



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO.99 OF 1999**

(From Original Conviction and Sentence in Criminal Case No.3857 of 1998 of the Chief Magistrate's Court at Mombasa - Stella Muketi, Mrs. – SRM)

**SAMSON OCHIENG.....APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

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

The Appellant was charged with Robbery with Violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to death. His appeal is against both that conviction and sentence.

The prosecution case was that on the 17th October, 1998 at about 2 a.m. PW.1 the complainant was asleep in his kiosk. He heard a loud bhang at the door and it gave in and immediately a man came in armed with a panga and asked for money. That assailant cut PW.1 on the right hand twice. PW.1 told him he had no money. Two other people came in too and asked for money but they decided to take away the shop goods. After the attackers had left PW.1 was escorted to the hospital by his brother one Nyerere who was with him during the attack. On the way to the hospital they met the police. Later the Appellant was arrested and charged with this offence.

The main ground in this appeal is that the Trial Magistrate erred both in law and fact in convicting the Appellant in reliance on identification without warning herself of a special need for caution. PW.1 in his evidence said that he was attacked at about 2 a.m. He was awakened from sleep by a loud bhang. Immediately a man entered with a panga and cut him twice. Two other attackers joined him. They robbed him of cash shs.1250/- plus shop goods valued at shs.33,000/-. PW.1 was with his brother Nyerere who was not called to testify. PW.1 said he was able to identify the Appellant through a light from a lamp which was in the shop. There is no evidence as to what sort of lamp it was and when it was lighted. There is no evidence that PW.1 had given the names of his attackers to the Police when he reported the robbery.

Again there is no evidence as to how the Appellant was identified when he was arrested. PW.3 who allegedly identified the Appellant was robbed on 16.6.98 and from the record it shows that there were no charges preferred against the Appellant in respect of the robbery from PW.3. But the charges preferred against the Appellant were in respect of the robbery which was committed against PW.1 on the 17.10.98. PW.3 was not with PW.1 when PW.1 was robbed therefore he (PW.3) could not purport to identify any of the assailants who robbed PW.1 on 17.10.98 because he was not there.

The only evidence material to this case on which the Trial Magistrate relied to convict the Appellant is that of PW.1 and that is evidence of a single witness.

Subject to 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 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 is circumstantial or direct pointing to the guilt, from which a Judge can reasonably concede 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 this case there is none and there is no explanation as to why Nyerere the

complainant's brother who was present when the complainant was attacked was not called to testify.

There was no supporting evidence. Had the evidence been thoroughly tested and analysed we cannot be sure that the Trial Magistrate would still have come to the same conclusion. Therefore we find that the conviction cannot safely be supported, and therefore the appeal is allowed.

The conviction of the Appellant is quashed, sentence set aside and the Appellant is ordered to be set at liberty forthwith, unless held for any other lawful cause.

**Dated and delivered at Mombasa this 27th day of September, 2001.**

**J.L.A. Osiemo**

**J U D G E**

**J.N. KHAMINWA**

**COMMISSIONER OF ASSIZE**