REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 332 OF 2003

1. CHARLES OTIENO ADERA ……. APPELLANT

2. CHARLES OTIENO MAGAK ……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

{Originating from Chief Magistrate's Court Cr. Case No. 504 of 2002 at Kisumu, Before M. Rungare (Miss) - P.M.}

JUDGMENT

The two appellants were charged with robbery C/Section 296 (1) of the Penal Code. That on 10th August 2002 at Nyalunya, Nyamasaria in Kisumu District of Nyanza Province jointly with others not before Court robbed Daniel Ouma Abuom one wrst watch Arinca valued to the said person. The two appellant were convicted and sentenced to four years imprisonment by the trial Court. The conviction of the two appellant was based on alleged identification of PW!, the complainant herein and that identification was described by the trial Court as positive. Secondly the trial Court casually and without any reason stated that PW1, 2, 3, 4, 5 and 6 during trial identified the two accused persons as suspects who were alleged to have robbed PW1 on the material day. It was the evidence of PW# that accused No. 1 sold him the watch for KSh. 200/= but suspected the same to have been stolen and went to report to PW^.

It is clear that no identification parade was carried out to confirm that the two appellants were the ones who actually without doubt committed the offence. I must say in Criminal Law the burden of proof is always on the shoulders of the prosecution. No accused person is required to prove his innocence indeed and infact the prosecution ought to proof the case and the ingredient therein against the accused person. The complainant rightly stated that he never knew the two accused persons, therefore it was mandatory for the police to have conducted an identification parade, so that the complainant can be in a position to identify the suspects. The complainant did not give a description of the suspect who have attached and neither did he give any special description of his watch. How would the complainant even know his own watch unless it has certain marks and description. The trial Court with respect did not consider the defence of the two accused person, but needlessly relied on suspicious evidence of the prosecution witnesses. The issue of visual dock identification was relief upon by the trial Court and such, testimony in my view was insufficient and incapable of sustaining conviction such a serious charge. The law is very clear on dock identification that it is unreliable and undesirable.

See Patrick Nabiswa Vs. Republic Criminal Appeal No. 80/1997.

It was held:

> **"a) Some persons may have difficulty in distinguishing between different persons of only moderately similar appearance and many witnesses to crime are able to see the perpetrators only fleeting by often in very stressful circumstances.**
>
> **b) Visual memory may fade with the passage of time and**
>
> **c) As is in the process of unconscious transference a witness may confuse a face he recognised from the scene of the crime"**

Therefore it is my judgment that there is no credible evidence to sustain the conviction of the two appellant. It was unsafe and they are entitled to the benefits of doubts stated.

In the result the appeal is allowed, the conviction quashed and sentence set aside.

Delivered and Dated at Kisumu This 13th day of May 2004

MOHAMMED WARSAME

AG. JUDGE

/MO