



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1188 of 2002

**(From original conviction(s) and Sentence(s) in Criminal Case No. 24635 of 2001 of the
Chief Magistrate's Court at Makadara (W. A. Juma (Mrs.) – PM)**

STEPHEN AUGUSTINE OLUOCH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

STEPHEN AUGUSTINE OLUOCH was charged with two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. He was convicted after a full trial, on both counts and sentenced to death as prescribed in the law. Being dissatisfied with the conviction, the Appellant lodged this appeal.

When the appeal came up for hearing, **Mr. Makura**, State Counsel representing the State conceded to the appeal. Counsel submitted that the evidence adduced by the prosecution was threadbare and could not sustain a conviction.

The Appellant was represented by Counsel **Mr. Mulanya**. Counsel relied on grounds 2, 3, 4, 5 and 6 of the petition of appeal which provides as follows: -

“2 That the learned trial magistrate misdirected herself by failing to look that the charge brought before her by the prosecution side firstly charged assault case and then withdrawn by the prosecution without any reason which was bad in law and according to section 296(2) of the Penal Code, the charge was unproved to sustain a conviction.

3. That the learned trial magistrate gravely erred in both law and fact when she failed to notice that there was no first report to the police by the complainant after the robbery while they said in their evidence in chief that knew me before recognition which was prejudice according to the law of Kenya.

4. That the learned trial magistrate misdirected herself by appreciating the production of P3 form by the complainant in absence of a doctor also filled it, their evidence was unsatisfactory to rely on to uphold a conviction.

5. That, the trial magistrate erred in law and fact by failing to see that the identification at scene vide me by the complainant was poor and unsuitable for a proper identification to take place.

6. That, the trial magistrate erred by rejecting my alibi defence which was unshaken by the prosecution, partly without enough reason of doing so.”

The brief facts of the case are that the two Complainants were walking to a stage on 19th August 2001, within Huruma Ngei II Estate when six men, all total strangers attacked and robbed them. The first Complainant, PW1 made inquiries from persons not called as witnesses and who led to the Appellant's arrest. The Appellant was eventually charged. On the Appellants part, he denied committing the offence. He said that the Complainants caused his arrest at a Busaa drinking den just because of giving money to his ex-wife a barmaid there. He said he was released only to be re-arrested almost three months later.

Mr. Mulanya in his submission questioned the evidence of identification saying that none existed that linked the Appellant to the offence charged. Counsel submitted that PW1 led to the Appellant's arrest. That instead of police conducting identification parade for PW2 to identify him, they led PW2 to the police cells and pointed him out to him. Counsel submitted that in so doing the police destroyed any chance for corroboration in the case. Counsel relied on the case **Kombo vs. Republic [1991] KLR 99** for this proposition.

Mr. Makura conceded to the appeal as stated earlier. Counsel submitted that there was single identification evidence for each count facing the Appellant and that the said evidence was dock identification, which was the weakest kind of evidence.

We agree that the conviction entered by the learned trial magistrate turned on the evidence of identification. The two Complainants were together when the robbery took place. In the circumstances, the evidence of identification was not that of a single identifying witness. Since the first Complainant in the case, PW1, led to the Appellant's arrest, his evidence of identification cannot fittingly be described as dock identification as can that of the second Complainant, PW2. Having said so we must say that we were disturbed by the prosecution case. PW1 admitted that prior to the offence, the Appellant was a total stranger to him. He then said that he made inquiries from third parties in order to know where his attackers could be found and that is how he led to the Appellant's arrest. PW1 did not disclose the date he led to the Appellant's arrest. However, PW1 admitted that 5 days after the Appellant's arrest, the police released him on a police bond. He did not say when the Appellant was arrested again. From PW1's evidence it is not clear what enabled him to identify the Appellant. PW1 said that the incident took place at night at a time that was not disclosed but that the area where they were attacked was well lit by streetlights. PW1 did not disclose the distance the Appellant was when he claims to have noted him, but he said that the attack lasted five minutes.

On PW2's part, the prosecution case became even more hazy. PW2 said that the attackers were six and that he noted the appearance of the one who emerged in front of the rest. PW2 described how he was beaten and that he lost consciousness until the next day when he woke up on a bed in a lodging. PW2 could not explain how he got to the lodging. More important however, neither did PW1 explain how he and PW2 parted company on the fateful night. PW2 admitted that the Appellant was shown to him at the police cells on an undisclosed date.

We are not impressed by the evidence of identification. The evidence of identification by PW1 was wholly unreliable since persons who purportedly helped him to know and to trace the Appellant and to have the Appellant arrested were not called as witnesses.

In the case of **CLEOPHAS OTIENO WAMUNGA vs. REPUBLIC 1989 e KLR** it was held: -

“What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant

in reliance on the correctness of the identification.”

The fact that the Complainant, PW1, was helped to trace the Appellant as the one who committed the offence seems to have escaped the attention of the learned trial magistrate.

The evidence of identification by PW2 was worthless since it was not preceded by a properly conducted identification parade. In the case of **Gabriel Njoroge vs. Republic (1982-88) 1 KAR** it was 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 identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

We have considered the many gaps in the prosecution case, the hazy evidence of identification by both Complainants, the unexplained release of the Appellant upon arrest and find that there was need for all these lapses to be explained by the prosecution. We also considered that the Appellant was booked for assaulting a police officer as per the evidence of the arresting officer. We have also taken into account the Appellant’s defence in which he explained that he had been arrested twice. The first time it was after both Complainants identified him to police officers at a bar. Upon arrival at the police station the nature of the offence changed to that of assaulting a police officer. He said that the Complainants sat with him and police officers on 1/9/01 and that the police officers informed him that the two had complained about an issue with a woman over which both claimed he beat them. Nevertheless, the Appellant contended, he was released on bond two days later. The Appellant continued to explain that 3½ months later he surrendered himself to the police when police went looking for him at his home.

We find that the Appellant’s defense was candid and not a “creation” as the learned trial magistrate found in her judgment. The Appellant’s defense was simple and clear and did not leave unexplained lapses and gaps, as did the prosecution case. The prosecution case could not have sustained a conviction in all the circumstances of the case. We agree with both counsels that the prosecution evidence was threadbare and therefore unsafe. We find the conviction entered in this case was unsafe and should not be allowed to stand. We allow the appeal, quash the conviction and set aside the sentences. The Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 2nd day of November 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Mulanya for the Appellant

Mr. Makura for State

Cc: Tabitha/Erick

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LESIT, J.

JUDGE

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MAKHANDIA

JUDGE