



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 46, 47 & 49 of 2005

(From original conviction and sentence in Criminal Case No. 2115 of 2003 of the Chief Magistrate's court at NAKURU – H. M. NYAGA, SRM)

EDWARD MARWA MAISOR1ST APPELLANT

ALFRED MOHERE RIOBA.....2ND APPELLANT

GEORGE BIKERI NYAKUNDI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants and four others were charged with the offence of robbery with violence. The particulars of the said offence were that on the 23rd day of February, 2002, at Milimani Estate, Molo in Nakuru District, jointly while armed with dangerous weapons namely a G3 rifle, rungus, pangas and axes robbed Charles Macharia of 2 video decks, 1 brief case, 4 log books, 1 mobile phone, make Siemens, 2 remote controls and cash Kshs.3,000/- and at or immediately after the time of such robbery used personal violence to the said Charles Macharia.

All the appellants denied the said charge and the hearing commenced before R. Kirui, Senior Resident Magistrate, Molo. The case was then transferred to the Chief Magistrate's court at Nakuru on the application by the appellants. The hearing proceeded before Mrs G. Ndeda, Chief Magistrate and thereafter before J. Nduna, Senior Resident Magistrate. That was done with full approval of the appellants and the other accused persons. The case was concluded before H. M. Nyaga, Senior Resident Magistrate, Nakuru, again with full approval of the appellants and their co-accused.

The duty of a first appellate court has been stated in several cases. See *Pandya Vs R [1957] EA 336*, *Shantilal M. Ruwala Vs Republic [1957] Ea 570* and *Okeno Vs Republic [1972] EA 32*. The first appellate court has to re-consider the evidence that was adduced before the trial court, evaluate it and draw its own conclusions as to whether the judgment of the trial court should be upheld. The court must, however, bear in mind that it did not have the opportunity to see the demeanour of the witnesses who testified before the trial court.

The evidence that was adduced before the trial court briefly stated was as follows; **Jane Wanjiku, PW1**, testified that on 23rd February, 2002, at about 2.00 a.m. she was sleeping in her house together with her husband, **Charles Kagatu Macharia, PW4**. She heard footsteps outside their house and saw a spotlight. She woke up her husband. She saw somebody standing outside the window. She attempted to switch on the lights and put on the alarm. She realised that electricity supply had been disconnected. She started screaming. Someone smashed the door and entered the house. PW4 hid himself. PW1 noticed that one of the robbers was holding a gun. She identified him as the third appellant. She further testified that the first appellant had an axe. One of the robbers whom she identified as the second appellant held a gun against her head and ordered her to tell them the whereabouts of her husband. They threatened to kill her unless she told them where he was. The robbers demanded that they be given money and began to ransack the house. They found Kshs.100,000/- under a mattress. They demanded more money threatening to shot her if she failed to give in to their demands. The robbers took another Kshs.3,000/- from PW1 and a briefcase containing her husband's keys, logbook and other personal belongings. The robbers then moved to the living room and took two video decks and a mobile phone. They ordered PW1 and others in the house to lie down and not to raise any alarm. They then left.

After the robbers left, PW1 went and replaced the electricity fuse. Power was restored. She found that their watchman had been tied on his hands and was bleeding from an injury on his head. She telephoned the police who went to the house with sniffer dogs. The following morning she recorded her statement at the local police station. PW1 said that she was able to see the faces of their assailants because they had torches and the robbery took about an hour.

On 3rd and 4th January, 2003, identification parades were conducted. PW1 identified the appellants herein. She testified that she had not seen any of the appellants before the date of the robbery. The evidence of PW1 was corroborated by that of her husband, PW4. However, PW4 was not able to identify any of the robbers. He said that the person he saw wore a hat and shortly after he saw him the lights went off.

Police Constable Joseph Okumu , PW3, testified that on 23rd February, 2002, he received a report regarding the robbery. They went to the scene. They found the watchman had been injured. The police commenced their investigations. There was a spate of robberies in Molo town in the months of November and December, 2002. In early December, 2002, the first appellant was arrested by police officers from "*the flying squad*" after they were tipped that he was at Huruma Estate where the third appellant was thought to have kept a gun. The police were also informed that the third appellant had gone to Keroka. They proceeded to Keroka and arrest him there. The third appellant was taken to Muchina farm where he was alleged to have given to the police a G3 rifle serial number FMJ405045. The third appellant was interrogated by the police. He implicated the second appellant and other accomplices.

Chief Inspector Gideon Nyale Munga, PW5, testified on how he conducted identification parades on 3rd January, 2003. He said that PW4, Charles Kagatu Macharia, was able to identify the second appellant. However, PW4 had told the court that he was not able to identify any of the assailants on the night of the robbery.

Inspector Stephen Lufaha, PW.. , testified that on 4th January, 2003, he conducted an identification parade at Molo Police Station. He had two identifying witnesses, PW1 and PW4. PW1 identified the first and the third appellants. She did not state how she was able to identify the two.

In his sworn statement of defence, the first appellant stated that on 13th December, 2002, he was at Naivasha Silver Hotel together with one Godfrey Okumu Papa and Ann Muthoni. Two police officers approached them. They said that they were looking for Ann Muthoni. They questioned him about his relationship with Ann Muthoni. They arrested him. He was taken to Molo police station and later on an identification parade was conducted. PW1 was purported to have identified the appellant. He denied having committed the offence.

The second appellant testified that he was staying at Langas estate in Eldoret and that on 10th

December, 2002, his younger brother came to his home because he wanted school fees. While there, three men and a woman entered his plot. They arrested his younger brother. When he enquired from them why they had done so, he was also arrested and taken to Eldoret Central Police Station. On 21st December, 2002, he was brought to Nakuru and later transferred to Naivasha Police station. On 3rd January, 2003, he was taken to Molo Police station where he remained for three days before he was charged with the present offence. He denied any knowledge of the robbery.

The third appellant also denied that he was involved in the alleged robbery. He said that he was arrested on 22nd December, 2002 from his home and taken to Molo police station. Later the police showed him a gun and questioned him about it. He remained in custody until 3rd January, 2003 when he was charged with the offence herein.

The learned trial magistrate rightly stated that the main issue for determination in the case was whether the appellants had been positively identified by PW1. After examining the evidence of PW1, the learned trial magistrate held that the appellants had been properly identified by the said witness and proceeded to convict each of the appellants.

It is important to note that the robbery herein was committed on 23rd February, 2002 and the identification parade was not held until 3rd and 4th of January, 2003, almost a year from the date when the offence was allegedly committed. Apart from PW1, no other prosecution witness purported to have identified the appellants. PW4 stated that he did not identify any of them. The offence was committed at night and the only source of light in the complainant's house was from torches which were said to have been held by the appellants. There was no indication that the appellants shone the torch lights on their faces.

When PW1 went to report the robbery, she did not describe any of the appellants to the police. It was therefore doubtful whether she could identify them after almost one year from the date when she allegedly saw them. As was held in ***Wafula & 3 Others Vs Republic [1986] KLR 627***, identification at night time by a single witness must be treated with great caution before it can be used as a basis for convicting an accused person. The same principle had been stated earlier by the Court of Appeal in ***Karani Vs Republic [1985] KLR 290*** where it was held that:-

“A fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult.”

In view of the foregoing, we are satisfied that the conviction of the appellant by the trial court was unsafe. We allow their appeals, quash the convictions and set aside the sentences that were pronounced by the trial court. Each of the appellants is set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2007.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment delivered in open court in the presence of the first appellant, the second appellant, the third appellant and N/A for the state.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE