



**REPUBLIC OF KENYA**

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

**Criminal Appeal 1164 of 2002**

**(From original conviction (s) and Sentence(s) in Criminal case No. 237 of 2002 of the Senior Resident Magistrate's Court at Garissa (J.G. King'ori - SRM))**

**MOHAMMED ABDULLAHI SHURIE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**MOHAMED ABDULLAHI SHURIE** was together with another charged **ROBBERY** contrary to **Section 296(1)** of the **Penal Code** and in the alternative to **HANDLING STOLEN PROPERTY CONTRARY** to **Section 322** of the Penal Code. After a full trial the learned trial Magistrate acquitted the Appellant's co-accused in both counts but convicted the Appellant for the principle charge. The Appellant was sentenced to 7 years imprisonment. It is against the conviction and sentence he now appeals to this Court.

The Appellant has raised the following grounds of appeal:

**One that the charge was not proved.**

**Two that the Learned trial Magistrate erred in acquitting the Appellant's co- Accused yet the Complainant identified him as the robber who was armed with a knife.**

**Three there was a discrepancy between amount allegedly stolen from the Complainant and the amount recovered from the Appellant for which the Appellant should get benefit.**

The facts of the prosecution case were that the Complainant on 21<sup>st</sup> March 2003 went to the Masalani Stage at Garissa town intending to travel to Ijara. The Complainant did not mention what time it was. However he paid for the journey but before he could travel he claimed that the Appellant approached him and offered him cheaper transport home. The Complainant got a refund of the fare he had and went with the Appellant. The Appellant took him to KCB area where he introduced the Appellant's co-accused as the UN driver who was to give cheaper transport. That when he was asked to declare what he was carrying for safety purposes, the Complainant declined and decided not to travel with them. That is when the Appellant's co-accused produced a knife and both knocked down the Complainant and robbed him of Kshs. 33,200/- proceeds of sale of cows. The Complainant reported the robbery to his nephew PW3. In the meantime, a shopkeeper received Kshs. 7000/= from the Appellant at his shop. The Appellant asked him to keep for him as he was very drunk. Eventually PW2 went to PW3 and described a brown slender man as one they were looking for in a robbery complainant. PW3 led PW2 to a bar where they found the

Appellant. Eventually both the Appellant and his co-accused were charged.

Both the Appellant and co-accused denied the charge and denied knowing each other prior to the incident.

The Appellant represented himself in this appeal. **Miss Gateru**, State Counsel appeared for the State and conceded to the appeal.

The Appellant has relied on this petition and grounds of appeal. He urged the court to reconsider the evidence adduced in the lower court afresh. The Appellant questioned the conviction on the basis of evidence that was his word against that of his co-accused and also on the basis that this co-accused was acquitted for the offence whereas the evidence against both of them was the same.

**Miss Gateru** for the State conceded to the appeal. Learned counsel submitted that the identification of the Appellant was not safe or free from error or mistake. That there was only the single identification evidence of the Complainant who was not present at the time the Appellant was arrested. That PW2 who identified the Appellant and caused his arrest did not witness the incident. That further PW2 had described a brown medium sized man to PW3, 30 minutes after the Appellant had left the Kshs.7,000/- with him and it was PW3 who led PW2 to where the Appellant was. Counsel urged the Court to allow the Appeal.

I have carefully analyzed and evaluated afresh the evidence adduced before the court below together with the Appellant's grounds of appeal and submissions by both sides. I agree that the conviction of the Appellant was predicated upon the identification by PW1 and PW2. PW2 was not present when the Complainant was robbed and therefore had no basis of identifying the Appellant as the culprit. As for the Complainant, the record does not indicate the time when the robbery took place. It was crucial that evidence he led not only of the time but also of the circumstances under which the Complainant alleged to have seen and identified the Appellant. In **Karani vs. Republic 1985 KLR 290**, Nyarangi, JA, Platt and Gachuhi JJA held: -

***“A fact may be proved by the 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 of favouring a correct identification were difficult in such circumstances there is a need for other evidence.”***

In the instance case the conditions under which the Complainant identified the Appellant are unknown. In the learned trial magistrate's Judgment at J2, he made the following observation: -

***“I have no doubt about his (Appellant's) identification, whatsoever. He is the one who hired (sic) the Complainant from the state talked with him and eventually led him to the scene where the 2<sup>nd</sup> accused was at the KCB area. The Complainant had ample opportunity to identify him and indeed no description of the 1<sup>st</sup> accused (Appellant) which he gave to PW2 and PW3 which led to the arrest of the accused at Makuti Bar. Upon being identified by the Complainant PW2 and PW3, the accused was searched and Kshs.1,100/- recovered...”***

This analysis of the evidence did not include a consideration of the circumstances under which the complainant saw the Appellant, whether it was day or night and what kind of lighting if any was present. That analysis does not meet the requirement that evidence of identification needs to be tested with the greatest care. In addition to lack of any evidence as to the conditions under which the identification was made, no identification parade was conducted for the complainant to identify the Appellant. The learned trial magistrate misdirected himself when he found that the Complainant identified the Appellant before his arrest. In fact the Complainant was not present at the place where the Appellant was arrested.

That means that the evidence of identification by the Complainant was dock identification. In **Gabriel Kamau Njoroge vs. Republic [1982/88] 1 KAR**, Platt and Apaloo JJA and Masime Ag. JA held: -

***“A dock identification is generally worthless and the court should not place much reliance on it, unless this has been preceded by a properly conducted parade...”***

I say no more. The identification by the Complainant was made under doubtful circumstances and without an identification parade being conducted there should have been not much reliance on it. I also noted that the learned trial magistrate did not warn himself before convicting on the evidence of the single identifying witness. in **Makokha vs. Republic 1989 KR 235 Masime JA, Gicheru and Kwach Ag. JJA** held: -

***“While a defendant may be convicted on the identification evidence of a single witness, before conviction can be based on such evidence the court must warn itself of the danger of doing so and should only convict if satisfied that the circumstances of identification were favourable and the evidence is reliable and free from the possibility of error.”***

Since the learned trial magistrate failed to warn himself of the danger of relying on the evidence of the Complainant before convicting the Appellant, the conviction was therefore unsafe. I agree with the state that the appeal should be allowed which I do. I quash the conviction, set aside the sentence and direct that 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 Gateru for .State

CC: Wambui

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**LESIIT, J.**

**JUDGE**