



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT LODWAR**

**CRIMINAL APPEAL NO. 25 OF 2018**

**EWAT LONGOLE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case No. 157 of 2016 by the Senior Resident Magistrate - Hon. J M Wekesa delivered on 7<sup>th</sup> August, 2018 at Kakuma)*

**JUDGMENT**

1. The appellant **EWAT LONGOLE** was charged with the offence of Robbery with violence contrary to section 296 (2) of the penal code for which he pleaded not guilty. He was tried convicted and sentenced to death.

2. Being dissatisfied with the said conviction and sentence, he filed this appeal on in his home grown grounds of appeal raised the following summarized grounds

- a) Vital prosecution witnesses were not called nor exhibits produced**
- b) No identification parade was conducted to connect him to the offence**
- c) There was no eye witness called and the prosecution case was full of material contradictions.**

He therefore sought for the appeal to be allowed, conviction quashed and sentence set aside.

3. At the trial herein the appellant who was un represented filed written submissions which he relied upon while Mr. Mongare for the state opposed the appeal through his oral submissions.

4. On behalf of the appellant it was submitted that he was not properly identified. He submitted the PW3 may have lost the motor bike and to cover up for the same implicated the appellant as it was his evidence in chief that the said motor cycle was red in colour but could not recall the registration number thereof. He submitted that the complainant did not know him before the date of the alleged robbery and there was need for an identification parade upon his arrest as the condition for identification were not favorable.

5. It was submitted further that there was contradiction on when the first report was made and that the complainant did not give his name to the police. It was contended that the documents in support of ownership of the motor cycle were not tendered in evidence. It was final submitted that since PW3 confirmed that he had been charged with a traffic offence of careless driving there was a possibility of the same hiding the motor cycle thereby using him as a scapegoat as the said motor cycle was never recovered.

6. On behalf of the State it was submitted that all vital prosecution witnesses were called to testify and produced all relevant exhibits. It was stated that identification parade was not necessary as the complainant was alone with the appellant in broad day light and had time to identify the same. It was contended that the injuries sustained by the complainant were confirmed through P3 form and the appellant defence properly rejected.

7. This being a first appeal this court is under legal duty to reevaluate the evidence tendered before the lower court and come to its own conclusion though giving allowance that unlike the trial court did not have the advantage of seeing and hearing witnesses see **OKENO – V – R [1972] EA 32, 36**

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court**

**must itself weigh conflicting evidence and draw its own conclusions (Shantilal Mruwala – V – R [1957] EA 570) it is not the function of a first appellate court to merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See Peters V Sunday post [1958]EA 424”**

8. The prosecution case was that on 30<sup>th</sup> day of May, 2016 at 5.00pm the appellant approached PW3 SAMMY EPEMAKAL while at a garage changing plugs to the motor cycle to ferry him to Locherengol but before they reached the destination the appellant stabbed him with a knife on the ribs, right leg and chest then took off with the motor cycle blue in color which was never recovered. He reported to the police and was issued with a P3 form. He was with the appellant for twenty minutes and was able to recognize his face. On 18/6/2016 he spotted the appellant at Nakurum in his village while drinking alcohol and reported to his cousin Ewesit who assisted in arresting the same. In cross-examination he stated that he only recognize the appellant on the date of the theft as heavily built unlike the accused on the dock.

9. **PW1 TIMU NICHOLAS AMURKOYA** received a report from one Peter Ekope PW2 that his rider had been stabbed with a knife at Lochere Angarengo and on 18/6/2016 he was called on phone by an elder who informed him that the appellant had been arrested and was about to be lynched by members of the public. He rushed to the scene and rescued the appellant. It was his evidence that PW3 also came to the scene but declined to show him where he was stabbed. He stated that it is the members of the public who had arrested the appellant.

10. **PW2 PETER EKOBE EKIDOR**’s evidence was that he was called on 31/5/2016 by PW3 a friend of his with information that the appellant had hired him only to turn against him. He stated that he was told of the incident by the area chief. He reported to the police and on 18/6/2016 PW3 called him and informed him that the appellant had been arrested, in cross-examination he stated that he was the owner of the stolen motor cycle and further confirmed that PW3 did not know the appellant.

11. **PW4 DR. FREDRICK CHEPKWONY** produced P3 form on behalf of Dr. Ken WASILWA who had gone on transfer and confirmed that the complainant had sustained injuries to the head and neck, anterior right thorax/chest had stab wound, lower limbs had stab wound on the thigh and injuries to the right knee he classified the degree of injury as grievous harm. **PW2 PC DUNCAN OKEYO** received the appellant at the station and took over the investigations.

12. When put on his defence the appellant stated that on 18/6/2016 he was living at Lomurewe within Songot and went to his cousin house at Nakurum where he went to drink alcohol and was arrested and taken to Lokichoggio police station and later charged with the offence herein. He stated that he did not know how to ride a motor cycle.

13. From the proceedings herein and the submissions I have identified the following issues for determination

**a) Whether the appellant was positively identified**

**b) Whether the prosecution case against the appellant was proved beyond reasonable doubt.**

**c) Whether the conviction of the appellant was safe.**

14. On the issue of identification; the evidence on record shows that the appellant was convicted based on the evidence of one identifying witness PW3 and it was incumbent upon the trial court to warn herself of the dangers of relying on the evidence of a single identification to convict the appellant as was stated by **Ngaah J in Nyeri criminal Appeal No.12 of 2017 WILSON KAMOTHO GITHUTI - V – R [2018]eKLR** thus:-

**“In Wambungu V R [1989] KLR 242 the court of appeal spoke of the evidence of identification generally in the following terms**

**‘ it is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.**

On the particular issue of the evidence of a single identification witness the same court acknowledged in **Ogeto – VS – Republic [2004] KLR 19EA** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult it noted as follows:

**It is trite law that a fact can be proved by evidence of a single witness although there is need to test with greatest care the identification evidence of such a witness especially when it is shown that the conditions favouring identification were difficult. Further the court has to bear in mind that it is possible a witness to be honest but to be mistaken.**

The court of appeal for East Africa discussed the danger of relying on such evidence without warning in **Rona – V – Republic [1967] EA 583 & page 584** it stated:

**A conviction resting entirely on identification invariably causes a degree of uneasiness. That danger is of course greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification”**

15. In this matter the appellant was convicted based on the sole evidence of PW3, the trial court proceeded to convict the same without warning herself of the dangers thereon. The evidence of PW3 was that he was with the appellant for twenty minutes and was able to identify him but while testifying before the trial court it was his evidence that the person who attacked him was heavy built unlike the apparent whom he identified in the dock. There is further a gap in the prosecution case on how the appellant was arrested as none of the people who arrested the appellant were called to testify so as to corroborate the evidence of the complainant PW3.

16. In convicting the appellant the trial court held that his identification by the complainant was that of recognition and therefore devoid of any error” but this was not supported by evidence on record. PW3 stated that he did not know the appellant before the date of the attack and did not state whether for those twenty minutes they were together he was able to properly look at the appellant so to enable him recognize the appellant eighteen days later when the same was arrested, I therefore find that his conviction based on the sole evidence of PW3 uncorroborated was not safe.

17. Further the prosecution case was full of material contradictions which went to the root of the case herein as the evidence of PW1 was that when he asked the complainant to show him where he had been stabbed at the same declined to do so. He was called by the elders who informed him of the arrest of the appellant but none of the said elders was called to testify. Further no evidence was presented before the trial court to prove ownership of the alleged motor cycle and to confirm its existence. Of further to note was that one EWESIT a cousin of the complainant who assisted in arresting the appellant was never called to testify.

18. Having taken into account the evidence tendered before the trial court and the appellants defence thereon I find and hold that the prosecution case was full of gaps and the appellant having been convicted solely on the evidence of the identifying witness but the prosecution case was not proved beyond reasonable doubt and therefore his conviction was not safe.

19. By reasons of the matters stated herein above I am satisfied and find that the appeal herein has merit and humbly allow the same and quash his conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

20. The state has a right of appeal and it is so ordered.

**Dated and delivered at Lodwar this 2<sup>nd</sup> day of April, 2019**

**J WAKIAGA**

**JUDGE**

**In the presence of:-**

Mongare for - Respondent

Ewat Longole - appellant

Richard - Court assistant