



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 244 of 2011**

*(An appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Mumias in Criminal*

*Case No. 208 of 2011 [E. K. MAKORI, PM])*

**EVANS OMOIT OTWANE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged in the subordinate court with two counts of robbery with violence contrary section 296 (2) of the Penal Code. The particulars of count I were that on the night of 13th April, 2011 at Shibale market, Mumias District within Kakamega County jointly with others not before court, while armed with offensive weapons namely pistols robbed Martin Simbauni of cash Kshs.50,000/=, three ATM cards for KCB, Co-operative Bank and Sukari Sacco, a motor vehicle registration No. KAY 547V the property of Martin Simbauni and immediately after the time of such robbery used actual violence to the said Martin Simbauni. The particulars of count II on the other hand were that on the same night, along Mumias-Bungoma road in Mumias District of Western Province jointly with others not before court armed with offensive weapons robbed Paul Kinyanjui Chege of Kshs.9,500 the property of the said Paul Kinyanjui Chege and immediately after the said robbery used actual violence to the said Paul Kinyanjui Chege. He denied all the charges.

After a full trial, he was acquitted of count I. He was however convicted on count II and sentenced to suffer death. Being dissatisfied by the decision of the trial court, he has appealed to this court through Kiveu Advocate on several grounds. Counsel also filed written submissions.

At the hearing of the appeal, Mr. Vadaga, who appeared for the appellant, adopted the written submissions filed. Counsel emphasized that the evidence of identification was conflicting. Counsel submitted also that important witnesses were not called by the prosecution.

Learned Prosecuting Counsel, Mr. Oroni opposed the appeal. Counsel emphasized that PW4 had positively identified the appellant. Counsel submitted that PW4 the driver of motor vehicle reg. No. KAC 547V was hijacked and driven around for six hours. In counsel's view, this was adequate time to identify the appellant positively. Counsel lastly submitted that it was not necessary for the prosecution to call the witnesses who did not testify.

In brief, the prosecution evidence is that on the 13th April 2011 at around 9.00 p.m., PW1, Paul Kinyanjui Chege, who was the complainant in count II was driving a canter lorry reg. No. KAY 522. He was

carrying items including tomatoes. Two people were in the vehicle. He was from Kitale and was now heading to Mumias from Bungoma. At Hamba shopping centre, the road had potholes and they had to slow down. A small white saloon car approached from behind, passed them and stopped abruptly. The occupants of that white car ordered them to open the door. They robbed him of Kshs.9,500/= and a mobile phone. PW1 and PW2, Jackson Kariuki Njenga were however not able to identify any of the robbers either at the scene or at the identification parade. Both were in the front cabin of the lorry.

Joseph Kedevede Achiayo, PW3 who was at the back of the canter lorry, peeped through the canvass and saw four people. According to him, the incident took about 10 minutes. In the process, he recognized the appellant through the lights of the two vehicles. He testified that the robbers wore dark clothes and caps. He identified the appellant in an identification parade.

The same night, PW4 Martin Simbauni Wamalwa (the complainant in count I), was driving his sister's car Reg. No. KAC 547V white in colour Toyota Corolla 110. At 9.30 p.m., he parked it at Shibale market in front of Boco gate. Suddenly, three people emerged, slapped him and took control of the vehicle at gun point. They drove him around for six hours, stopping lorries and robbing the owners, as well as stripping them naked and taking their clothes. His own clothes were later taken by the robbers. He was then thrown out of the vehicle at a place called Indangalasia. He sought assistance from residents and was lucky to be given a lessa (piece of cloth) by one woman.

The two incidents were reported to the police. The appellant was arrested later on information from members of the public. Investigations were conducted by PW6, PC. Momanyi Nyabuti. On the 15th April 2011, PW5, CI. Kevin Maina conducted an identification parade at Mumias Police Station. The appellant was identified by Martin Simbauni Wamalwa PW4 the complainant in count I and Joseph Kedevede, PW3. He was then charged with the offences. In his defence, the appellant gave sworn testimony. He said that he was a boda-boda operator. That he was arrested for a reason which he did not understand. The motor bike was impounded. He denied committing the offences.

Faced with the above evidence, the learned trial magistrate convicted the appellant on count II and sentenced him to death. He acquitted him on count I. Therefrom arose this appeal.

This being a first appellate court, we have to start by reminding ourselves that we are duty bound to re-evaluate the evidence on record and come to our own conclusions and inferences. See the case of **Njoroge -vs- Republic [1987] KLR 19**.

We have re-evaluated the evidence on record. The conviction of the appellant is predicated on the evidence of visual identification. The appellant denied committing the offence. In the case of **Wamunga -vs- Republic [1989] KLR 424 at page 430**, the Court of Appeal stated as follows -

***“Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or 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 or identifications.”***

Our perusal of the judgment shows that the trial court erroneously relied heavily on the identification of the appellant by Martin Simbauni Wamalwa PW4. The magistrate stated in the judgment as follows -

***“The accused is concerned with the robberies of two characters Joseph Edevede and Martin Simbiri, PW3 and PW4 respectively. The two witnesses particularly Simbauni narrated how he was car-jacked and driven the whole night where a spat of robbery within Western Province and environs. He was later to be dumped at Indangalasia. He was later to be rescued. He said he was able to identify the accused when called to a parade. He said he had the opportunity to see the accused well as the one who robbed him and robbed the occupants of the lorry in which Paul Kinyanjui and others were robbed. He saw the route he passed and there were several police stations, several lights and that in the vehicle itself at some point like when they picked the two girls, they lit the vehicle lights.”***

The reliance on the evidence of PW4 by the trial court above was a mistake. Firstly, PW4 was a victim of the alleged robbery in count I on which the appellant was acquitted. His identification of the appellant could therefore only relate to count I, not count II. Secondly, there is no evidence on record that PW4 witnessed Paul Kinyanjui being robbed by the appellant. The only evidence of the identification of the appellant with regard to count II therefore should have been that of Josephat Edevede, PW3.

However, PW3 was at the back of the canter vehicle. The said vehicle was covered with a canvass. It was therefore quite difficult for him to identify robbers who were on the ground while the victim PW4 was not able to identify the robbers. In addition, PW3 does not give details on the distance between him and the assailants when he identified the appellant. He did not give the description or details of the intensity of the light from the vehicles, and whether it was possible for him to see the faces of the appellants in that light from where he was. Further, there is no evidence that he told any of the other people in that lorry nor members of the public, or the police, that he was able to identify any of the robbers. The appellant was also not arrested on the basis of any information or hint given by PW3. In those circumstances, we conclude that the identification of the appellant by PW2 was not free from the possibility of an error, even though he identified him at the identification parade.

Further, we observe a crucial witness was not called by the prosecution to clarify the circumstances and reason for the arrest. The Investigating officer, PW6 stated that the appellant was arrested merely on suspicion while he was washing cars. He stated that the report of the suspicion was given by an informer who could not be disclosed to the court. In our view, the person who led to the arrest of the appellants should have been called in court to testify. He was a crucial witness who would have given reasons why the appellant was arrested. As it is, the arrest of the appellant was based on undisclosed suspicion. In criminal law, suspicion, however strong cannot be the basis for inferring guilt, which must be proved by evidence. See the case of **Sawe -vs- Republic [2003] KLR 3364**.

In conclusion, we find that the conviction of the appellant was not safe. The appeal has merits. We allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

*Dated at Kakamega this 11<sup>th</sup> day of February, 2014*

**GEORGE DULU**

**HELLEN WASILWA**

**JUDGE**

**JUDGE**