



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

Criminal Appeal 267 of 2005

(From Original Conviction and Sentence in Criminal Case No. 1041 of 2004 of the Senior Resident Magistrate's Court at Githunguri)

DAVID KARONGO GATHUIAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

DAVID KARONJO GATHIJI, the 1st Appellant and **JOSEPH GICHERU NDUNGU** 2nd and 1st accused respectively in the trial before the lower Court where, together with a third accused person they had been charged with **Robbery with Violence contrary 296(2) of the Penal Code**. The trial Magistrate, after hearing the whole case, convicted both Appellants for a reduced charge of **Robbery contrary to Section 296(1) of Penal Code** and proceeded to sentence the Appellants to 7 years imprisonment.

I will start by making an observation that the learned trial Magistrate misdirected herself as to what ingredients constitute the charge of **Robbery with Violence contrary to Section 296(2) of Penal Code**. It is trite law, as was held in the case of **OLUOCH –V- REPUBLIC 1985 KLR 549** holding 6 thus:-

“6. (Obiter) It is not the degree of actual violence that differentiates the offence of robbery and robbery with violence. Robbery with violence is committed in any of the following circumstances:

- (a) The offender is armed with any dangerous and offensive weapon or instrument; or**
- (b) The offender is armed with any dangerous and offensive weapon or instrument; or**
- (c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person. The ingredients of the offence of robbery under section 296(1) of the Penal Code are:**
 - (i) stealing anything, and**
 - (ii) at or immediately before or immediately after the time of stealing**
 - (iii) using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or to overcome resistance to its being stolen or retained.”**

I now turn to the grounds raised by both Appellants in their appeals. The two Appellants raised the issue of identification saying it was that of a single witness made in difficult circumstances. The Appellants also challenged the complainant's evidence whether he identified anyone on the basis that he had reported that he could identify only one of the assailants but in Court he identified both Appellants.

In this appeal, the 1st Appellant was unrepresented while **Mr. Wachira** represented the 2nd Appellant. **Mrs Gakobo** learned State Counsel represented the State and opposed the appeals. It was the learned State Counsel's submission that even though the offence took place at 7.30 p.m. the complainant had a candle light on and that it was sufficient to enable him identify the Appellants.

Coming straight to the analysis and evaluation of the evidence, the prosecution called only two witnesses the complainant, P.W.1 and the arresting officer, P.W.2. The complainant was a sole identifying witness. He did not know any of the Appellants before this incident. The offence took place at night. Under those circumstances, the complainant's evidence needed to be considered very carefully to ascertain whether he indeed saw the persons who robbed him on the date in question to be able to subsequently identify him without a possibility of error or mistake.

The complainant's evidence was that he saw his attackers by the aid of a candle light whose size, its proximity to the attackers, and its intensity was not described. In the case of **MAITANYI –V- REPUBLIC 1986 KLR 198** it was held:

“It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not careful test if one of those matters are unknown because they were not inquired into. In days gone by, there would have been a careful inquiry in to these matters, by the committing Magistrate, State Counsel and defence Counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrate trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test the “greatest care” the evidence of a single witnesses?”

The learned trial Magistrate did not subject the complainant's evidence to the scrutiny and care required while considering evidence of this nature.

The circumstances of identification were difficult and were not conducive for positive identification by a single witness. In such circumstances what a trial Court should do was described in **ODHIAMBO – V- REPUBLIC (2002) 1 KLR 241** thus

“2. where evidence rests on a single witness and the circumstances of identification are known to be difficult, then other evidence either direct or circumstantial pointing to the guilt of the accused persons from which, the court may reasonably conclude that identification is accurate and free from the possibility of an error. In this case the courts below subjected the evidence of identification to the requisite critical analysis as enunciated by the courts below.”

Before considering whether there was other direct or circumstantial case I must deal with other issues which came up in the complainant's evidence. The complainant stated in evidence that he was positive he could identify one of his assailants. I noted that it was not until he discussed the robbery with a neighbour one **Ngendo** that he was able to lead to the Appellants arrest. There can be no explanation for this enlightenment except that the discussion the complainant held with “*Negndo*” revealed the identity of his assailants.

I have also noted that despite saying he could identify only one of his attackers, the complainant insisted on identifying the two in Court. He said it was the 2nd Appellant whom he could identify all along but how he could later also identify the 1st Appellant remained a mystery.

There was a need to hold identification parades in this case given the fact that the Appellants were arrested in the complainant's absence and given the understanding that he did not know them before. Failure to conduct identification parades reduced the reliability of the complainant's evidence of

identification.

I do find for all the reasons I have stated herein, that the evidence of identification by the complainant was not safe. That there was need for other evidence pointing to the guilt of the Appellants from which the Court could conclude that the complainant's evidence of identification was accurate. Such evidence was lacking in this case. In the circumstances I find the Appellants appeals have merit. Consequently I allow the Appellants appeals, quash the convictions and set aside the sentences. The Appellants should be set free unless they are otherwise lawfully held.

DATED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2006

J. LESIIT

JUDGE

Read signed and delivered in the presence of:-

Appellants present

Mrs Gakobo for State

Tabitha – Court Clerk

J. LESIIT

JUDGE