



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 170 OF 1999

**(From Original Conviction and Sentence in Criminal Case No.
797 of 1999 of the Chief Magistrate's Court at Nakuru)
–S. Muketi**

JOEL KIPRONO SERONEY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The Appellant, Joel Kiprono Seroney, together with others was charged with two counts of robbery with violence Contrary to **Section 296 (2) of the Penal Code**. The particulars of the offence were that on the 31st of August 1998 at Mikima Farm, Subukia, Nakuru District while armed with Somali swords, bows and arrows jointly with others not before Court robbed Elvis Macharia Clispo of personal items worth Kshs. 5,350/= and at or immediately before or immediately after the time of such robbery wounded the said Elvis Macharia Clispo. The particulars of the second count were that on the same day and at the same place while similarly armed jointly with others not before Court robbed Alice Wangechi Mwangi and at or immediately before or immediately after the time of such robbery wounded the said Alice Wangechi Mwangi. The Appellant pleaded not guilty. After a full trial, the Appellant was convicted as charged and sentenced to death as mandatorily provided by the law. The Appellant was aggrieved by the said conviction and sentence and has appealed against the said conviction and sentence to this Court.

In his Petition of Appeal, the Appellant has raised several grounds faulting the decision of the trial Magistrate in convicting him. His grounds in Support of his Appeal were that he was convicted on the basis of the evidence of an identification parade which was not conducted according to the law. He further faulted the decision of the trial Magistrate in convicting him while the Investigating Officer had already pointed him out to the Complainants prior to the conduct of the identification. He further faulted the trial Magistrate for convicting him based on the evidence of identification that was not upto the scratch. At the hearing of this Appeal, the Appellant, with leave of the Court, presented Written Submissions in Support of his Appeal. Mr. Gumo, Learned Counsel for the State, supported both the conviction and sentence and urged this Court to dismiss the Appeal and uphold both the conviction and sentence.

The facts of this case briefly stated were that on the 31st of August 1998 at about 11.30 p.m. PW 1 Elvis Chrispo Macharia was asleep in his house at Mukoma Farm, Subukia, Nakuru District. He was woken up by the screams of his watchman. He took a torch, armed himself with a panga and went outside to where the screams was emanating from. He saw his watchman had been surrounded by about seven men. When he was seen by the men, he was ordered to sit down. It was his evidence that he was cut on the head by the Appellant. The robbers demanded money from him. He said he did not have any money.

He testified that he was cut again by the Appellant on the head. He then agreed to take the robbers to his house where he handed over Kshs. 100/=. His wife screamed. She was cut on the head. PW 1 was then ordered by the robbers to take them to his brother's house after ascertaining that he did not own a gun. They then broke into his brother's house, harassed PW 1's sister in law and later accompanied PW 1 to his house. They attempted to steal the motor vehicle which was at the farm, but the said motor vehicle would not start.

The neighbours answered their call of distress. The robbers ran away. PW 1 was taken to hospital where he was treated and discharged. PW 1 testified that he was able to identify the Appellant when he shone the torch on the Appellant's face and later while inside his brother's house when the electric lights were put on. He testified that he was able to identify the Appellant in an Identification Parade conducted by the Police. The radio cassette which was stolen during the robbery was not recovered. PW 1 testified that he was able to identify the Appellant from his physique, a gap in his teeth, the Appellant's complexion and weight. PW 2 Alice Wangechi testified that on the material night she was woken up by PW 1 his brother in law who called her to allow him in. She peeped through the window and saw that PW 1 had been held hostage. She put on the electric lights. She saw seven men. She refused to open the door and instead screamed. The robbers broke the front window and entered the house. She was beaten with the blunt side of the panga and asked for money. She gave them her purse. The robbers took Kshs. 1000/= therefrom. She testified that she was able to identify the Appellant during the course of the robbery even though she had not seen the Appellant before. She was later able to point out the Appellant from the identification parade which was conducted by the Police. She testified that she was able to identify the Appellant from the gap between his teeth, his physique and his complexion which was dark. PW 3 Jacinta Wanjiku Macharia testified that she was able to identify the Appellant as being among the robbers who attacked them six months prior to the Police Identification parade. She was able to point out the Appellant at the Identification Parade conducted by the Police. The Identification Parade was conducted on the 26th of April 1999. PW 3 is the wife of PW 1. She testified that she was able to identify the Appellant from his complexion from light emitted by the moonlight. She testified that she had not seen the Appellant prior to the robbery incident. She testified that she was also able to identify the Appellant as the lamp was on in her house during the night of the robbery.

PW 4 Police Constable David Kairu testified that the robbery incident was reported to Subukia Police Station at 4.30 a.m. on the 1st of September 1998 by the Complainants. He went to the scene of the robbery and saw the damage that the robbers had done to the Complainants house. Later the Appellant and his co-accused were arrested and identified by the Complainants in an Identification Parade. PW 5 Inspector Yacob Muthai conducted the Identification Parade where the Appellant was identified. He testified that he conducted the first Identification Parade on the 26th of April 1999 where PW 3 was able to identify the Appellant. This was between 1.12 pm and 1.26 p.m. Later on the same day at between 3.45 p.m. and 4.00 p.m. PW 1 was able to identify the Appellant at the Identification Parade. PW 6 Phillip Yare, a clinical officer treated the Complainants when they sought medical attention on the 1st of September 1999 at 5.00 a.m. after the robbery attack. He filled the P3 forms indicating the injuries that the Complainants had sustained. When the Appellant was put on his defence, he testified that he was arrested on the 14th of April 1999 by Police Officers from the Anti-Stock Theft Unit. He was interrogated and later charged with the offences which he was convicted. He testified that he knew nothing about the robbery.

The High Court as the first Appellate Court in Criminal Cases is mandated to look at the evidence adduced before the trial Magistrate afresh, re-evaluate and reassess the same and reach its own independent conclusion whether or not to uphold the conviction of the Appellant by the trial Court. In reaching its decision, the High Court has to put into consideration the grounds of Appeal put forward by the Appellant. The High Court is required to put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any finding as to the demeanour of the witnesses. (**See Gabriel Njoroge –versus. Republic [1982-88] I KAR 1134**). In the instant case, the issues for determination by this Court is whether or not the Complainants were able to identify the Appellant during the night of the robbery. The second, but minor point for consideration is whether or not the Appellant was properly identified by the Complainants at the Identification Parade which was carried out by the Police. It is not in dispute that on the night of the 31st of August 1998 the

Complainants PW 1 and PW 2 were attacked by robbers who assaulted them and were in the process injured. They were also robbed of money and valuables. The circumstances of the robbery as narrated by PW 1 was that he heard his watchman scream at about 11.30 p.m. He took his torch and went outside to investigate. He was armed with a panga. He was confronted by about seven people. One of them cut him on the head. He was escorted back to his house and ordered to give money. He gave them Kshs. 100/= .He was then taken to the house of his brother. He was ordered to ask his sister in law to open the door for the robbers. The sister-in-law, PW 2 refused to open the door. She put on the Electric lights. The window of the house was broken into. She was beaten with the blunt side of the panga, when she screamed to raise alarm. They took Kshs. 1000/= which was in her purse. PW 1 testified that the whole robbery incident took about twenty minutes. PW 1 and PW 2 testified that although they did not know the Appellant prior to the robbery incident, they were able to identify him. PW 1 testified that he was able to identify the Appellant from the gap between his teeth, his complexion, height and weight. It was his testimony that he was able to identify the Appellant when he shone the torch at him. He was further able to identify him when the robbers went inside the house of PW 2 where the electric light was on. PW 2 was equally emphatic that she was able to identify the Appellant when he was at her house where the electricity lights were on. PW 3 the wife of PW 1, also testified that she was able to identify the Appellant first from the moonlight and secondly from the lamp which she says had been put on. What emerges from the evidence of the three witnesses, which fact is not disputed is that the robbery took place at night. It was further not disputed that the robbery took place at most, for about thirty minutes. PW 1 was cut on his head immediately he went outside to answer to the screams by his watchman. He could not therefore have been in a position to have shone the light of his torch on the face of the Appellant so as to be able to identify him putting into consideration that there were seven robbers. PW 1 further stated that he was able to identify the Appellant when they entered the house of PW 2, his sister-in-law from the electric light which had been put on. PW 1 did not know the Appellant prior to the robbery incident. He said that he was able to identify him from the gap between his teeth, his complexion, height and weight.

PW 1 did not tell the Court what features the Appellant had to enable him to be distinguished from other people of the same complexion, height and weight. This Court takes Judicial Notice of the fact that some people in the community where the Appellant comes from engage in the cultural removal of some of the front teeth. It cannot therefore be said that the fact of the Appellant having a gap between his teeth was unique only to himself.

We have considered the evidence of Identification that was adduced before the trial Magistrate's Court. The three witnesses, PW 1, PW 2 and PW 3 testified that they were able to identify the Appellant from an Identification Parade six months after the robbery incident. This Court is of the considered view that the said witnesses saw the Appellant at night for a maximum period of thirty minutes. It was dark. The said witnesses were in fear of their lives having been assaulted by the robbers. They could not have had the opportunity of being able to positively identify the Appellant from amongst a group of robbers who attacked them. No evidence was adduced by any of the witnesses that the witnesses who gave the evidence of Identification recorded their descriptions of the robbers with the Police immediately after the robbery. We therefore find the Police Identification Parade conducted six months after the robbery incident in the absence of a recorded evidence of the description of the robbers by the witnesses to have been superfluous.

We further find that the trial Magistrate seems to have misdirected herself in accepting the evidence of Identification by the said witnesses in circumstances that were difficult for positive Identification to be made. The trial Magistrate did not warn herself of the danger of relying on the sole evidence of Identification before convicting the Appellant. The Court of Appeal in Maitanyi –versus- Republic [1986] KLR 198 approving the decision of Abdulla bin Wendo & Anor – versus- Reg (1953) 20 EACA 166 and Roria –versus- Republic [1967] EA 583 stated:

“Subject to the well known exceptions it is trite law that a fact may be proved by the testimony of a single

witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions

favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of Identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

In the instant case, the Identification of the Appellant was made in circumstances which were difficult. The events that took place on the material night cannot be described to have been an ordinary occurrence for the witnesses who testified in Court. We are of the considered view that the circumstances of the robbery were such that it was impossible for the witnesses to make a positive identification. It did not matter that the three witnesses said they were able to identify the Appellant. In the celebrated case of **R. – versus- Turnbull [1976] 3 All E. R. 549** It was held that several witnesses could be honestly mistaken about the identification of an accused person. In the absence of any other evidence connecting the Appellant to the robbery, we are unable to sustain the conviction of the Appellant on the evidence on record by the Prosecution. It cannot be ruled out that the Appellant was a victim of mistaken identity.

In the circumstances, therefore, we allow the Appeal filed by the Appellant, quash his conviction and set aside the sentence imposed. The Appellant is hereby set at liberty unless otherwise lawfully held.

DATED at NAKURU this 6th day of May 2004.

D. K. MUSINGA

AG. JUDGE

L. KIMARU

AG. JUDGE