



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

**(CORAM: CHERERE -J)**

**CRIMINAL APPEAL NUMBER 197 of 2015**

**BETWEEN**

**DAVID WANDABWA SANJA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal against conviction and sentence in Criminal Case Number 320 of 2014 in the Principal Magistrate's Court at Webuye delivered by S.N.Abuya (PM) on 30.10.15)*

**JUDGMENT**

**Background**

1. **DAVID WANDABWA SANJA**, the appellant herein has appealed against the conviction and death sentence imposed on him for the offence of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The particulars of the charge are that:-

*On 13.4.15 at Makhese area in Bungoma East District within Bungoma County jointly with another not before the court robbed Damaris Munyenye one Mobile phone make Ideos, handbag containing one long trouser, one blouse, one top, one skirt, copy of form 4 certificate, living certificate, ID card and birth certificate all valued at Kshs. 5,500/- and at or immediately after the time of such robbery used actual violence on the said Damaris Munyenye*

**The prosecution's case**

2. The prosecution called 3 witnesses in support of the charges. PW1, Damaris Munyenye, the complainant recalled that on the material date, she was walking to her sister's home at Makhese when two men on a motor bike robbed her all the items names in the charge sheet. She stated that it was not dark and that she was able to recognize the appellant whom she knew by the name David. It was her evidence that appellant was arrested because his voice was similar to that of one of the persons that robbed her. PW2 Reuben Abiola found complainant crying and she told him that she had been robbed by persons unknown to her. PW3 PC Vincent Mokoit the investigating officer received the appellant on 14.4.14 and after recording complainant's statement charged appellant.

3. The appellant denied the offence and in a judgment dated 30th October, 2015; he was convicted and sentenced to suffer death.

**The Appeal**

4. The conviction and sentence provoked this appeal. In his petition of appeal filed on 13.11.15 and written submissions filed on 24.10.18, he raises the issue of identification.

5. When the appeal came up for hearing on 7.11.18, the appellant's counsel Mr. Sichangi stated that the appellant was wholly relying on the grounds of appeal and written submissions.

6. Mr. Oimbo, learned State Counsel opposed the appeal and submitted that the complainant told court that it was not dark when she was robbed and that the appellant was therefore properly identified at the scene of crime and a day later when he was arrested.

**Analysis and Determination**

7. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of

Appeal's decision in the case of Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005.

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellant and the state.

9. The gravamen of this appeal really turns on the issue of identification, of the appellant by the complainant. The offence was committed at 7.30 pm and hence the means by which the appellants were identified becomes critical.

11. That being the case it was necessary for the trial court to test the reliability of such identification. In the case of Maitanyi –vs- Republic (1986) KLR 198, the Court of Appeal held:-

*“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.*”

12. In the recent case of John Muriithi Nyagah v Republic [2014] eKLR, the Court of Appeal held:-

*“In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”*

13. According to the complainant, the offence was committed at about 7.30 pm and she said it was not dark. Contrary to the trial court's finding, the complainant did not testify that the offence was committed while it was day light. That finding by the trial magistrate was therefore against the weight of evidence.

14. Further to the foregoing, the court record shows that the learned trial Magistrate did not make an inquiry of the relevant circumstances such as the nature of the light that may have assisted the complainant to identify the appellant, the strength of the light, its size and its position relative to the appellant.

15. In the case of Ndungu Kimanyi vs. The Republic, (1979) KLR 282 at page 283, the Court of Appeal stated:-

*“We lay down the minimum standard as follows: The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”*

17. The appellant was a stranger to the complainant. Her evidence that she identified the appellant at the scene and even called him by his name David is not factual and in my humble view indicates that she is an unreliable witness which makes it unsafe to accept her evidence.

18. In the Court of Appeal decision in the case of Elizabeth Gitiri Gachanja & 7 others vs Republic (2011) eKLR, it was held that the evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt.

18. The fact that there is no evidence regarding the light condition at the scene of crime creates a doubt whether the scene was well lit and that ought to have sowed the seed of doubt on the mind of the learned trial magistrate concerning the identification of the appellant by the complainant. It was not enough for the complainant to say that it was not dark. She had a duty to lay a basis regarding the conditions that enabled her to identify the appellant. The fact that that duty was not discharged created a doubt that should have benefited the appellant.

19. Having considered the evidence in its totality, I find that the complainant's evidence fell short of proving the prosecution case beyond any reasonable doubt.

20. Consequently, the *appeal succeeds*. For that reason, the conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellant shall be released and set free forthwith.

**DELIVERED AND SIGNED AT BUNGOMA THIS 9TH DAY OF NOVEMBER 2018**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistants - Ribba & Diannah**

**Appellant -**

**For the Appellant**

