



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 31 OF 1999**

(From Original Conviction and Sentence in Criminal Case No.596 of 1998 of the  
Principal Magistrate's Court at Kilifi – P.M. Ndungu, Esq., S.R.M.)

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**DISMAS OMONDI AYOO ..... ACCUSED**

**JUDGEMENT**

The main issue arising from this Appeal is that of identification. The facts were simple enough.

At about 2 a.m. on 30.5.1998 the residents of a Swahili-type house in Mtwapa, Kilifi, were rudely awakened from their sleep by a gang of robbers. On one account they were more than ten but certainly three of them were seen as they broke down doors and entered no less than seven rooms and robbed the occupants at the pain of injury with the slasher, knife and iron bar they carried. They also had a torch.

After some time neighbours started shouting “*thieves, thieves*” and the assailants ran away. Soon after, a taxi driver arrived and the matter was reported to Mtwapa Police Base. The police went to the scene at about 3 a.m. Six of the occupants who were robbed testified in court as PW.1 to PW.6. All except two said they could not identify any of the assailants. But PW.2 L.A.B (L) and PW.3 R.A.O(R) said they positively identified the Appellant at the scene. The Appellant was not arrested until 7 weeks later on 19.7.98 when R.A.O saw him in one of the bars in Mtwapa and informed a Special Branch Police Officer who was accompanying her; PW.7 IP. Daniel Irungu Maina – (IP. Maina). IP. Maina then reported to Mtwapa Police Base and the Appellant was arrested the same evening. The following day he was shown to the complainants who confirmed he was one of the robbers. No identification parade was conducted before the Appellant was charged with the offence.

The Appellant however protested strongly against his arrest asserting that the arrest was instigated by Mtwapa Police Base Officers with whom he had differed over the land where the Base stands. He had contended on behalf of his father that the plot belonged to his father and had gone ahead to construct some structures. He was warned against interfering with the plot but he reported the matter to the Provincial Administration who were about to institute investigations when he was arrested and charged with an offence he knew nothing about.

The Learned Trial Magistrate dismissed the Appellant's explanation terming it “*ingenious*” but far-fetched. He saw no personal interest of the Police Officers in the alleged plot on which stands a public institution. He believed the two identifying witnesses whose demeanour he said he observed. Of PW.2 L.A.B he said:-

***“PW.2 stated he was able to see and identify the accused as one of the robbers. He saw the accused very well as accused asked him for his watch which accused took.*”**

***He was able to see accused with aid of light from a torch which was being shone at accomplice of accused as he was flashing at the money they had taken.***

***He saw accused for ab out five minutes. He had not slept but had just been relaxing on his bed and was therefore quite alert. PW.2 knew accused before. He was familiar with him as he used to see him in that area. PW.2 was therefore able to recognize the accused.”***

And of PW.3 R.A.O, he said:-

***“PW.3 was able to identify the accused. She saw accused who held her and caressed her and tried to separate her legs as he desired to rape her but was restrained by an accomplice. She saw accused for a good five minutes. There was light in her room as the lamp was on. The circumstances were therefore favourable for positive identification. On 9.7.98 PW.3 spotted the accused while he was at Garden club. PW.3 was able to identify the accused immediately. She informed PW.7 who is a Police Officer who was in the said bar. PW.7 made arrangements for the accused to be arrested and he was promptly arrested and taken to the base. The court upon evaluation of the evidence of these two witnesses found their evidence credible and accept them as witnesses of truth. The two were able to see and identify the accused as having been among the robbers who robbed them”.***

The Appellant now attacks those findings in a Petition of Appeal filed and argued in person.

He contends that the prevailing conditions were not conducive to positive identification by the two witnesses. They were filled with fear and in the case of PW.2 the only source of light was a torch. The torch light was not described nor the distance it was from the Appellant. As for PW.3 she was hiding under her bed and the intensity of the kerosene lamp light she said she used to identify the Appellant was not described.

Furthermore, he submitted, the two witnesses did not report the matter to the police immediately. He was only arrested long after the event in circumstances that cast doubts on the accuracy of his identification. The two witnesses were only called to the Station after the arrest to implicate him in the offence while the real reason for his arrest was covered up by the Police. It was the land dispute and the Police wanted to grab his deceased father's plot. He was only being taught a lesson for challenging the Police and he had cross-examined IP Maina on the dispute which he (Maina) admitted was in existence. Learned State Counsel Mr. Gumo agreed with the findings of the Trial Magistrate.

We must as a first Appellate Court re-evaluate the entire evidence and have done so. Any criminal case must succeed on the strength of the prosecution evidence and not on the weakness of the Accused's evidence, as there is no onus placed on the Accused person to prove anything. As we stated earlier the main issue here is identification for it is the only basis on which the Appellant was convicted.

We are alive to the oft-repeated caution by the Court of Appeal in visual identification matters. It is captured from a discussion in **BLACKSTONES CRIMINAL PRACTICE 1997** section F18:

***“(a) Some persons may have difficulty in distinguishing between different persons of only moderate ly similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, 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 recognized from the scene of the crime (it may be of an innocent person) with that of the offender”.***

To lend credence to visual identification, particularly of a sole identifying witness, that Court has also cautioned that it is necessary to arrange an identification parade.

The case before us however does not simply relate to visual identification or a single-witness identification. In addition to visual identification, there was recognition by one of the witnesses. Both were believed by the trial court as truthful. It is necessary therefore to re-evaluate what they tendered in their evidence.

PW.2 L.A.B was asleep and first woke up when he heard the main door being broken. On opening the door to his room he saw someone who ordered him to return to his room which he did and he locked up. Five minutes later his door was broken down and three people entered into the room. A torch was flashed at him and he was hit with a "fimbo" . He then continued:-

***"They insisted I produce money. I then told them to pick some money which was in the cupboard. It was kshs.590/ -. The money was in silver coins. They started counting the money. I looked at them. There was no light in my house. They flashed torch on the money. With aid of reflection of the torch I was able to see those people. They had placed the money on the bed. They counted the money and one of them asked me to give him my watch. When they were counting the money the rays of the torch were not pointing at me and I was able to look at those people. I was able to identify one of those people. I used to see that person in that area. That person is the accused in the dock. The accused asked me to give him my watch. This is when I was able to identify him. The accused told me to give him the watch as they were going out."***

He went on to say that he knew the Appellant before as he used to see him in the "**Mtaani**" for a long time. He denied in cross-examination that he was sleepy and stated that he had just gone to bed and was with the robbers for 5 minutes as they counted money with the aid of a torch. The money was placed on his bed and the torch was not trained on him. He was also positive that the Appellant was the person who returned to take his watch. When he saw the Appellant at the Police Base he confirmed it was him who had robbed him.

As for R.A.O, she was also in bed and woke up when the main door was broken. She also heard other doors being broken and then hid under her bed. When three of the robbers broke in and entered her room, she could not identify them but they asked for money and she gave them Kshs.120/-. They went out but returned shortly asking for gold rings. She said she had none. One of them said he would rape her but was dissuaded by his colleague. He had held her legs and compressed her. She marked that person whose face was not covered. After ransacking the neighbouring rooms one of the three robbers who had entered her room returned and started another search but found nothing. She identified the person who entered her room twice and wanted to rape her as the Appellant. All this time which she put at about 5 minutes, her kerosene lantern was on as she always left it on all night.

That is the experience she used in recalling the Appellant's identity 7 weeks later when she saw him in a bar. She informed a Police Officer.

In our evaluation we think there was sufficient close proximity of the two witnesses to the Appellant and the illuminating sources were sufficient to provide positive identification of the Appellant.

Like the Learned Trial Magistrate we believe the two were able to identify the Appellant, one visually, the other visually and by recognition. They were positive about it. It was safe to convict and we so hold.

Accordingly we dismiss the Appeal in its entirety.

**Dated this 25th day of July, 2001.**

**P.N. WAKI**

**JUDGE**

**P. GM. TUTUI**

**COMMISSIONER OF ASSIZE**