



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 22 OF 2018**

**JOHN NGUMARACH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case No. 137 of 2014*

*by the Ag. Principal Magistrate – Hon. W. Wachira delivered*

*on 29<sup>th</sup> August 2014 at Lodwar)*

**JUDGEMENT**

1. The Appellant **JOHN NGUMARACH** was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He pleaded not guilty, was tried, convicted and sentenced to life imprisonment.

2. Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following grounds of appeal:-

*(a) His constitutional right was violated in that he was not furnished with witnesses statement to enable him prepare for the trial.*

*(b) The language of the proceedings was misinterpreted throughout the trial.*

*(c) The prosecution case was marred with incurable irregularities and was therefore not proved beyond reasonable doubt.*

*(d) He was not given adequate time to prepare for her defence.*

He therefore sought retrial under alleged **Section 200 (4)** of the **Criminal Procedure Code**.

**SUBMISSIONS**

3. When the appeal came up for hearing before me, the Appellant who was unrepresented filed written submissions which he relied upon while the appeal was opposed by Mr. Mongare the learned Public Prosecutor who supported the conviction and sentence. On behalf of the Appellant it was submitted that there was material contradiction in the evidence of **PW2** and **PW4**. He stated that his alleged identification was not safe and free of error and the conditions prevailing was not ideal for identification since the source and strength of lighting was not indicated. It was contended that the description given by **PW2** of the alleged attacker did not point to him. He further submitted that it was **PW3** who was found in possession of the stolen mobile phone and that he was not subjected to identification parade to eliminate the possibility of mistaken identity.

4. On behalf of the prosecution it was submitted that the Appellant was given reasonable time to prepare and present his defence and that an order was made that he be supplied with witness statements and the Appellant did not complain thereafter. He submitted that court records indicated that the language used was English/Kiswahili and Turkana and therefore the appeal lacked merit.

5. This being a first appeal the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in **OKENO v R REPUBLIC [1972] EA 32:-**

*“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence*

*to support the lower court's findings and conclusions; it must make its own 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."*

## PROCEEDINGS

6. The prosecution case was that **PW2 JEAN BOSCO NDIKUMUKIZA** while on his way home at 8.00 p.m. with one Claude on a *boda boda* when they met six people armed with stones who ordered the *boda boda* rider to switch off the engine and the attackers started to beat off his friend while he took off with two people following him who caught up with him and attacked him. Through the use of the headlights of an oncoming motor vehicle he managed to see the Appellant whom he described as having dyed hair and black. **PW3 MUSHIRANDZIKO ERNEST** testified that on 16/3/2014 the Appellant sold to him a mobile phone which was later on identified by **PW2** as his. He later on pointed the Appellant to the police and was arrested. **PW4 CLAUDE DIDAISABA** who was with **PW2** stated that they were attacked by two people and was able to identify the Appellant. **PW5 PC PAUL SUM** investigated the matter and arrested the Appellant while **PW1 AUSITN OMBIJA** confirmed the injuries sustained by the complainant. When put on his defence the Appellant denied committing the offence and stated that he was given the mobile phone which he sold to **PW3**.

7. In convicting the Appellant the trial court found that his identification was proper, the recovered mobile phone from **PW3** had been obtained from the Appellant and stated as follows on the Appellant's defence:-

*"Accused's defence is not that believable. He claims alibi. He called no one to support his side of the story; that actually he was elsewhere if not the scene of crime . . ."*

## ANALYSIS AND DETERMINATION

8. I have identified the following issues for determination:-

- 1) *Whether the Appellant was properly identified.*
- 2) *Whether the prosecution case on the charge of robbery with violence was proved beyond reasonable doubt.*
- 3) *Whether the court considers the Appellant's defence.*

9. The law on identification in Kenya is well settled as was stated by the Court of Appeal at Nyeri in **JOHN NDUATI NGURE v REPUBLIC [2016] eKLR** an appeal arising from a determination of Wakiaga and Ngaah JJ. where the court stated:-

19. *Once again, this Court has repeatedly stressed that:-*

*"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 a defendant depends wholly or to a great extent on the correctness of 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 defendant in reliance on the correctness of the identification". See WAMUNGA v REPUBLIC [1989] KLR 424.*

20. *Furthermore, the High Court was of the view that an identification parade was not mandatory and that dock identification may be sufficient, citing the Muiruri case (supra). While it may not be mandatory, this court has underscored the utility of identification parades in order to minimize the danger of mistaken identity. We take it from the case of JAMES TINEGA OMWENGA v REPUBLIC, CRIMINAL APPEAL NO. 143 OF 2011, where the Court expressed itself as follows:-*

*"The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless."*

10. In the case appealed against the Appellant was unknown to the complainant at the time of the alleged attack which took place at night. The only source of lighting as per the evidence on record was that from the headlight of the *boda boda* bike and the oncoming motor vehicle. The only description given by **PW2** of the Appellant was that he had dyed hair. I have further noted the contradiction between the evidence of **PW2** and **PW4**, whereas **PW2** stated that they were attacked by six people it was **PW4's** evidence that the attackers were two and further whereas **PW2** stated that he took off leaving **PW4** at the scene while being followed by two people including the Appellant it was **PW4's** evidence that the Appellant remained with him.

11. This was a case where the police should have in line with the Court of Appeal decision stated herein conducted an identification parade upon the arrest of the Appellant as to confirm the identification which was not done. Further the trial court did not as required warn himself of the danger of convicting the Appellant on the evidence of identification in circumstances which was difficult.

12. It therefore follows that the identification of the Appellant was not free from error and therefore his conviction based on the same was not safe.

13. On the evidence tendered before the trial court it is clear that the same was connected to the offence through the evidence of **PW3** to

whom he sold a mobile phone which was allegedly stolen from the complainant and which the complainant identified as his thereby bringing the case in line within the doctrine of possession of recent stolen items. It is noteworthy that the Appellant in his defence stated that he had been given the said mobile phone to sell and the burden was upon the prosecution to prove that the Appellant attacked and robbed PW2 of the said mobile phone. I have noted that it was not for the Appellant to prove his *alibi* defence as stated by the trial court.

14. It is clear to my mind that the Appellant was entitled to the benefit of doubt raised in the prosecution case and whereas the evidence tendered before the court is strong enough to prove a lesser charge of handling stolen property, I hereby grant the Appellant the benefit of doubt raised in the prosecution case and allow the appeal herein, quash the conviction and set aside the sentence of death imposed on the Appellant by the trial court. The Appellant shall be set free forthwith unless otherwise lawfully held.

15. The State has a right of appeal and it is so ordered.

**Dated, delivered and signed at Lodwar this 5<sup>th</sup> day of June, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

\_\_\_\_\_ *for the Respondent*

\_\_\_\_\_ *for the Appellant*

*Accused person* \_\_\_\_\_

\_\_\_\_\_ *- Court assistant*