



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

**Criminal Appeal 1032 & 1035 of 2004**

**(From Original Conviction and Sentence in Criminal Case No.6705 of 2003 of the Chief Magistrate’s Court at Kibera- Ms. Siganga SRM).**

**BOB OWINO WERE .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 1035 OF 2004**

**FRANCIS NDEGWA NJERI ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

***BOB OWINO WERE*** and ***FRANCIS NDEGWA NJERI*** hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively were jointly charged with one count of robbery with violence. The particulars of the charge were that the Appellants on the 10<sup>th</sup> day of September, 2003 at Wanyee Sharon Riruta, within Nairobi area province, being armed with dangerous or offensive weapons namely a knife robbed Titus Musembi Muasya off a mobile phone make Nokia 6150 valued at Kshs.7000/= and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said Titus Musembi Muasya. Following a trial in which the prosecution called 4 witnesses, the Appellants were convicted and sentenced to death as required by the law.

Being aggrieved by the conviction and sentence, they each lodged an Appeal. We have caused the two Appeals to be consolidated as they arose from the same trial in the subordinate Court and for ease of hearing. The Appellants have advanced the same grounds in their petitions of Appeal to wit; that they were convicted on a defective charge sheet, evidence of identification which was not watertight, failure to call material witnesses, their mode of arrest and finally failure by the trial Magistrate to adequately consider their defences.

The brief facts of the case were as follows; on 10<sup>th</sup> September, 2003, the Complainant, Titus Musembi Muasya (PW1) was in the house of his cousin Ruth Mbeke Munguti (PW2) and one George. At about 9 p.m. there was a knock at the door and two men entered the house. One of the intruders then demanded a cell phone whilst ordering them to keep quiet if they valued their lives. PW1 then produced his cell phone – Nokia 6150 and placed it on the table. One of the intruders grabbed it and they left. As soon as the intruders left the Complainant and those in the house started screaming and neighbours came and started pursuing the robbers. However they were unable to arrest any of them. Days after the incident the Appellants were separately arrested and escorted to the Police Station and were later charged with offence. The 1<sup>st</sup> Appellant in his unsworn statement of defence said that he was arrested at a bus stage as he waited for a matatu to take him home. He was suspected of wearing stolen shoes. He denied committing the robbery. As for the 2<sup>nd</sup> Appellant, he stated in his unsworn statement of defence that he was arrested in his house and then taken to the Police station for an offence he had no knowledge of.

In support of the Appeals, the Appellant with our permission of the Court tendered written submissions. We have carefully perused and considered the same. Mr Makura, Learned State Counsel opposed the Appeal on behalf of the state. Counsel submitted that there was overwhelming evidence on record. Counsel referred the Court to the evidence of PW1 and PW2 who all said that there was light in the house during the robbery which enabled them to identify the Appellants as the robbers. That PW2 identification of 1<sup>st</sup> Appellant led to his arrest. Finally Learned State Counsel submitted that the evidence of the Prosecution witnesses was consistent in material particulars and was sufficient to support the charge.

In response, the 1<sup>st</sup> Appellant submitted that PW1 and PW2 did not describe any of the assailants. He also pointed out the two witnesses had testified that they did not know how this particular robber had been arrested. The Appellant further submitted that the investigating officer was never called as a witness. Infact according to the Appellant no investigations were conducted with regard to the incident at all.

We have carefully considered the submissions by the Appellant as well as by the Learned State Counsel. We have also subjected the evidence led in the subordinate Court to fresh evaluation as required of us. **(SEE OKENO VS REPUBLIC (1972) EA 32).**

From the charge sheet, it is clear that the Prosecution set out to prove that the Appellants were armed with dangerous and offensive weapons namely a knife when they committed the offence complained of. However that is not borne by the evidence. Infact the evidence on record is at variance with the charge sheet. There is no single witness who mentioned that any of the thugs had any weapon, more so a knife. PW2 unclear cross-examination by the 1<sup>st</sup> Appellant specifically stated:-

***“..... You did not actually produce any weapon from your jacket.....”***

Secondly, violence as one of the three ingredients of a charge under Section 298 (2) of the Penal Code was not proved in this case as well. Neither PW1, PW2 nor George who were the victims of the robbery testified as to violence being visited upon them in the cause of the alleged robbery. All that happened is that two people suddenly entered the house. Demanded a mobile phone which to PW1 gave out to them. The mobile phone was then taken by the thugs who then fled. The robbers were more than one. Accordingly a conviction would have resulted on that basis. However, from the evidence on record, it would appear that the other robber played no role at all in the robbery. He did nothing in pursuit of the robbery. He merely stood behind his colleague. Having played no role at all in the robbery, it becomes difficult for us to say whether he was a party to the robbery. Was he a willing participant in the robbery? We cannot tell.

In our view the evidence on record could not have sustained a conviction for the offence of robbery with violence. Had the trial Magistrate been alive to the ingredients of the offence as set out in the celebrated case of **JOHAN NDUNGU VS REPUBLIC**, she would definitely have come to the conclusion that on the facts perhaps another offence other than robbery with violence had not been

committed.

We now turn to consider the evidence of identification. Evidence on record is that the offence was committed at around 9 pm. This was at night. The only source of light was the hurricane lamp. PW1 and PW2 however did not disclose the intensity of the said light, its source in relation to the robbers. The two witnesses also did not tell the Court for how long they had kept the robbers under observation as to be able to identify them. Indeed in the entire prosecution case no attempts at all were made to establish the time taken during the commission of the offence. The Court was duty bound to make the aforesaid inquiries as well if the Prosecution was unable to. Those inquiries are must particularly in circumstances as in the instant case where the offence is committed at night when visibility is generally poor and those purporting to identify suspect claim that they were assisted in identifying him by some light. See **MAITANYI VS REPUBLIC (1986) KLR 198**. In the absence of such inquiries, we are not satisfied that PW1 and PW2 could have been in a position to positively identify any of the attackers. We note from the evidence of PW2 that she was able to identify the two robbers because she had earlier seen them seated outside a door of her neighbour. However if this was the case then how come she did not immediately tell PW1 and one Mr. George who were in the house during the incident, the fact that she had recognized the attackers as men she had seen an hour prior to the attack while seated outside the door of a neighbour. Further after the alleged robbery PW1 and PW2 screamed attracting the attention of neighbours who came to their rescue. They unsuccessfully pursued the robbers. Surprisingly however PW2 did not tell any of the neighbours that she had seen robbers earlier on outside the door of a neighbour. Thirdly PW2 did not even report to the Police that very same fact. In our view failure by PW2 to tell her companions – PW1 and George, neighbours and Police that she had see the robbers earlier on renders her evidence on identification doubtful. Ordinarily one would expect that PW2 would have contacted Mr. Odhiambo, at whose house she had seen robbers seated, seeking to know their whereabouts. Why did she not put Odhiambo to task to lead to the arrest of the assailants immediately since she had seen them at his place?

We note that no identification parade was conducted in respect of the Appellants for PW1 and PW2 to identify them. This would have been the most desirable thing to do. In the absence of an identification parade properly conducted and in the absence of a first report given by PW1 and PW2 describing the Appellants, their subsequent purported identification in Court was mere dock identification which has been held to be worthless. It is also not lost on us that as at the time the Appellants were being arrested, the Complainants had not lodged any formal complaint with Police regarding the alleged robbery. He only made the complaint after the Appellants had been arrested and exposed to him. In those circumstances the possibility that a wrong person could have been linked to such an offence is not farfetched.

Contrary to the finding by the trial Magistrate, we are skeptical regarding the evidence of identification due to the following:-

- (i). The conditions prevailing at the scene were unsatisfactory for positive identification of the robbers.
- (ii). Failure to conduct a proper identification parade.
- (iii). Though PW2 claimed to have recognised the robbers she never gave the information to PW1, one Mr. George, the neighbours or even the police.
- (iv). There was no first report made to the Police by either PW1 or PW2.
- (v). Identification evidence by PW1 and PW2 was dock identification which is generally worthless.

On arrest we note that the two Appellants were arrested separately days after the incident. Whereas the 1<sup>st</sup> Appellant was arrested on 14. 9. 2003, the 2<sup>nd</sup> Appellant was arrested on 20. 9. 2003. They were not arrested on the strength of any Complainant or report to the Police by the Complainant herein. With regard to the 1<sup>st</sup> Appellant PW4 testified that he re-arrested the 1<sup>st</sup> Appellant from members of public. This witness, a Police officer did not therefore know how, where and when the 1<sup>st</sup> Appellant was

arrested. With regard to PW1, he also testified that he did not know how the 1<sup>st</sup> Appellant was arrested. He stated:-

**“.....a day later, accused 1 was arrested. I don't know how he was arrested.....”**

James Kimani Mwangi (PW3) claimed in his evidence that he arrested the Appellant. He stated in Court how he and others (who never testified) were told by a lady on 14. 9. 20003 at 4 p. m. that her cell phone had been stolen and she had spotted the thief. She then took them to the thief. From this evidence it is the lady who led to the arrest of the 1<sup>st</sup> Appellant. However according to PW2 it is a neighbour called Margaret, who had seen the thief fleeing from PW2 house on the right of the robbery, who led them to a house from where the 1<sup>st</sup> Appellant was arrested. This is how she delivered herself on the issue:-

**“... The following Sunday another neighbour who had seen accused of fleeing from our house knew accused 1's whereabouts. The neighbour is called Margaret and on that Sunday, Margaret came and told us that she had seen accused 1 in another house. Other neighbours went to that house and arrested accused 1.....”**

From the foregoing it is quite clear that PW2 was not among the neighbours who went to arrest the 1<sup>st</sup> Appellant from a house, contrary to PW3's evidence. PW3 never mentioned Margaret in his evidence as the person who led to the arrest of the 1<sup>st</sup> Appellant, nor did PW2 mention PW3 as the person who helped in the arrest of the Appellant. Of particular concern to us on this aspect of the matter however is that the said Margaret was never called to testify and tell the Court how she was able to identify the fleeing thief in darkness on the material night. We doubt whether Margaret could have been able to identify positively a fleeing person at 9 p. m. at night and in darkness as claimed by PW2. Due to the aforesaid contradictions and inconsistencies in the testimony of PW2 and PW3 regarding the circumstances under which the 1<sup>st</sup> Appellant was arrested makes their evidence unreliable.

As for the 2<sup>nd</sup> Appellant, it is clear from the recorded evidence that one person by the name George was responsible for the 2<sup>nd</sup> Appellant's arrest. According to PW2:-

**“.....On the same night George caught and arrested the shorter robber at about 9.30 p. m. George recognised the robber and released him after taking his shoes. George came back with the robbers shoes....”**

Pertinent questions arise with regard to the conduct of George. What was the connection of the shoes and the alleged robbery? Why did the prosecution tender the said shoes as exhibits in the case? Finally it appears strange that one should arrest a suspect and later release him, opting only to retain his shoes. It is also strange that the Police never bothered to call the said George as a witness. However it would appear that the Court heavily relied on the evidence given by PW1 and PW2 regarding George's alleged encounter with the 2<sup>nd</sup> Appellant to convict him which in our view was really hearsay and ought not to have been acted upon.

Evidence on record also shows that the case was never investigated at all. The Prosecution did not bother to procure the evidence of critical witnesses. Robbery with violence is a serious offence, for it carries with it a mandatory death sentence upon conviction. This being the case it behoves the Police preferring such charges to conduct thorough investigations. In our view this case was treated as though it was a minor traffic offence. Once the Appellants were handed over to PW4 by members of the Public and were identified by PW1 and PW2, no other investigations were carried out. What PW4 did was merely to prefer the charge. He never bothered to establish the circumstances of the Appellant's arrest, the circumstances under which the offence was committed and if there were other witnesses to the crime. Indeed there were several critical witnesses who ought to have been called. In our view it was necessary to call George, Margaret, Odhiambo and members of the Public who assisted in the arrest of the Appellants. The Law is clear on the issue. The Prosecution should always endeavor to secure the testimony of key witnesses failing which adverse inference may be drawn. There is no reason given why the Prosecution failed to call the said witnesses.

For all the foregoing reasons we are not satisfied that the Appellants conviction was safe. Accordingly we allow the Appeal, quash the convictions entered against each Appellant and set aside the death sentence imposed. Each Appellant should beset a liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 16<sup>th</sup> day of May, 2006.

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**LESIIT**

**JUDGE**

.....

**MAKHANDIA**

**JUDGE**