



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

**Criminal Appeal 925 of 2002**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 714 of 2001 of the Chief Magistrate's Court at Makadara (Mrs. R. Kimingi - PM)**

**FRANCIS MUGAMBI LIMBITO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**FRANCIS MUGAMBI LIMBITO** was convicted on one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. He was sentenced to death as by law prescribed. Being dissatisfied with the conviction and sentence he lodged this appeal.

The Appellant relied on amended grounds of appeal in which he raised four grounds. One that the evidence of identification was unreliable as it was made under difficult circumstances, secondly that the circumstantial evidence relied upon to convict him did not link him to the offence; thirdly that the prosecution did not prove its case as required and lastly that the Appellant's defence was not given due consideration.

The Appellant represented himself in this appeal. For the Respondent, **Miss Nyamosi**, State counsel represented it.

The brief facts of the prosecution case was that PW1 had been left in charge of a soda wholesale stock by PW2, his brother, on the evening of 6<sup>th</sup> January 2001. The next morning at 5.00 a.m. robbers struck and after an unsuccessful attempt to extract money from PW1, they stole 22 crates of mixed sodas. The same morning at 9.00 a.m., PW1 identified the Appellant to the police as one of the robbers who had a fresh wound on the face and who was wearing a khaki jacket and a cap. PW3 another kiosk owner told the court that at 7.00 a.m. the Appellant and another tried to sell two crates of soda to him but he declined. PW3 described the Appellant as wearing a sweater at the time. The Appellant in his defence denied the offence.

We have carefully re-evaluated and re-analysed the evidence adduced before the trial court while applying the necessary safe guards as expected of us as a first appellate court. See **OKENO vs. REPUBLIC EA 32.**

The Appellant in his written submission contended, and correctly so, that the conviction entered by the trial court against him hinged on two factors, one the visual identification by a single identifying witness, PW1, and two, circumstantial evidence. On the evidence of the single identifying witness, the Appellant

submitted that there was need for corroboration since the said witness did not give any description of the Appellant and that the circumstances under which he purported to identify the Appellant were not conducive for positive identification.

**Miss Nyamosi**, while opposing the appeal submitted that the offence was proved as required. Counsel submitted that in fact the evidence of PW1 was that of recognition as he knew the Appellant before. Counsel further submitted that the evidence of PW2, whom counsel erroneously stated that he was the owner of the shop where the robbery took place, corroborated the evidence of PW1.

We agree that the conviction entered in this case was predicated upon two factors that of visual identification by PW1 and two, recovery of soda crates. On the evidence of visual identification, it was that of a single witness and certain safeguards are required to be borne in mind while considering the evidence of a single witness. For that point we can do no better than quote from various cases. In **KIARIE vs. REPUBLIC [1984] KLR 739**, the Court of Appeal held as follows: -

***“where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction.”***

How can a court test whether the evidence of identification is watertight. In **WAMUNGA vs. REPUBLIC CA No. 20 of 1989** the Court of Appeal cautioned as follows: -

***“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 the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution on the correctness of the identification.”***

The issue is whether the learned trial magistrate tested the correctness of the evidence of identification given before her. At page J5 of the Judgment the learned trial magistrate observed thus: -

***“The prosecution evidence is that he accused was one of those who so robbed (sic) the complainant and he was arrested with one crate of sodas and led the police among others to where the other sodas identified in court were recovered. PW2 and PW1 said that they had been seeing the accused around the area where they were selling sodas. PW3 stated that the accused and another offered two crates of sodas for sale to him in the morning before he later found the accused in a police vehicle..”***

We find that the learned trial magistrate misdirected herself in her judgment as a result of misconstruing the evidence that was adduced before her. There was only one eye witness to the attack, PW1. His evidence was that the place where he was sleeping at 5.00 a.m. when robbers struck was dark. He was ordered to lie on a bed. After the crates were removed and the robbers scattered, PW1 said he woke up and tried to follow them. It is at that point that he describes the Appellant as one of the two he had seen by a torch light held by his co-accomplice. PW1 described the Appellant as having a fresh wound on the face and Khaki Jacket and a Cap. PW1 reckons that he spotted the Appellant again at 9.00 a.m. wearing the same clothes but that he disappeared into the village. That he saw him again soon thereafter with elastoplast covering his wound and having changed his clothes. It is quite clear to us that the person PW1 saw between 5.00 a.m. and 9.00 a.m. and the one PW3 saw could not have been the same person. There was marked difference between the two, one, a covered wound and secondly different clothes. What has led us to this conclusion is the evidence of PW3 to whom the Appellant and another are alleged to have tried to sell crates of soda to at 7.00 a.m. That was the same morning of the robbery. PW3 had this to say of the Appellant in re-examination by the prosecution at page 22 of the proceedings: -

***“Accused was wearing the same sweater as in court when he came to sell the sodas to me. I noted his face.”***

PW3 did not talk of any wound, cap or jacket. If at 9.00 a.m. when PW1 saw the Appellant he was

wearing a khaki jacket and cap, and PW3 saw him at 7.00 a.m. with a sweater, then the two key witnesses were not describing the same person. That was an irreconcilable discrepancy in the prosecution case.

The other misdirection was in the learned trial magistrate reference to the evidence of PW2 as if he had witnessed the robbery. PW2 was away when PW1 was robbed. He could not have witnessed the robbery. The learned trial magistrate's conclusion that both PW2 and PW1 had been seeing the Appellant in the area before the robbery was misplaced.

PW3 in his evidence in chief stated as follows concerning the identity of two people he found in police custody.

***“In the vehicle I saw the accused person (pointing to him) and others. These people I found were not people I had seen before. I had never seen those who brought sodas to me. I saw the accused in this case at the time he brought me sodas in the morning. I next saw him when I saw him in the police vehicle.”***

PW3 did not come out clear whether or not the Appellant was one of the two men who had offered him sodas. This witness negated his evidence twice when he stated clearly that the people he saw in the vehicle were total strangers to him. Later on, he said the two who took him sodas were total strangers to him too. He seemed to retract his own evidence when he said that the Appellant was one of those who offered him soda. One cannot approbate and reprobate at the same time. PW3 was either confused or was a liar. In Ndungu Kimani vs. Republic (1979) KLR 282 it was held: -

***“The witness upon whose evidence is proposed to rely upon should not create an impression in the mind of the court that he is not a straight forward person or say or do something which indicates that he is a person of doubtful integrity and therefore makes it unsafe to accept his evidence.”***

We find that the evidence of PW3 was not reliable given the variations he made in his own evidence. In any event, upon consideration of PW3's evidence in totality we find that it was not helpful to the prosecution case since PW3 did not connect the Appellant to the robbery at PW2's store.

We wish to make reference to another matter in the learned trial magistrate's conclusions which has caused us anxiety. The sodas exhibited in court were recovered by police officers who were not called to testify. It was unknown in what circumstances, if at all, the Appellant led to the recovery. PW1 who says he was present during the recovery, which he doubted because he said he went away for treatment, said that the Appellant pointed to a store which Police officers broke into to get the crates of sodas. Perhaps the more disturbing aspect of that evidence was the fact that there was no basis laid for the identification of the 7 crates by PW1 and or PW2 as those stolen. PW1, who was the one, robbed of the sodas merely said at page 12 of the proceedings: -

***“The sodas could be the ones in court.”***

PW2 on the other hand, who owned the sodas on identification of the crates in court merely stated: -

***“At Pangani, I found my seven crates of sodas. The sodas is (sic) in court (referring to MF11).”***

With every due respect the evidence of identification of the crates of sodas before the court was not proper identification of the exhibits as the property of the Complainant and owner PW2. The prosecution had the duty to lay a basis for the identification of the crates as the property of PW2 in court and this they failed to do.

We also agree with the Appellant that he was not properly identified as one of the three who robbed PW1 on the material morning. We also agree with him that whatever circumstantial evidence the prosecution adduced in court did not connect him to the offence. We agree that in the circumstances, the prosecution failed to prove its case to the standard required contrary to the learned State Counsel's submission.

The Appellant consistently denied the offence and gave a reasonable explanation for the reasons behind his arrest. Had the learned trial magistrate evaluated the evidence adduced before her properly as required, we believe that she would have come to a different conclusion of this case.

Having carefully considered this appeal, we find that the conviction entered herein was unsafe and that the appeal has merit. We allow the Appellant's appeal, quash the conviction and set aside the sentence. We direct that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 2<sup>nd</sup> 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

Miss Nyamosi for the State

CC: Tabitha/Eric

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**