REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 159 of 2004
(From original conviction and sentence in criminal case No. 1180 of 2003 of the Senior Resident Magistrate's Court at Molo –R. K. KIRUI)

JOHN KIBII LANGAT……..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT OF THE COURT

The appellant, John Kibii Langat (*with another person who was acquitted*) were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the 10th of May 2002 at Nyakinyua Farm in Nakuru District, the appellant jointly with others not before court, while armed with dangerous weapons namely swords, pangas, bows and arrows robbed Samuel Kaguta of one donkey valued at Kshs 3,000/= and at or immediately before the time of such robbery threatened to use actual violence to the said Samuel Kaguta. The appellant was also charged with three other counts of stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that at various dates between the months of May and July 2002, at Nyakinyua Farm, the appellant jointly with others not before the court stole three donkeys each valued at Kshs 3,000/= from Paul Kanyingi, Naftali Kamau and James Ndungu. The appellant was alternatively charged with the offence of handling stolen property contrary to Section 322(2) of the Penal Code. The particulars of the offence were that on the 23rd of May 2003 at Nyakinyua Trading Centre the appellant otherwise than in the course of stealing dishonestly retained three donkeys having reason to believe that they were stolen or unlawfully obtained. The appellant pleaded not guilty to all the charges. After a full trial, the appellant was acquitted of all the other counts save for the first count on the charge of robbery with violence where he was found guilty as charged. He was sentenced to suffer the mandatory death penalty. The appellant was aggrieved by his conviction and sentence. He had filed an appeal to this court.

In his petition of appeal, the appellant has raised several grounds faulting the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted on the insufficient and contradictory evidence of the prosecution. He faulted the trial magistrate for convicting him whereas the essential ingredients to support the charge of robbery with violence had not been proved. He was aggrieved that the trial magistrate had relied on the evidence of identification to convict him whereas doubts were raised on the said identification due to the fact that it was made in circumstances that were not ideal for positive identification. The appellant further faulted the trial magistrate for relying on the photographic evidence of the donkeys (*which were the subject matter in the charge*) without actually having the said donkeys themselves produced in court as exhibits. The appellant urged the court to allow the appeal, quash the conviction and set aside the sentence imposed on him. At the hearing of the appeal, we heard the submissions which were made by Mrs Wanderi, Learned Counsel for the appellant. She reiterated the contents of the petition of appeal and urged us to allow the appeal. Mr Koech, Learned State Counsel did not oppose the appeal. We shall give our finding after briefly setting out the facts of this case.

On the 10th of May 2002, PW1 Samuel Kaguta Wakaba and PW2 Lucy Wanjiku went to Londiani Forest to collect firewood. PW1 and PW2 are husband and wife. They testified that they had gone to the forest to collect firewood with five donkeys. PW1 testified that he tied the donkeys in a grass patch so that they could graze whilst he and his wife were collecting firewood. After they had collected the firewood, PW1 went to retrieve the donkeys. He found three men untying the donkeys. One of them, who was wearing a hood and therefore covered his face, was armed with bows and arrows. PW1 asked them where they were taking his donkeys. They did not reply. The armed man then shot at PW1 with an arrow. PW1 ran for his dear life. He went to where his wife (PW2) was and they managed to hide in the forest. After about three hours, PW1 and PW2 went to the place where they had left the donkeys. They found the donkeys had been taken. PW1 testified that he was able to identify the appellant in the group of three men although he admitted it was the first time that he had seen the appellant on the material day. He testified that he was able to identify the appellant as the incident took place in broad daylight. PW1 reported the robbery incident to the Antistock theft police unit based at Grassland ASTU Camp. The police made a futile attempt to track down the donkeys for two days but they were unable to recover the donkeys. From the testimony of PW1 and PW2, it appears that no report was made to the regular police about the theft of the donkeys. About one year later, on the 22nd of May 2003, while PW1 was at Nyakinyua Trading Centre, he saw the appellant driving seven donkeys. He confronted him. With the assistance of the members of the public, he arrested the appellant and took him to Molo Police Station. PW1 and PW2 testified that they were able to identify the donkeys due to their appearance. They both admitted that the donkeys which were recovered from the appellant did not have any special features that could distinguish it from any other donkey. Whereas PW1 testified that the particular donkey was born at his home, PW2 (his wife) testified that she had purchased the donkey when it was very young. PW1 did not tell any distinct physical features of the appellant that enabled him (PW1) to identify the appellant one year after the robbery incident. PW1 admitted that no police identification parade was held after the arrest of the appellant.

PW3 James Ndungu testfied that his donkey was stolen while in possession of PW1 on the 10th of May 2002. The said donkey was recovered in possession of the appellant in May 2003. PW3 testified that there were no distinguishing marks on the donkey that could have enabled him to identify the donkey. He was however sure the donkey was his by its docile behaviour towards him. PW4 Simon Mwangi testified that his donkey which was recovered in possession of the appellant was stolen from his homestead on the 7th of August 2002. PW4 testified that he was able to identify his donkey by the white mark which appeared at the donkey's back. He also stated that the donkey had a tatoo in its ears. It was his testimony that the white mark which appeared on the donkey's back was a natural birth mark.

PW5 Patrick Gichina Mwaura likewise testified that his two donkeys were stolen from his home on the 10th of March 2002. He was informed that the stolen donkey had been recovered and was at Molo Police Station. PW5 went to Molo Police Station and was able to identify the donkey to his by a mark that was caused by a cut on the right leg of the donkey and also on its right ear. PW6 Paul Kanyingi likewise testified that his donkey was stolen from his homestead on the night of the 6th of June 2002. He was informed that his donkey had been at Nyakinyua farm which the appellant was offering for sale. PW5 went to the Molo Police Station on the 23rd of May 2003 and was able to identify one of the recovered donkeys. He testified that he was able to identify the donkey by the cut marks on both its ears. He stated that he had purchased the donkey when it already had the cut marks. PW7 Naftali Kamau, testified that in July 2002 while he was sleeping in his house at Nyakinyua farm, thieves stole his donkey. On 25th of May 2005 he was informed that some donkeys had been recovered and they were being held at Molo Police Station. PW7 went to the police station and was able to identify one of the recovered donkeys. He stated that he was able to identify the donkey by its appearance and behaviour. He admitted that the donkey did not have any distinguishing marks. He was however certain that the donkey was his.

PW8 Police Constable Vincent Langat arrested the appellant when he was taken to Molo Police Station by the members of the public. PW9 Police Constabe Moses Rono arranged for the donkeys which had been recovered from the appellant to be photographed. The said donkeys were photographed by PW10 Joseph Maina, a Commercial Photographer based at Molo Township. The photographs were produced as Prosecution's Exhibit No. 1 to 6. PW9 testified that the donkeys, after being photographed were released to the complainants, (i.e. *the persons who claimed them*).

When the appellant was put on his defence, he testified that he was a maize trader. On the material day, he met with PW1 at Nyakinyua Trading Centre. The appellant asked PW1 if he could sell him maize. The price that PW1 offered was however too high for the appellant. As the appellant sought to leave, he was stopped by a hostile crowd who claimed that he had stolen some of the donkeys that were in his possession from PW1. The appellant testified that he was harassed by the crowd who managed to relieve him of the sum of Kshs 6,315/=. He denied that he had robbed the donkeys from PW1. He testified that some of the donkeys had been borrowed from DW3 Henry Kipkoros Chepkwony, who had lent him three donkeys, which he identified from the photographs which were produced as exhibits by the prosecution.

DW5 David Bett and DW4 Julius Kiplagat Koskei similarly identified some of the donkeys that were also claimed by the complainants. DW6 Stephen Rono recalled seeing the appellant on the 23rd of May 2003 in a shopping centre near Nyakinyua Shopping Centre known as Sirikwa. He recalled that the appellant was with about eight donkeys. He talked with the appellant and even took tea with him at the trading centre. The appellant informed DW6, who was known to him, that he was looking for maize to purchase. After they had taken tea, they parted ways. DW6 saw the appellant go to the next shopping centre with the donkeys. He later learnt that the appellant had been arrested for the theft of the donkeys. This is a first appeal. As a first appellate court in criminal cases, we are mandated to reconsider and re-evaluate the evidence adduced by the witnesses before the trial magistrate's court and reach our own independent determination whether or not to uphold the conviction of the appellant. In reaching such determination, this court has always to put in mind that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (See **Njoroge – versus- Republic [1987]KLR 19**. Having re-evaluated the evidence adduced and considered the submission made before us on appeal, the issue for determination by this court is whether the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt. The prosecution's case turned on two pieces of evidence; that of identification of the appellant by PW1 Samuel Kaguta Wakaba and secondly that of the recovery of the donkeys in the possession of the appellant.

As regards the identification of the appellant by PW1, PW1 testified that when he sought to retrieve the five donkeys which were grazing, he saw three men who were untying the said donkeys. When he confronted them, one of them, who was armed with a bow and arrows shot at him with an arrow. PW1 testified that he ran for dear life. It was his testimony however that he was able to identify the appellant among the three men, one of whom he claimed was wearing a mask. He later made the report to the police. There is no evidence however that the said witness gave the description of his assaillants to the police. He testified that he saw the appellant for the first time when the robbery incident took place. He had now known the appellant prior to the robbery incident. One year later, PW1 claimed that he was able to recall the identity of the appellant as being among the persons who robbed him when he saw the appellant at Nyakinyua Trading Centre. It is trite law that for the prosecution to rely on the evidence of identification (*especially when a witness saw the accused for the time*) it is vital that there must be a description of the assaillant when the first report is made to the police. In **Charles Ouma –versus- Republic C.A. Criminal Appeal No. 222 of the 2002** (unreported) (Mombasa) it was held at page of the judgment that:

> **"In Maitanyi –vs- R [1988-1992]2 KAR 75 at page 77 this court dealing with a similar situation state:-**
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> **"There is a second line of inquiring which ought to be made, and that is whether the complainant was able to give description of his or her assaillants to those who came to the complainant's aid or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assaillant, the witness will usually be able to give some description".**

In the instant case, like was observed by the Court of Appeal in the above quoted case, there is no evidence that PW1 ever gave the description of the robbers to anyone or to the police when he made the first report. In the circumstances of this case, his evidence that he was able to identify the appellant one year after the robbery incident is doubtful, to say the least. Although he claims that the robbery took place

in broad daylight, this court is unable to reach a conclusion that PW1 identified the appellant as being among the three men who robbed him. The circumstances under which the said identification was made precludes this court from making a finding that the said evidence of identification was beyond any shade of doubt.

PW1 had a look at the robbers for a few minutes before he was shot at with an arrow. He then ran for his dear life. In the hectic circumstances of the moment, we do hold that the said witness could not possibly have identified his assaillants. Having re-evaluated the said evidence of identification we have reached the conclusion that the said evidence is unsatisfactory and could not be relied upon to convict the appellant. The said evidence was unreliable and ought not to have formed the basis upon which to convict the appellant. In that regard, we agree with the appellant that the trial magistrate erred in convicting him on such doubtful evidence of identification.

As regard the evidence of possession of the donkeys by the appellant, having reevaluated the evidence adduced, we similarly find the said evidence to be completely unsatisfactory. The complainants were not able to categorically prove that the donkeys which were found in possession of the appellant belonged to them. The said donkeys did not have any distinguishing marks that would have enabled a court of law to confirm without fear of contradiction that the said donkeys belonged to the complainants. This court had the opportunity of looking at the photographs which were produced in evidence by the prosecution. The said photographs are unremarkable. We were unable to distinguish one donkey from the other. Our close scrutiny of the said photographs reveal the fact that all the donkeys appeared similar. The evidence offered by PW1 and PW2 as regard how they came into possession of the donkeys in the first place, differed. Whereas PW1 testified that the donkey was born at his homestead, PW2 (his wife) testified that they had purchased the donkey when it was young.

Similarly, the other complainants could not categorically give a description of how they were able to be certain about the identity of the donkeys. The evidence offered by the defence witnesses as to the description of the donkeys was more believable that that offered by the prosecution witnesses. In any event, the trial court erred in admitting the said photographic evidence since the said photographs were taken by a person who was not qualified in law to take photographs for the purpose of having the same produced in evidence. According to the evidence of PW9, the photographs of the donkeys were taken by PW10 a commercial photographer based at Molo township. The said photographer was not an officer appointed for the purpose by the Attorney-General as envisaged by the provisions of **Section 78** of the **Evidence Act** which provides that;

"(1) In criminal proceedings a certificate in the form in the schedule to this Act, given under the hand of an officer appointed by order of the Attorney-General for the purpose, who shall have preferred a photographic print or a photographic enlargement form exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

(2) The court shall presume that the signature to any such certificate is genuine.

(3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it".

The above section of the evidence Act gives conditions under which photographic evidence may be admitted in criminal cases. A condition to be satisfied is that the photographic prints or enlargement must have been prepared by an officer duly appointed by the order of the Attorney General. Such an officer shall prepare a certificate to the effect that he reproduced the photographic prints from the exact film which was exposed. The said certificate shall be produced in evidence together with the photographs.

In this case, PW10 is not an officer appointed by the order of the Attorney- General to prepare and produce such photographic prints. Neither was a certificate produced together with the photographs when they were produced in evidence by the prosecution. The trial magistrate therefore erred in admitting the photographic evidence which were inadmissible under the provision of **Section 78(1) of the Evidence**

Act. In the circumstances of this case, the prosecution did not therefore establish that the appellant was found in possession of stolen property. No evidence was adduced to establish the ownership of the said donkeys by the complainants. No exhibits were produced to establish the ownership of the said donkeys.

Having carefully re-evaluated the evidence adduced by the prosecution and also considered the defence offered by the appellant, it is our finding that the prosecution failed to establish a charge of robbery with violence against the appellant to the required standard of proof beyond reasonable doubt. Mr Koech for the State, who did not oppose the appeal, in our view rightly conceded to the appeal. In the premises, therefore, the appeal is allowed, the conviction quashed and the sentence imposed set aside. The appellant is set at liberty and ordered released from prison unless otherwise lawfully held.

DATED at NAKURU this 15th day of November 2005.

D. K. MUSINGA

JUDGE

L. KIMARU

JUDGE