



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO.428 OF 1998**

(From Original Conviction and Sentence in Criminal Case No.1341 of 1998 of the Chief Magistrate's Court at Mombasa – B. Maloba, Ms. – S.R.M.)

**GEORGE OKELLO.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

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

The Appellant was charged and convicted with Robbery with Violence contrary to Section 296(2) of the Penal Code. He was sentenced to death. His appeal to this court is against both conviction and sentence. Briefly the prosecution case was that on the 27th March, 1998 at about 10 p.m. PW.1 had come from a funeral and was waiting for a bus at Mikindani Bus Stage when he was attacked and robbed by two people who were armed with an object which he identified as a metal bar. He was robbed of cash shs.2,500/-. He was able to identify his attackers as George Okello the Appellant and Geoffrey Opego. He had known them before as touts at Mikindani Bus Stage and he also knew their names. When he reported the robbery to the police, he also gave their names. He was able to identify them through street lights. He sustained injuries during the robbery and was admitted for 10 days.

According to the complainant he was attacked by 2 people. The evidence of PW.1 was corroborated by that of PW.2 and PW.3. PW.2 said on the material date while he was at Mikindani Stage, he heard people making noise about 40 meters away. He rushed there and found PW.1 being beaten by a group of 5 people. When they saw him they escaped. He was able to identify the Appellant whom he had known before. There was security lights. While PW.3 said on the material date while he came from the kiosk he heard someone screaming from Mikindani Bus Stage. He rushed there and found the complainant laying down and he had sustained some injuries on the mouth. He saw 5 people attack PW.1 and when they saw him they ran away. He was able to identify the Appellant through moonlight.

The issue here is identification. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against an Appellant depends wholly or to a great extent on the correctness of one or more identifications of the Accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the Appellant in reliance of the correctness of the identification.

The way to approach evidence of visual identification was succinctly stated by Lord Widgory, CJ, in the well known case of **R. –v- TURNBULL, (1976) 3 All E.R. 549 at page 552**, where he said:-

***“Recognition may be more reliable than identification of a stranger; but even when a witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”.***

The robbery in the present case was committed at night. PW.1 said he was assisted to see and recognize his attackers by street lights. They were two and armed with a metal bar, while PW.2 and PW.3 said they were assisted to see the people who robbed PW.1, through moonlight and the assailants were 5, while PW.4 said after he received the robbery report, he was given the names of the assailants. He went and looked for them and arrested them. He recovered the knife which was used by the Appellant during the robbery. These contradictions in the evidence in our view greatly erode the probative value of the evidence of these 4 witnesses.

The Trial Magistrate did not caution himself before accepting visual identification as a basis for convicting the Appellant nor did he direct his mind to this serious weakness in the evidence of these witnesses.

The conclusion we have come to is that the identification evidence upon which the Appellant’s conviction was based, has not been shown to have been free from the possibility of error. The end result is that there is no evidence upon which the conviction can be sustained.

For these reasons, we allow the Appellant’s appeal, quash the conviction and set aside the sentence and order for his immediate release unless he is otherwise lawfully held.

**Dated and delivered at Mombasa this 26th day of September, 2001.**

**J.L.A. OSIEMO**

**J U D G E**

**J.N. KHAMINWA**

**COMMISSIONER OF ASSIZE**