



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 631 of 2003**

***(From original conviction and sentence in Criminal Case No. 29035 of 2002 of the Chief Magistrate's Court at Makadara- C. O. Kanyangi, SPM)***

**WYCLIFF ABUYA OUMA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant in this Appeal, **WYCLIFF ABUYA OUMA**, was after trial convicted by the Senior Principal Magistrate Makadara, Law Courts, of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. He was aggrieved by the conviction and hence preferred the instant Appeal. In his three point Petition of Appeal, the Appellant impugned his conviction on the grounds; that his identification was not free from possibility of mistake, that the doctrine of recent possession was inapplicable and that his defence was not given due consideration.

The facts which gave rise to this Appeal are indeed brief and may be stated as follows. The Complainant, Alloyce Okech Abuor was on 29<sup>th</sup> November, 2002 at about 6.45 p. m. standing at Kariokor Bus Station waiting for a motor vehicle to take him home. There were many other people at the bus stage. Suddenly a group of 8 people approached him and strangled him from behind. One of those showed him a knife. He was then robbed of Kshs.11,000/= and a handkerchief. The eight people then ran away. People chased them and arrested one of them and took him to the Chief's Camp. The person arrested was found with an handkerchief which the Appellant identified as his. He also had in possession a knife. That person according to the Complainant, was the Appellant herein.

The Appellant in his defence gave unsworn statement. He said that on the material day he was on his way from Mathare when at about 6.30 P. M. he neared APs Camp. He then heard screams and people came and arrested him. They beat him thoroughly claiming that he was the one who robbed the Complainant. He was taken to the AP's Camp and then to Kamukunji Police Station where he was charged with the offence of capital robbery. He categorically denied his involvement in the crime.

In convicting the Appellant, the Senior Principal Magistrate, in a somewhat perfunctory Judgment stated:-

***“.....According to the evidence the accused and others were seen committing the offence. The***

***others were lucky to escape. The accused person would like the Court to believe that he was just arrested and taken to the Police Station on the allegation that he had committed the offence while he was innocent. This cannot be. The accused and others appear to have attacked the Complainant and robbed him as charged. The evidence adduced against him was proved beyond reasonable doubt. The accused person is guilty as charged and is convicted accordingly.....”***

With this one paragraph in the whole Judgment the Learned trial Magistrate condemned the Appellant to death.

It is trite law that a trial Court has a duty and obligation to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no Court should run away from or play down. In the circumstances of this case the Learned Magistrate fell short of this expectation with disastrous consequences. The accused faced a capital charge whose sentence upon conviction is death. Accordingly it behoves the trial Court to be extremely careful, must analyse and evaluate the evidence tendered in support of the charge before arriving at a conviction for the life of an individual is at stake here. The Court cannot afford to be casual in the circumstances. The Judgment of the Learned Magistrate in our view was pedestrian and left a lot to be desired.

Our misgivings aforesaid notwithstanding Mr. Makura, Learned State Counsel opposed the Appeal and supported both the conviction and sentence. He submitted that the Appellant was positively identified by PW1 and PW2 as the offence occurred at 6.45 p. m. Further Counsel submitted that the Appellant was immediately arrested after the commission of the offence and he was identified by PW1. It was Counsel's further submission that upon arrest, a search was conducted on him and a handkerchief belonging to PW1 was recovered. The handkerchief was positively identified by PW1 as his. Regarding the Appellant's defence, Counsel submitted that contrary to the Appellant's submissions that the same was not considered, indeed the defence was considered and rightly rejected by the Learned Magistrate.

In support of his Appeal, the Appellant tendered written submissions which we have carefully considered alongside the submissions of the Learned State Counsel.

As a first Appellate Court, we have a duty imposed by Law to carefully examine and analyse afresh the evidence on record and come to our conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor and so we should give allowance for the same. There are a myriad of case law on this point but the well known case of **OKENO VS REPUBLIC (1972) EA 32** will suffice.

It is plain from the record before us that the conviction of the Appellant was predicated upon the evidence of identification by PW1 and PW2 and also; that the Appellant was found in possession of the Complainant's handkerchief.

From the extract of the Judgment of the Learned Magistrate already referred to above, it is abundantly clear that he said nothing at all as to whether the identification of the Appellant by PW1 was positive or not. It is noteworthy that the alleged offence was committed at about 6.45 p. m. The Learned Magistrate did not address his mind as to the conditions of light prevailing at that time. It could very well have been dark. It is also possible that there was still natural light that may be could have assisted PW1 to identify the Appellant. However the Learned Magistrate never made any specific finding as to what would have enabled or assisted PW1 to specifically identify the Appellant. Further, there is evidence that PW1 was attacked by 8 people in a crowded place. Indeed in PW1's evidence he clearly stated that he was suddenly attacked from behind strangled until he fell down. In those circumstances, how could he have been able to identify the Appellant. We note from the evidence that PW1 stated that he identified the Appellant as one who pointed a knife at him. However he did not state from what position he saw the Appellant point a knife at him. Was the Appellant standing behind, in front or by his side when he allegedly pointed the knife at him! Further it is not clear for how long PW1 kept the Appellant under observation as he pointed the knife at him as to be able to register his appearance. It would appear that the offence was executed so fast that the PW1 could not possibly have had time to observe and register

the facial appearance of the Appellant.

PW1 in his evidence, further stated that members of the Public chased those people who robbed him and managed to arrest one who turned out to be the Appellant. It is clear therefore that PW1 did not participate in the chase and eventual arrest of the Appellant. This was done by members of the Public. However none of the members of the Public who participated in the chase testified. Such evidence was necessary to buttress PW1's evidence on identification. It has been held that:-

***“..... The identification of a person who took part in the alleged offence and was chased from the scene of crime to the place where he was arrested is ofcourse strong evidence of identification and if all links in the chain are sound, it may be safely relied upon.....”***

See **ALI RAMADHANI VS REPUBLIC, CRIMINAL APPEAL NO. 79 OF 1988 (UNREPORTED)** such evidence would only have been tendered by those who participated in the chase and arrest of the Appellant. None testified.

Upon Appellant's arrest by PW2, APC Paul Githinji, he exposed him to PW1 who immediately identified him as one of those who attacked and robbed him. This action by PW2 was wrong and prejudicial to the Appellant. It has been held that:-

***“.....It is very likely and very natural that if a Police confront Complainant with an individual arrested soon after a robbery on them the witnesses would say the person so arrested was among those who robbed them....”***

See **PAUL MWANIKI KITILU VS REPUBLIC, CRIMINAL APPEAL NO. 270 OF 2002 (UNREPORTED)**. We think that what PW2 should have done upon arrest of the Appellant was to take the Appellant straight to the Police Station, arrange for an identification parade and see whether PW1 could identify him.

Arising from the foregoing we are hard pressed to state that the identification of the Appellant by PW1 was not safe and free from the possibility of mistake.

The Appellant's conviction was also based on alleged recovery from him of PW1's handkerchief moments after the robbery. Again, the trial Court did not fully consider the evidence relating to the alleged possession of the stolen handkerchief by the Appellant i.e. the doctrine of recent possession. It is trite that before a Court of law can rely on the doctrine of recent possession as a basis of conviction, the possession must be positively proved, first, that the property was found with the accused, secondly, that the property is positively identified as the property of the Complainant, thirdly, that the property was stolen from the Complainant, and lastly, that the property was recently stolen from the Complainant. In order to prove possession there must be acceptable evidence as to the search for the suspect and recovery of the alleged stolen property. In our view any discredited evidence on the same cannot suffice no matter from how many witnesses. The evidence of search and recovery of the handkerchief on the Appellant was given by PW2 an Administration Police Officer. His evidence is not consistent. According to his evidence whilst on duty, he heard screams and proceeded to the scene of robbery. He found a man claiming to have been robbed of Kshs.11,000/= He managed to arrest one suspect who is the accused. He searched him and found him with 2 handkerchiefs and a knife.

According to PW1, however, the Appellant was arrested by members of the Public and not PW2. Further according to PW1, only one handkerchief of his was stolen and not two. However PW2 stated that on searching the Appellant he recovered two handkerchiefs and on being shown the two handkerchiefs, PW1, claimed their ownership. Further, it is not clear on what basis PW1 claimed that the handkerchiefs were his. There is no evidence that the handkerchiefs were special or had any specific mark that associated them with PW1. We would in the circumstances therefore say that the handkerchiefs were not positively proved to belong to PW1. Handkerchiefs are not unique items and are easily available in the market in many but similar colours and decorations.

The Appellant put up a reasonable and plausible defence. It merited deeper and serious consideration. However this was not the case. Considering that the offence was committed by 8 people in a crowded place and who eventually ran off in the direction in which the Appellant was found and arrested, it may very well be that the Appellant could have been a victim of mistaken identity.

In the end we think that the conviction of the Appellant is unsafe and we do not uphold it. The Appeal is therefore allowed, conviction quashed and sentence of death set aside. The Appellant shall be set free unless otherwise lawfully held.

Dated at Nairobi this 28<sup>th</sup> day of November, 2006.

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**LESIIT**

**JUDGE**

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**MAKHANDIA**

**JUDGE**

Judgment delivered in the presence of:-

Appellant present

Mr. Makura for State

Court clerks – Tabitha/Eric

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**LESIIT**

**JUDGE**

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**MAKHANDIA**

**JUDGE**