



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

**Criminal Appeal 333 of 2005**

**LERINGIN LEPARACHAU .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From the conviction and sentence in Criminal Care No. 9159 of 2004 of the Chief Magistrate's court  
at Kibera – Mrs. W.A Juma SPM)***

**JUDGMENT**

LERINGIN LEPARACHAU, the appellant, was charged before the subordinate court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of offence were that on 17<sup>th</sup> September (year not indicated) at around 11.30 pm at Flamingo bar in Ngong Town within Kajiado District within the Rift Valley Province, jointly with other not before court while armed with a pistol and other crude weapons robbed PATRICK LANGAT of cash Kshs.9850/= and some hot drinks and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said PATRICK LANGAT. After a full trial, he was convicted and sentenced to suffer death as by law prescribed. Being aggrieved by the decision of the learned trial magistrate, he has appealed to this court. His supplementary grounds of appeal are that –

1. The trial magistrate erroneously convicted him on the single (witness) evidence of identification/recognition as having sufficiently established that he was one of the (robbers) while the same fell short of accuracy.
2. The trial magistrate erred in convicting him on the evidence of PW2 without considering that the same lacked corroboration in the form of a prompt report to the police.
3. The learned magistrate erred in disregarding his defence without giving cogent reasons as stipulated under section 169(1) of the Criminal Procedure Code.

The appellant also filed written submissions.

Learned State Counsel, Mrs. Gakobo, conceded to the appeal.

Counsel contended that the appellant was convicted on the evidence of PW2 who testified in court that he identified the appellant. The offence was committed on 17/9/2004 and PW2 saw the appellant again on 6/11/2004 but he claimed to be able to identify him. Counsel contended that it was in fact the boss of

PW2 who called PW2 to identify the appellant. PW2 stated in evidence that he had seen the appellant twice before, but there was no evidence that he reported to PW1 and PW3 that he was able to recognize the appellant or any of the robbers. The boss of PW2 stated that he was informed about the presence of the appellant by LANGAT. That Langat was actually PW1, who testified in evidence that he was not able to identify any of the robbers.

Counsel contended that the learned magistrate stated in the judgment that PW2 appeared to be sure of the identification. That, in counsel's view, meant that the magistrate was in doubt, which doubt should have been resolved in favour of the appellant. Further, the magistrate found corroboration in that whenever the appellant went to that bar, there was a robbery. Counsel contended that there was no evidence on record to show that the appellant was connected with any robbery in that bar. Therefore, in counsel's view, that observation by the magistrate was a misdirection and could not provide corroboration.

We have re-evaluated the evidence on record. The conviction of the appellant is clearly predicated on the evidence of visual identification by one identifying witness PW2 AHMED IBRAHIM SUGHAEI. The circumstances of identification were difficult as the incident occurred at night, the attack was sudden, and the three people who were in the bar, were ordered at gun point to lie down. In **ODHIAMBO –vs- REPUBLIC [2002] 1 KLR 241** Chunga CJ, Lakha and Ole Keiwua JJA held –

“1. Courts should receive evidence of 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 in 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 evidence on record is that PW1 PATRICK LANGAT, the cashier in Flamingo bar, a customer, and PW2 AHMED IBRAHIM SUGHALI were in the bar at closing time at about 11.30 pm on 17/9/2004 when robbers, who were four in number suddenly entered the bar. They were threatened with pistols and PW2 and the customer were the first to lie down. The robbers talked to PW1 who was the cashier and demanded for the money from the counter drawer. The electric lights were on throughout. The robbers later ordered PW1 to lie down. The robbers were partly masked on the heads. In his evidence PW1 testified that he did not identify any of the robbers. The appellant was arrested several days later on 7/11/07. He was said by PW4 PETER OJIAMBO to have been noticed in the bar drinking by PW1, who in fact gave testimony that he could not identify any of the robbers. Through PW2 claimed to have identified the appellant when he was called to the bar on 7/11/2004 by PW4, there is no evidence that PW2 informed anybody after the incident that he could identify the appellant or any of the robbers.

In the judgment, the learned trial magistrate appreciated that the appellant was said to have been identified by a single witness PW2. The learned magistrate warned herself of the danger of relying on the identification of a single witness without corroboration. The magistrate however found corroboration in that PW1 and PW3 testified that whenever they saw the accused in the bar, various robberies would take place soon thereafter. With profound respect to the learned trial magistrate, PW3 never gave such evidence in court. In any case, merely being seen in a bar or any other place, cannot, ipso facto, connect someone with an offence or offences. That cannot be corroboration. Corroboration is material evidence whether direct or circumstantial, that connects someone to the commission of an offence. The evidence of PW1 and PW3 amounts to mere suspicion. Mere suspicion, however strong cannot be a basis for founding a conviction – see **SAWE –vs- REPUBLIC [2003] KLR 364**. Suspicion also cannot be corroboration, as it is not in itself material evidence.

Having re-evaluated the evidence on record, we come to the conclusion that the conviction of the appellant is not safe and cannot be sustained. The identification was not free from possibility of error. We will therefore have to 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 6<sup>th</sup> day of November 2007.

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**J.B. OJWANG**

**JUDGE**

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**G. A DULU**

**JUDGE**

**In the presence of –**

Appellant in person.

Mrs. Gakobo for State

Huka/Eric court clerks