



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

**Criminal Appeal 982 of 2003**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 2752 of 2002 of the Chief Magistrate's Court at Nairobi (J.O. Oseko – PM)**

**JAMES KARIUKI MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**JAMES KARIUKI MWANGI** was convicted of the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death as by law prescribed. He has lodged this appeal against both the conviction and sentence.

The Appellant has raised three grounds of appeal which in essence challenges the conviction on the basis of a single identification witness made in circumstances that were not conducive to positive identification, the reliance of the evidence adduced not backed by investigations into the case and the learned trial magistrate failure to give due consideration to the Appellant's defence.

The appeal was opposed.

We have carefully considered the appeal, re-analyzed and re-evaluated the evidence adduced before the Court giving due allowance for the fact that we neither saw nor heard the witnesses. It is true that the Appellant's conviction is based on the evidence of a single identifying witness who is also the Complainant in this case. The Complainant testified to two separate incidents, one that took place on 29<sup>th</sup> September 2002 at 6.30 a.m. and a second one which took place on 17<sup>th</sup> October 2002 at 5.45 a.m. Both incidents happened during the day. The Appellant is however only charged with the incident of 29<sup>th</sup> September 2002. It was the Complainant's evidence that 3 men accosted him a long Luthuli Avenue as he went to pick a bus. They had knives and a soda bottle. They ordered him to stop, then held him and took away his shoes, wallet with cash and identification card and his mobile phone. The Complainant alleged that the same group accosted him again on 17<sup>th</sup> October 2002, two weeks later and that one of them, the Appellant in this case, was arrested. The Complainant said that the Appellant was the man with the bottle during the first incident. He was arrested by a Police Officer who went to the Complainant's rescue after he called police on his mobile phone, on walking out of the mosque where he was hiding. In the second incident as Police Officer including PW2 watched, the Appellant and 2 others walked towards the Complainant after he left his hiding place but before they could do anything they started running. The

Appellant fell down and he was arrested.

On the issue of identification of the Appellant by the Complainant on 29<sup>th</sup> September 2002, the learned trial magistrate observed that even though the incident took a short time, the attack was from the front side, face to face and at dawn and so **“though it was for a short time it was sufficient to register a face, luckily enough, they tried to rob him again after 2 weeks. That in itself is a good indication that he did see them properly on the 29<sup>th</sup> September 2002”**.

From the learned trial magistrate’s analysis of the evidence before her, she seems to have taken into account the identification of the Appellant by the Complainant in the second incident to confirm the identification during the first incident. Each identification should have been regarded on its own merits. The identification of the Appellant on 29<sup>th</sup> September 2002, which is the incident for which he was tried, is scanty. The Complainant only said that three men approached him, ordered him to stop, held him and removed his shoes and wallet in which was some cash and identity card. They then walked away. Apart from mentioning that the Appellant was the man who had a soda bottle during the first incident, the Complainant does not say the basis of identifying the Appellant. How was he dressed? What features caused the Complainant to know definitely that he was one of the three who robbed him. What role did the Appellant play? All these questions remained unanswered. All the Complainant said concerning the Appellants was **“The one who was arrested is among those who had attacked me. The first time, I noted his face. He is the man in the dock.”**

With due respect to the learned trial magistrate, that evidence was insufficient to sustain a conviction for the offence committed on 29<sup>th</sup> September 2002. There is no doubt at all that the Appellant was arrested on 17<sup>th</sup> October 2002 as he and others harassed the Complainant with a bad intention. The Appellant “acted suspiciously” on the 17<sup>th</sup> October 2002 as the learned trial magistrate observed in her judgment. However there is insufficient evidence to establish that he was one of the three who robbed the Complainant 2 weeks earlier. The incident of 17<sup>th</sup> October 2002, in our view should not have formed the basis for the conviction on the earlier incident. In so doing, the learned trial magistrate misdirected herself and thereby caused the Appellant to suffer serious prejudice. In regard to the offence, the evidence of identification was by a single identifying witness. The incident took place very fast, in the words of the Complainant himself. The Complainant had a fleeting glance at those who robbed him and to prove it, the Complainant could not describe any of the three men in any way. The fact that three people tried to accost him at around the same place 2 weeks later cannot be a basis of finding that these men were the same ones who robbed him earlier. We think that such a conclusion is not only dangerous but also lacks evidential backing. There was a complete lack of corroboration of the Complainant’s shallow evidence by both direct or circumstantial evidence. We find that the Complainant’s evidence of identification could not have formed a basis for the Appellant’s conviction for the offence of 29<sup>th</sup> September 2002. In **OSIWA vs. REPUBLIC 1989 KLR 469** at 470 Court of Appeal held: -

***“We reiterate what we said yesterday that where the only evidence against an accused is as here, evidence of identification or recognition, a trial court must examine such evidence carefully to be satisfied that the circumstances of identification are favourable and free from the possibility of error before it can safely make it the basis of a conviction (See Kisura Criminal Appeal No. 20/89 Cleophas Otieno Wamunga v. Republic).*”**

On the issue of lack of investigation into the offence charged, we find merit in the Appellant’s complaint. There seems to have been no investigation at all into the incident of 29<sup>th</sup> September 2002. The result is that the prosecution failed to link the Appellant with the offence charged. That failure would suffice to dispose of this appeal.

On the Appellant’s defence not having been given due consideration, the Appellant did not mention anything to do with the incident he was charged with of 29<sup>th</sup> September 2002. All the Appellant said concerned his arrest on 17<sup>th</sup> October 2002. His complaint as regards his defence in relation to the offence charged is also neither here nor there.

Having considered this appeal, we have come to the definite conclusion that the conviction of the Appellant for the offence charged herein was unsafe and cannot be allowed to stand. We allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 9<sup>th</sup> day of May 2006.

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**LESIT, J.**

**JUDGE**

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**MAKHANDIA, M.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant for the State

Wambui/Erick - CC

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**LESIT, J.**

**JUDGE**

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**MAKHANDIA, M.**

**JUDGE**