



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

**Criminal Appeal 55 of 2005**

**(From original conviction (s) and Sentence(s) in Criminal case No. 753 of 2004 of the  
Senior Principal Magistrate's Court at Kiambu (M. W. Wachira - SPM))**

**CHRISTOPHER KAMAU MBUGUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The Appellant had been charged with two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. After a full trial, the learned trial magistrate reduced the charge to **ROBBERY** contrary to **Section 296(1)** of the **Penal Code** on the basis that no force was used or injury caused during the robbery. The trial magistrate proceeded to sentence the Appellant to five years imprisonment on each count with prison terms running concurrently. The Appellant was aggrieved by the conviction and sentence and therefore lodged this appeal.

The Appellant raised several grounds of appeal which can be summarized as follows: -

That the learned trial magistrate erred in basing the conviction on dock identification which was not free from mistake or error.

That the Appellant's defence was not given due consideration.

The Appellant argued the appeal in person. **Miss Wafula**, learned State Counsel represented the State in this appeal.

Going directly to the analysis and evaluation of the evidence the two robberies charged were committed on the same date at the same village. It is not clear whether the two offences were committed within the same vicinity or plot. On the material date at 8.30 p.m. PW1 the Complainant in count 1, and her sister PW2, were having supper at their house when a person knocked at their door. PW2 opened the door to a stranger who asked to see one Wambui. None of the two sisters was called Wambui. PW1 also went to the door and at that point the visitor whisked out a gun and ordered both to lie down. A second man ransacked the house and stole an iron box and radio. The gun man stole the TV and took a mobile phone and cash Kshs.2000/- from PW1. The gun man was identified as the Appellant. Both PW1 and PW2 saw the Appellant at police cells on 28<sup>th</sup> March 2004 and identified him as one of the two assailants.

The other incident took place at 10.00 p.m. the same night against PW3 and PW4. PW3's evidence was that his sister-in-law called out his wife, PW4 at 10.00 p.m. as they ate supper at home. When they opened, three men entered the house, one with a gun and two of them wearing masks. They stole

Kshs.2,700/- and a mobile phone from PW3's bedroom. They also took a mobile phone and shopping from his sister-in-law. Both said they knew the gunman before and that he was the Appellant. PW3 saw the Appellant in Kihara shopping centre on 28<sup>th</sup> March 2004 and caused his arrest.

The Appellant gave a sworn statement and gave alibi defence. He called one witness, DW2 **ROBERT MBUGUA**, his brother who said that on 4<sup>th</sup> March 2004, he and the Appellant worked together at his barber shop between 2.00 p.m. and 9.15 p.m.

The Appellant in his submission before this court stated that he was challenging the conviction entered in the lower court on account of identification. The Appellant submitted that there was no identification parades conducted in the case. That PW1, the Complainant in count 1 did not know the Appellant before. That the said PW1 in her evidence stated that she heard rumours that one Kamau had been arrested for the offence and that she and PW2 were taken to the police cells and the Appellant pointed out to them. That the police failed in the case for having failed to conduct identification parades.

On count 2, the Appellant submitted that even though PW3 and PW4 claimed that they knew him before, none of them reported the matter to the police until after the Appellant's arrest several days later. The Appellant urged the court to find the failure to report as grounds of finding that there was a doubt whether the alleged robbery took place.

**Miss Wafula** for the State submitted that the conditions under which PW1 and PW2 saw the Appellant were clear and good for proper identification. Counsel also submitted that identification by both PW3 and PW4 was proper and conviction should be upheld.

The evidence of identification in support of count 1 was that of dock identification. After the incident on 4<sup>th</sup> March, 2004 both witnesses PW1 and PW2 saw the Appellant again on 28<sup>th</sup> March at the police cells. The police did not conduct identification parades. The identification parades were very important given the lapse of time between the robbery and the arrest, i.e. is 4 weeks. In the case of **WALTER AMOLO VS. REPUBLIC [1991] 2 KAR 254**, Hancox, CJ, Masime JA and Omolo Ag. JA held: -

***“Following Gabriel Njoroge vs. Republic [1987] 1 KAR 1134 visual identification must be treated with the greatest care and ordinarily a dock identification alone should not be accepted unless the witness has in advance;***

***(a) given a description of the assailant.***

***(b) Identified the suspect on a properly conducted parade.”***

In the instant case, it is clear that both PW1 and PW2 did not describe the Appellant to the police prior to his arrest. There was no identification parade. Even though there was electric light on at the house where the incident occurred, without the identification parades having been conducted to confirm the ability of both witnesses to identify the Appellant, I find the identification unsafe. I am not satisfied that the identification by PW1 and PW2 was proper or free from error or mistake. Since there was no other evidence connecting the Appellant to the robbery in count 1, the conviction is quashed and the sentence set aside.

In regard to count 2, both eye witnesses of the incident PW3 and PW4 claim that they knew the Appellant before separately. They did not disclose for how long they knew him. It was material for the two witnesses to disclose the period of time which they had known the Appellant and the circumstances under which they claim to have known him. All each said was that they had been seeing the Appellant at the shopping centre and for PW3 he claimed he had carried the Appellant here and there in his public service vehicle. In **JOSEPH OLE TOROKE VS. REPUBLIC KLR 204 of 1987** Masime, Gicheru and Kwach JJA, it was held: -

***“It is possible for a witness to believe quite genuinely that he had been attacked by someone he knew well and yet still be mistaken so the possibility of error is still there whether it be a case of recognition***

**or identification.”**

The above case underlines the importance of testing the evidence of identification with care even where the identification is that of recognition. In **SAMSON KIPRUTO & 3 OTHERS vs. REPUBLIC CA No. 140 of 1987 NYARANGI, PLATT and GACHUHI JJA** held: -

***“An identification parade is not usually essential in cases of recognition, but it may be where the previous association is slight and the chances of recognition difficult.”***

This case underlines further why it is important for the court to establish the nature and circumstances of association of a witness claiming to have recognized an accused person having known him before. In the absence of such evidence the court has no way of determining whether the recognition by the two witnesses was safe. The situation is more critical because of the Appellant’s alibi defence. The evidence of identification implicating the Appellant must be viewed vis-à-vis the Appellant’s defence of the alibi. Bearing in mind that PW3 and PW4 claim to have seen the Appellant at night where the conditions for correct identification are known to be difficult, I think that the Appellant’s alibi defence shook the prosecution case. The Appellant not only put forward an alibi defence but went ahead to prove it through his defence witness. In such a circumstance the court needed to consider the evidence of recognition with caution especially bearing in mind that there was no other evidence against the Appellant except visual identification and further considering that the two witnesses had not reported the matter to the police prior to the Appellant’s arrest. PW4 in her statement to the police did not mention that she could identify anyone. PW4 identified the Appellant in court during the hearing. This goes further to suggest that the evidence of identification of the Appellant by PW4 was an afterthought and strictly speaking was dock identification which was in the circumstances worthless.

Having considered the evidence of recognition by these two witnesses I find that the conviction was unsafe. I will allow the appeal, quash the conviction in count 2 and set aside the sentence

The upshot of this appeal is that the appeal is allowed, conviction quashed and sentences set aside. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 11<sup>th</sup> day of October 2006.

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**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant present

Miss Wafula for the .State

CC: Wambui

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**LESIIT, J.**

**JUDGE**