO – vs – REPUBLIC [1972] EA 32**.

The appellants conviction is predicated on identification and the mode of arrest.

In **PAUL ETOLE & ANOTHER – vs – REPUBLIC CA NO. 24 OF 2000** (unreported) the Court of Appeal stated –

“The appeal of the second appellant raises problems relating to the evidence of visual identification. Such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made..... It is true that recognition may be more

reliable than identification of a stranger; but even when a witness is purporting to recognize someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made”.

With regard to count 1 with which the appellant was convicted, it was the evidence of the complainant PW1 that he was robbed by someone who was having a pistol. The other companions of that person were merely standing by at a distance. There is no evidence that those people participated in the robbery. PW2 was farther away from PW1 in the vehicle of PW1. There is no evidence that she identified the robber at the scene of crime. The appellant was arrested after the police were alerted by PW1, that the robber had got into a bar. The appellant was found in the bar drinking with two others. All three tried to escape. However, the appellant was arrested. One of them who was brandishing a pistol was shot dead. The person killed was also found with 2 Dollars, and some money.

In my view, the evidence on record does not prove that the appellant was one of the robbers. He was not identified as the person who threatened PW1 with a pistol and robbed PW1. He was not the person who had the pistol in the bar. He was not the person who was found with 2 dollars, which is an amount of money that was stolen from PW1. The pistol and the money were found with somebody else who was killed by the police. The fact that the appellant was found in the bar, drinking with the person who had the pistol and the stolen money, per se, di not prove that he was the robber of PW1. In our view, the evidence of identification of the appellant by both PW1 and PW2 mere arises from the fact that the appellant was arrested by police and they saw him at or after the arrest. That alone cannot make him the robber.

We find that the evidence on record is not sufficient to sustain the conviction of the appellant on count 1. We will therefore quash the conviction on that count.

We now turn to count 5. The evidence of identification of the appellant on this count is that of PW3 AMOS KAHU KUNGU. It was his evidence that he was approached by two young men, one of them had a pistol. There was electricity light and they asked for cigarettes before one of them threatened him with a pistol. They robbed him of money and drinks which they drank in the pub. He went and reported the incident to someone, who was not disclosed, after the young men left. He identified the appellant in an identification parade.

Though this witness stated that he identified the appellant at the parade, there is no evidence that he gave any description of the appellant to the person to whom he first reported the incident or to the police before the identification parade. There is no evidence that he told anybody, including the police, that he could be able to identify the appellant or any of those two robbers if he saw them.

In our view, the fact that there is no evidence that PW3 told anybody that he could identify the appellant before the identification parade, and the fact that the appellant was the only person arrested after a spate of robberies on the same night, could lead to the appellant being identified in the parade which was conducted the next day 10.1.2004, merely by his general description. In our considered view, the identification of the appellant on count 5 is also not without possibility of error. We doubt that it was positive identification, and we give the benefit of the doubt to the appellant.

Consequently, we allow the appeal, quash the conviction and set aside the sentences imposed by the learned trial magistrate. We order that the appellant be set at liberty, unless otherwise lawfully held.

Dated at Nairobi this 5<sup>th</sup> day of July 2007.

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**J.B OJWANG**

**JUDGE**

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**G.A DULU**

**JUDGE**

In the presence of-

Appellant

Mr. Makura for State

Tabitha/Eric Court Clerks