REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 20 OF 2016

DAUDI ABDI ALIOW ..... APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(From the original conviction and sentence in criminal case No. 119 of 2015 of the Senior Resident Magistrate's Court at Moyale by Hon. Gathogo Sogomo – Senior Resident Magistrate)

JUDGMENT

DAUDI ABDI ALIOW ,the appellant , was charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code**.** He was convicted for the lesser offences of robbery contrary to section 296(1) of the Penal Code and sentenced to ten years imprisonment with hard labour.

The particulars of the offences were that on 15th April 2015 at Moyale township, Marsabit County, jointly with another not before court, while armed with a knife robbed **LUCY WAITHERA MUTUGI** of her mobile phone valued at Kshs. 7000/= and immediately before the time of such robbery threatened to use actual violence to the said **LUCY WAITHERA MUTUGI.** The particulars in count two are that on 17th April 2015 at Moyale township, Marsabit County, jointly with another not before court, while armed with a knife robbed **ADIA EKIRU** of her mobile phone valued at Kshs. 7000/= and immediately before the time of such robbery threatened to use actual violence to the said **ADIA EKIRU.**

The appellant has appealed against both conviction and sentence.

He was in person and raised the following grounds:

1.That the trial suffered some procedural irregularities.

2.That the learned trial magistrate erred in law and in fact by failing to appreciate that no identification parade was conducted .

3. That the learned trial magistrate erred in law and in fact by relying on contradictory and uncorroborated evidence.

The state opposed the appeal through **Mr. Kibet**, the learned counsel.

The facts of the prosecution at the trial court were briefly as follows:

At about 6 a.m on 15th April 2015 and 17th April 2015 both complainants were accosted and robbed of

their mobile phones by a gang of about four men. It was contended that the appellant was one of the gang members.

In his defence the appellant pleaded an alibi. He contended that on both dates of the offences he was in Ethiopia. When he was arrested on 21st April 2015, he was waiting to go for some work.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC [1972] EA 32.**

Upon my perusal of the entire record, I do not find any procedural irregularities as contended by the appellant. This ground of appeal has no basis.

On both days of the robberies no arrest was made. The appellant is contesting that his arrest on 21st April 2015 was erroneous. In the leading decision on identification of **R V TURNBULL AND OTHERS [1976] 3 ALL ER 549** Lord Widgery C.J said the following:

> ***Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken.***
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> ***....***
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> ***Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given o the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.***

The alleged robberies took place at about 6 a.m.. Section 4 of the Penal Code defines night as follows:

> ***"night" or "night-time" means the interval between half-past six o'clock in the evening and half-past six o'clock in the morning;***

None of the two complainants testified whether there was ample light for them to be able to see the culprit. This was nighttime, the prosecution ought to have adduced evidence on the issue of lighting.

Of the two complainants none had testified to have seen the appellant before. It was incumbent on the prosecution to adduce evidence as to what reasons made the duo to conclude that he was one of the robbers. It is worth noting that after the robberies of 15th and 17th April 2015 the complainants did not give any description of any of their attackers. The question is therefore upon the arrest of the appellant on the 21st April 2015, how they were able to link him to the previous robberies. Without evidence to that effect, I find that the learned trial magistrate erred in making a finding that he was involved in the offences.

The appellant put forth an alibi defence. The trial court rejected it and stated:

The overwhelming eye witness testimony debunks his alibi defence which is hereby rejected.

With respect to the learned trial magistrate, there was no eye witness in the two robberies. In the case of ***KOSSAM UKIRU v. R.*** **(2014) eKLR** the court of appeal stated as follows:

> ***We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see*** *Karanja vs. Republic [1983] KLR 501****). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it.***

In the instant case there was no evidence against the appellant that displaced his alibi defence. It was not safe to convict the appellant. His appeal is allowed. Consequently, the conviction on both counts is quashed and the sentence thereof set aside. He is set at liberty unless if otherwise lawfully held.

DATED at Marsabit this 8th day of March 2017

KIARIE WAWERU KIARIE

JUDGE