REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Appeal 161 of 2003
(From original conviction(s) and Sentence(s) in Criminal Case No. 3377 of 2002 of the Chief Magistrate's Court at Kibera (Ms. Mwangi – PM)

OBADIAH OKILA OCHOLA…...……..……..APPELLANT

VERSUS

REPUBLIC……...……...…….....RESPONDENT

J U D G M E N T

OBADIAH OKILA OCHOLA was charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2) of the Penal Code.** After a full trial, he was found guilty and convicted of the said offence. He was sentenced to death as mandatorily provided for in the law. Being aggrieved by the conviction and sentence he lodged this appeal.

The Appellant challenges his conviction on several grounds. One that the learned trial magistrate failed to caution herself before relying on the evidence of a single identifying witness. Two, that the evidence of identification was made under difficult circumstances. Three that the learned trial magistrate relied on exhibits that were never included as same and finally that no due consideration was given to his defence.

MISS OKUMU learned counsel for the State submitted that the evidence adduced before the Court supported a lesser offence of **ASSAULT** contrary to **Section 257** of the

Penal Code. Learned counsel urged us to invoke **Section 179** of the **Criminal Procedure Code** and reduce the charge accordingly.

We have carefully re-analyzed and re-evaluated the evidence adduced before the trial court. It is true that the evidence against the Appellant was that of a single identifying witness, the Complainant in this case. The Complainant, PW1 said he had left his place of work at 8.30 p.m. when he met the Appellant along the road and he asked him for money. That the Appellant cut him on his head before running away. The Complainant reported the matter to PW2, a Kanu Youth Winger on the same day of the incident. PW2 arrested the Appellant five months later. The Appellant had in his defence denied the offence.

We are unable to tell from the Complainant's evidence whether he knew the Appellant before the incident. That is crucial because of the time the incident took place, at 8.30 p.m. It is noteworthy that the learned trial magistrate did not exercise any care or caution while recording the evidence of identification. The Complainant's evidence is therefore almost in monologue and is devoid of any detail at all. In two sentences, the Complainant gave evidence of the events of the incident as follows: -

"On 29/02/002 I was doing work of plumbing and at 8.30 p.m., I had come from work when I met with the accused along the road and asked for money and I said never

have. He cut me on the leg and I fell. He cut my head here (shows the scar) AND HE RAN AWAY."

In that short summary the Complaint of the Complainant against the Appellant was that he cut him on his leg and head. No where does he mention any loss until during crossexamination by the Appellant. Even though the learned trial magistrate noted that the incident was alleged to have taken place at 8.30 p.m. and therefore at night, no evidence was led to indicate the nature or intensity of light with which the Complainant could claim he saw the Appellant. This evidence was sloppy and could not support a finding of guilt on such a serious offence, especially where one very important ingredient of the offence, that is theft, is given in cross-examination as an afterthought. The evidence could not even support a conviction for the lesser offence of assault due to the weakness of the evidence of identification.

We are not satisfied that the Complainant identified his attacker at all. In any event, we are not satisfied with the evidence adduced and neither can we say with certainty that the Appellant has been identified sufficiently or at all in connection with any criminal act. In the case of ***KIARIE vs. REPUBLIC 1984 739,*** the Court of Appeal held. "Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction…"

The evidence of identification adduced in this case was not watertight. The identification by the Complainant was made under difficult circumstances which did not favour positive identification. We are unable to find that the identification was free from mistake or error.

Having considered this appeal we are of the view that the conviction entered herein was not safe and should not be allowed to stand. We allow the appeal quash the conviction and set aside the sentence. The Appellant be set free unless otherwise lawfully held.

Dated at Nairobi this 17th day of November 2005.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE