



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**Criminal Appeal 206 of 2002**

**MAURICE ONYANGO KIRA ALIAS ONYIS ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

The appellant MAURICE ONYANGO KIRA alias ONYIS was charged with four others with one count of Robbery with Violence Contrary to Section 296 (2) of the Penal Code. The appellant who was the 1st accused in the lower court, together with the 4th accused in the case were found guilty and convicted of the lesser offence of Robbery Contrary to Section 296 (1) of the Penal Code. Both of them were sentenced to 7 years imprisonment. The 4th accused apparently lodged his appeal and it was heard and allowed by this court. The appellant before us has now lodged this appeal challenging the conviction and the sentence.

The brief facts of the case were that on the night of 8th September 2001 at Kitengela, the complainant PW1 and his wife PW2 were sleeping in their house at 3 a.m. when robbers broke in. The complainant hid under his bed, while his wife PW2 got dressed. PW2 said that immediately she started dressing, then bedroom door was opened and electricity lights switched on. Then she saw a clean shaven man asking for money as another man hit her back with a whip. PW2 said that one of them was the 4th accused in the case who took her handbag and another bag. PW1 said that the robbers went to the sitting room and that she followed them there where she noticed that their radio and speaker were missing.

PW1 said that apart from the 4th accused, she also identified the 1st accused. She said that she identified the 1st accused by his brown teeth and his facial appearance. PW1 did not describe the alleged facial appearance. PW1 later identified the appellant in an identification parade conducted by I.P. Nelly PW5 20 days after the robbery. Two days after the robbery PW3, P.C. Kiruma arrested the appellant after a co – accused, the 5th in the case, identified the appellant to him as having taken a radio to her house on the same evening. The radio was later identified by the complainant as his and he also produced a receipt and permit for the same radio.

The appellant in his unsworn defence denied the charge. He stated that P.C. Kirema had gone to his house on the 10th September 2003 and arrested him on accusation that he moved around with his wife. The appellant said that at the time of arrest, P.C. Kirema was accompanied by PW2 whom he informed that he, the appellant had been arrested with their radio. We have carefully re-evaluated the evidence adduced before the lower court, as expected of the first appellate court, bearing in mind that we neither saw nor heard the witnesses and giving due allowance. See case of *OKENO versus REPUBLIC 1972 EA 32*.

The appellant in his written submission raises three grounds of appeal; one that the learned trial magistrate erred in law and fact in convicting him on the basis of identification made under difficult

circumstances; two that the learned trial magistrate erred in law and fact in convicting him on basis of circumstantial evidence, that is the radio recovered from others and not the appellant and three that the learned trial magistrate erred in law and facts in rejecting his alibi defence without giving tangible reasons for doing so.

The appeal is opposed. Mr O'Mirera, learned counsel for the state submitted that the evidence adduced against the appellant was good. On the issue of identification, Mr O'Mirera, submitted that the appellant was not identified by the complainant and his wife. That submission is however not in line with the evidence on record. From the record of the proceedings PW2, the complainant's wife stated clearly that she saw the appellant and eventually identified him in an identification parade 20 days after the offence. PW2 said thus on the issue of those she saw during the robbery.

"The man who entered the bedroom was shaved completely and had tied a red headscarf on his head. The men then begun to hit me with a Kiboko on back and head asking me for money. That is the 1st accused. He was the 2nd one to enter my bedroom... The 1st accused I saw on the face and he had brown teeth and he also hit me. He stayed in my bedroom about five minutes..."

Having established from the record that PW2 identified the appellant, we now consider the circumstances and conditions under which he was identified with respect. We were disturbed by the shoddy way in which the evidence of identification was recorded by the learned trial magistrate. At the beginning of PW2's evidence it appeared as if only one person broke into her bedroom whom she even described as clean shaven. Then as she spoke her story changed and she then gave details of a second person and what he did to her. PW2 described that the second man identified in court as the appellant hit her on the back. Since she did not say where he was standing in relation to herself, taking into account her evidence that she was hit on the back and with a whip we shall assume that he must have been standing behind her.

The question is how was PW2 able to see and later identify the appellant as the man who whipped her back? Towards the conclusion of her evidence is when PW2 claimed that she saw the appellant's face and teeth. The evidence is not clear as to the distance from which she saw him. Apart from saying that the robbers switched on the lights in their bedroom, PW2 did not describe the intensity of the lights and the distance these lights were from herself and the appellant at the time she saw him. She did mention that the robbers were in the bedroom for five minutes but did not say the period of time they remained under her observation.

In the court of Appeal case of **PAUL ETOLE & ANOTHER** versus **REPUBLIC C.A. No. 24 of 2000, GICHERU, LAKHA** and **OWOUR, J.J. A** observed and heed:-

***"All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is concerned, but the poorer the quality, the greater the danger ...***

***There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis a vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error."*** (emphasis are ours).

We are aware that the Court of Appeal on the Etole case (Supra) was discussing the danger of mistaken identity in relation to identification by recognition where the inquiry like the one discussed in the case is not made. It is the principles in that case that we are interested in and which also apply to this case. It is the duty of the trial court to make an inquiry as to the nature of the light available which assisted in the identification of the accused person, its brightness and its location vis a vis the accused. That duty should be exercised by the court especially where the prosecution fails to bring out that evidence in the examination of the witnesses.

The extent of that duty is limited to assisting the court to establish the conditions of lighting and the circumstances under which the witness identified the accused person. Going back to our case, no such inquiry was made as we have already observed. It is also clear from the evidence of PW4, P.C. Matheka the investigation officer of this case that the complainant's report was that he had been robbed by unknown thugs. Those robbers remained unknown even 2 days later when the appellant was arrested by PW3, P.C. Kiruma in unrelated investigations. The evidence of PW2 as to her ability of identification of the robbers, seem to us to have been an afterthought. Infact the identification parade was held 18 days after the appellant's arrest. The lapse of time was not explained.

The evidence of PW2 therefore needed other direct or circumstantial evidence to implicate the appellant. There was other evidence which was that of a co-accused, the 5th accused in the case and her daughter Defence witness No. 1 (DW1). These two were not consistent in their evidence. The 5th accused said that the appellant took the radio to her saying he would collect it the next day. DW1, her daughter said that the appellant was in company with the 3rd accused in the case. DW1 also said that the appellant had said that he was shifting from his house when the vehicle broke down. DW1 further said that her mother had inquired from them whether they had a permit and that her mother was answered affirmatively.

The inconsistency in their evidence is quite glaring. However the important issue concerning their evidence is the value of that evidence. The appellant raised issue with the fact that he had no opportunity to cross examine the 5th accused because she gave unsworn evidence. The law on the value of statements made against co-accused in a joint trial is well settled. In *ANYANGU & OTHERS* versus *REPUBLIC 1968 EZ 239, Sir Newbold, P, Sir de Lestang, V-P, and L.W J.A*, held at Page 240,

***“A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused, it may, in a joint trial be “taken into consideration” against that co-accused. It is however, not only accomplice evidence but evidence of the ‘weakest kind’ (Anyona s/o Omolo and Another VR (1953) 20 EACA 318). A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried.”***

We apply the law in this case to find that the evidence of the 5th accused given against the appellant was accomplice evidence. The evidence exonerated the maker and so did not amount to a confession. It was the weakest kind of evidence which could not be used to conducting assurance to other evidence against the appellant since the other evidence itself needed corroboration. It was therefore valueless.

As for the evidence of DW1, she was described as the daughter of the 5th accused. The court did not however state her age but we shall not dwell on that since the appellant did not raise it. DW1's evidence contradicted that of the 5th accused in that DW1 said two people and not one took the radio in question. DW1 also said that they, without specifying who among them begged the 5th accused to keep it and promised to go back for it later. DW1's evidence does not corroborate that of the 5th accused and the introduction of a second person into the picture created a controversy in the evidence which needed to be discussed and resolved by the learned trial magistrate.

In her judgment, all the learned trial magistrate said was that she believed the evidence of the 5th accused and DW1. We have noted another inconsistency in the case which is material and which may go to the core of the prosecution case. The complainant's evidence was that the robbery took place on 9th September 2000 at 3. 00 a.m. PW2 said it took place on 8th September 2000 at 3.00 a.m. The 5th accused on her part said that the appellant took the radio to her at 8 p.m. on 8th September 2000.

Whichever way one looks at the evidence of these witnesses and accused persons, it is apparent that the 5th accused alleged that the appellant took the radio to her before it was stolen. Taking these inconsistency into consideration in its rightful perspective, we are not satisfied that the prosecution can be said to have discharged their burden of proof in their case against the appellant. The conviction was not based on sound evidence and cannot therefore be regarded to be safe.

We have effectively dealt with the issue of identification and of circumstantial evidence against the

appellant as raised in his petition of appeal. The last issue he raised was that of his defence being rejected without good grounds. We do not wish to go with that ground. We have already found that the conviction was unsafe. Accordingly, we find that the appeal has merit and allow it. We quash the appellant's conviction and set aside the sentence. The appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Machakos this 24th day of November 2005.

**D.A. ONYANCHA**

***JUDGE***

**J. LESIIT**

***JUDGE***