



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEALS NO. 46 AND 47 OF 2016**  
**(CONSOLIDATED)**

**JACKSON NGUTHIRU WANJOHI.....1ST APPELLANT**

**SAMUEL GACHARA WANJIRU.....2ND APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against Conviction and Sentence imposed in*

*Karatina Criminal Case Number 276 of 2015 on 14.6.16 by Hon. F.W. Macharia SPM)*

**JUDGMENT**

**The Trial**

The Appellants herein **Jackson Nguthiru Wanjohi** (*hereinafter referred to as the 1st appellant*) and **Samuel Gachara Wanjiru** (*hereinafter referred to as the 2nd appellant*) who were accused 2 and 1 respectively in the trial court have filed appeals against sentence and conviction on the second charge of robbery with violence contrary to section 296(2) of the Penal Code Cap 63 Laws of Kenya.

The prosecution called a total of eleven (11) witnesses in support of their case but I will only evaluate the evidence that is relevant to count No. 2.

PW6 Paul Waweru Githinji, the complainant in count 2 recalled that on 24.5.15, he was with Carol and Nyaboke when he was robbed of Kshs. 25,400/- by two men did not know before, and that one had a big gun. That he later identified 2nd appellant in an identification parade. PW9 Dickson Njuki Kamwere recalled that on 24.5.15, he was at a bar when they were attacked by robbers one of whom had a gun. That he later identified appellants in an identification parade.

PW3 CIP Korir told court that on 31.5.15, he conducted an identification parade for the 2nd appellant and he was not identified by PW6 Paul Waweru Githinji, the complainant. PW8 IP Adan told court that on 5.6.15, he conducted an identification parade for the 1st appellant and he was identified by PW9 Dickson Njuki Kamwere. PW10 IP Nzioki told court that on 3.6.15, he conducted an identification parade for the 2nd appellant and he was identified by PW9 Dickson Njuki Kamwere.

At the close of the prosecution case, appellants were ruled to have a case to answer and were placed on their defences. Both appellants gave sworn defences in which they denied the charges. They said they were arresting from their hawking businesses in Karatina town and were later charged with offences they

did not commit.

On 14.6.16, the learned trial magistrate delivered a judgment in which she convicted the appellants of the 2nd count of robbery with violence and sentenced them to suffer death.

### **The Appeal**

Aggrieved by this decision, the appellants lodged the instant appeals. In their petitions of appeal filed on 21.6.16, 1st appellant raised 9 grounds and 2nd appellant raised 6 similar grounds which I will summarize into 2 main grounds as follows:-

- 1. The trial magistrate erred in law and fact by placing reliance on identification parades conducted after appellants had appeared in court for plea and were thus exposed to the witnesses***
- 2. The trial magistrate erred in law in disregarding the defence without giving cogent reasons***

Ms. Mwai, learned counsel for the appellants faulted the trial magistrate for placing reliance on the identification parades that were conducted when appellants were placed in police after plea was taken. She submitted that the PW6 and PW9 who purported to identify the appellants had not given any description in their first reports. Counsel relied on the case of **R v Turnbull, (1976) 3 All ER 551** where Lord Widgery CJ observed

***“the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger”.***

Counsel also cited **Peter Okello v Republic [2014] eKLR** which cited with approval the case of **Wamunga -vs- Republic [1989] KLR 424 at 430** where the court stated as follows with regard to convictions based on identification:-

***“Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge must warn himself of the special need for caution before convicting the accused person in reliance on the correctness or the identification or identifications or both.”***

Counsel further faulted the trial court for disregarding appellants’ alibis. To this end, counsel cited the case of **Victor Mwendwa Mulinge vs Republic [2014] eKLR** in which the court of appeal held:-

***“Even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant’s defence”.***

Mr. Nyamache learned Counsel for the state, conceded that identification of the appellants was flawed.

### **Analysis and Determination**

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC [1972] E.A.32**. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

#### **1. Identification of appellants by PW6 and PW9**

It is not disputed that PW6 and PW9 did not know the persons that committed the robbery before the

material date. In the case of *Maitanyi -vs- Republic (1986) KLR 19*, the Court of Appeal held,

***“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained”.***

I have considered the evidence by PW6 and PW9 and I find that their evidence that they identified appellants at the scene of crime is suspect since they did not give their description to the police when they made their report.

The fact that PW6 and PW9 did not identify the appellants is reinforced by the evidence of PW7 IP Muthui who testified that said that on 29.5.15, PW8 instructed him and other officers to arrest robbery suspects within Karatina. He conceded that that they did not know who the robbers were as a result of which they arrested all people that were gambling at Karatina bus stage and it was after arrest that the appellants were later identified and charged.

To prove the extent to which the investigators went to fix the appellants, identification parades by PW8 IP Adan and PW10 IP Nzioki were conducted in the absence of prior description by the witnesses and only after the appellants had taken plea and been exposed to witnesses. The identification parades fly on the face of the laid down procedures, were a waste of time and added no value to the prosecution case.

The quality of identification evidence was critical and the trial magistrate erred in placing reliance on identification that was flawed.

## **2. Were appellant's defences considered?**

On alibi evidence, the Court of Appeal in the case of *Kiarie v Republic [1984] KLR* held:-

***“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons”.***

The appellants' defences are buttressed by the evidence of PW7 who as stated hereinabove set out to arrest appellants and others and thereafter branded them robbers in the absence of overwhelming evidence to support their actions. I am of the considered opinion that the learned trial magistrate ought to have appropriately considered the alibis and given the appellants the benefit of the doubt.

## **Decision**

From the foregoing, it is clear to this court that the evidence of identification could not be safely relied upon. I find that the prosecution failed to discharge its burden of proof. The learned trial magistrate erred in convicting and sentencing the appellants when there was no evidence in law to warrant or sustain a conviction. Accordingly, I set aside the judgment and quash the appellants' conviction and sentence and unless otherwise lawfully held, order that they shall be released and set free forthwith.

**DATED THIS 13<sup>th</sup> DAY OF July 2017**

**T. W. CHERERE**

**JUDGE**

**DELIVERED ON THIS 19<sup>TH</sup> DAY OF JULY 2017**

**BY: - MSHILA A**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant -

Appellant -

For the State -