



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 480 OF 2000**  
**(From Original Conviction and Sentence in Criminal Case No. 1055 of 2000  
of the Chief Magistrate’s Court at Mombasa, R.M. Ndubi, Esq., RM)**

**JAMES ASITUA MANGALI ..... APPELLANT**

**Versus**

**REPUBLIC ..... RESPONDENT**

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

The Appellant, James Asitua Mangali, was with another, Peter Wambi Omburo, charged with the offence of robbery with violence contrary to section 296(1) of the Penal Code. The particulars of the offence were that on the 23rd day of March 2000 at about 5.10 a.m. at Soweto village in Likoni location within Mombasa District of the Coast Province jointly with others not before the court robbed Joseph Gisemba Nyangau of a bicycle and one jacket both valued at Ksh. 3,600/= and that at or immediately after the time of such robbery threatened to use actual violence on the said Joseph Gisemba Nyangau. After trial before the Resident Magistrate at Mombasa, they were both convicted and sentenced to 5 years imprisonment. The Appellant has appealed against both the conviction and sentence.

On the 23rd March 2000 at about 5.00 a.m. the complainant Joseph Nyangau Gisemba was going to work. He was riding on his bicycle with a pillion passenger, P.W.2. On the way about four people emerged from a kiosk and ordered them to stop. When they did not they attacked them and robbed them of the bicycle and a jacket. The complainant and his pillion passenger identified two of those people. One of the two, Peter Wambi Omburo, had stayed with the complainant from 1993 to 1997. The complainant said there was moonlight and they were able to see their attackers and even identified the clothes the attackers were wearing. At about 6.00 a.m. that morning the complainant and his friend reported the matter to Likoni Police Station and at about 10.00 p.m. that evening they led police to where Omburo lived and the two were arrested.

The testimony of the complainant was corroborated by that of his companion who testified as P.W.2. He also identified the two accused persons as being among his attackers. The first accused in the case testified on oath. He denied the charge. He said that on that day, the 23rd March 2000, at about 9.00 a.m. he received information that the complainant had reported that he was one of his (complainant’s) attackers who robbed him of his bicycle. He also said he had stayed with the complainant between 1993 and 1997.

The Appellant gave an unsworn statement . He also denied the charges and said that on that day he went to work at TSS Millers and returned in the evening at around 6.00 p.m. Later the same evening while seated outside the first accused’s house police went there and arrested them.

In this appeal the Appellant has raised five grounds of appeal which can be summarized as follows:

1. That the trial magistrate erred in acting on hearsay evidence of P.W.1.

2(a) That the trial magistrate failed to find that he was arrested at his house and that nothing was found with him connecting him with this case.

(b) That the magistrate erred in failing to find that if indeed he was one of the robbers the complainant should have shouted his name and he could have been followed to his house and arrested.

3. That the trial magistrate failed to call for the police OB to see if indeed his name was there.

4. That the trial magistrate erred in convicting him on Evidence of exhibits which had nothing to do with him.

5. That the sentence imposed on him is harsh.

At the hearing of the Appeal the Appellant tendered written grounds in which he has mainly argued that his identification was not proper and that the conditions were not proper for a favourable identification.

Mrs. Mwangi the Principal State Counsel supported the conviction. She submitted that there was overwhelming evidence against the appellant. There was moonlight and the conditions for a favourable identification were therefore present. Besides that, she further submitted, P.W.1 and P.W.2 knew the Appellants well as they were neighbours. On sentence she submitted that the Appellant was lucky to escape with a light sentence of only five years for an offence with a maximum sentence of life imprisonment.

I have considered the evidence on record and the submissions tendered. It is manifest that the conviction of the appellant was based on the evidence of visual identification as was related by P.W.1 and P.W.2. Evidence of visual identification should always be approached with great care and caution - **Waithaka Chege =Vs= The Republic [1979] KLR 271**. Greater care should be exercised where the conditions for a favourable identification are poor and where the identification is by a single witness **Gikonyo Karume & Another =Vs= The Republic [1980] KLR 23**.

In this case the Appellant was identified by two witnesses who said they knew him well as they were neighbours. From the recorded evidence the impression I get of these two witnesses is that they were honest witnesses. They were simple watchmen who were going to their place of work where they were perhaps required to report at 6.00 p.m. Their evidence is also consistent. They gave the names of their attackers to the people who went to their aid and the police. This is confirmed by accused one himself. By 9.00 a.m. that morning he had received information that the complainant P.W.1 had named him as one of the people who robbed him of his bicycle.

What has however caused me concern is whether or not the identification of the Appellant and the other accused person by the two witnesses may not have been mistaken. The attack was between 5.00 and 5.30 a.m. The two witnesses are emphatic that they were able to identify their attackers because there was moonlight.

P.W.3 P.C. Elijah Odera stated that when they arrested the accused persons there was moonlight. But the two witnesses, P.W.1 and P.W.2 said that the robbers had spotlights. P.W.2 said that when they were attacked and screamed a neighbour came with a spotlight. For the neighbour coming out with a torch I can understand. Being in a dark house he may probably have thought it was dark outside and carried a torch. But when he got out and if there was moonlight which could enable the two witnesses to see the robbers and identify the Appellant and the other accused then the neighbour did not need to flash his spotlight in which case P.W.2 could not have seen that he had one. The robbers also did not need to flash theirs if there was clear moonlight.

Apart from the S.P. evidence of spotlights there is also some other evidence which has led me to conclude that the identification of the Appellant may have been mistaken. That is the evidence of the clothes the Appellant was said to have been wearing. Before I deal with that I should point out that there are discrepancies in the evidence of the two witnesses as to what exactly happened at scene during the attack. The discrepancies as to whether the robbers alleged they were police and ordered the witnesses to stop, whether the witnesses stopped because they went into mind or they stopped because P.W.1 was hit and he fell and as to which robber hit who have not bothered me at all. In a sudden attack like the one in this one cannot expect the witnesses to relate the events exactly as they happened.

Going back to the clothes the Appellant was said to have worn that morning the record shows P.W.1 said the Appellant was dressed in a jeans jacket. However in cross-examination P.W.2 said the Appellant was wearing a white T-shirt and a black jeans trouser. These two pieces of evidence have left me with no doubt in my mind that the conditions for a favourable identification were not there and that the identification of the appellant was mistaken. As I said I find that the two witnesses were honest. But as the Court of Appeal for Eastern Africa held in **Abdallah Bin Wendo =Vs= Republic (1953) 20 EACA 166** a witness can be honest but mistaken.

For these reasons I find that the conviction of the Appellant based as it was on the visual identification is unsafe and I accordingly allow this appeal, quash the conviction set aside the sentence and order that the Appellant be released forthwith unless otherwise lawfully held. As I have held that the identification of the appellant and that of the co-accused was not proper the conviction of the co-accused who has not appealed cannot stand. I therefore quash the conviction of the co-accused, **PETER WAMBI OMBURO**, set aside the sentence imposed upon him and order that he should also be released forthwith unless otherwise lawfully held.

Dated this 19th day of February, 2004.

D.K. Maraga

**Ag. JUDGE**