



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 258 OF 2011**

*(An appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Vihiga in Criminal Case No. 869 of 2008 [L. O. ONYINA, SRM] delivered on 26<sup>th</sup> October, 2011)*

**EDWIN KINAMBEDI CHUNGUZI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged in the subordinate court jointly with seven (7) others, with two counts of robbery with violence. He was the 7th accused.

The particulars in count I were that on the 9th July 2008 at 12.20 a.m. at Sabatia Eye Hospital guest house within Sabatia market of Vihiga District within Western Province, jointly while armed with dangerous weapons namely pangas, knives and simis robbed Leonard Wanjala Wanyonyi of a Nokia 6085 valued Kshs.9,990/=, TV make Sonny valued at Kshs.11,500/=, Recorder make ASTR/OKOS valued at Kshs.5,500/= all to the total value of Kshs.26,000/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Laonard Wanjala Wanyonyi. The particulars of count II are that on the same day, time and place, jointly with others not before court, while armed with dangerous weapons namely pangas, knives and simis robbed Juegeh Muller of Casio wrist watch valued Kshs.4,000/= and at or immediately before or immediately after used actual violence to the said Juegeh Muller occasioning him actual bodily harm.

Henry Amimo Kagenga, Ezekiel Lidava Adeka, Solomon Luvumbatsi Avoyo, and Peter Musalia Ngaira were in the alternative charged with failing to prevent a felony contrary to **Section 392** of the Penal Code. The particulars of the charge were that on the night of 8<sup>th</sup> July and the morning of 9<sup>th</sup> July 2008 at about 12.30 a.m. at Sabatia Eye Clinic hospital guest house, jointly being watchman employed by Ninja Security Company and assigned to guard the above said Sabatia Eye Clinic Hospital failed to prevent a felony namely robbery at the said guest house building.

After a full trial, the appellant was found guilty of count I convicted, and sentenced to suffer death as provided by law. The other co-accused persons were acquitted of this count. All the accused were acquitted of count II. The 3rd accused in the subordinate court Henry Amimo Kangenga was convicted of the alternative charge of failing to prevent a felony. He was sentenced to fine of Kshs.15,000/= and in default to serve three (3) months imprisonment.

Being dissatisfied with the decision of the trial court, the appellant has appealed to this court. He has raised several grounds of appeal. He also filed written submissions. We have perused the said written

submissions.

The learned Prosecuting Counsel, Mr. Oroni opposed the appeal and relied on the evidence in the lower court record.

The prosecution evidence in brief, is that PW1 who was the complainant in count I in which the appellant was convicted and sentenced, was asleep in the doctor's quarters at Sabatia Eye Hospital on the night of 8th/9th July 2008. At about 1.30 a.m., he heard screams from the guest house. He initially ignored them, but later decided to go and check. When he opened the door of his residence, he found somebody flashing torches. There was a black-out on that night. This person told him "go back into the house". He at once went back into the house and locked himself in the bedroom.

After some time, the assailants forced the doors to his house open. As they pulled the door to his bedroom, he struggled to prevent them from opening it. After sometime however, he was overpowered and the door was opened. In the process, PW1 identified the appellant through the light of the torches. The appellant demanded the Nokia mobile phone which PW1 reluctantly gave. The appellant was the only person that PW1 identified.

The intruders also took PW1's TV set and Recorder. As the intruders were still in the house, a whistle was blown outside several times. The intruders then left. When PW1 later came out of the house, he discovered that some German guests, who were parents of a doctor at the hospital and were sleeping in the nearby guest house were seriously injured and robbed. The robbery of the Germany couple was the subject of count II. However, the affected complainants did not come to court to testify.

Following this incident, the watchmen and supervisor of the private security firm on duty were arrested and charged in court. The appellant was also arrested by one Pamela Nyandusi and was later identified as one of the robbers twice in parades conducted by the police. He was then charged with the others.

When put on his defence, the appellant gave sworn testimony. He denied committing the offences. He was however convicted on count I and sentenced. Therefrom arose this appeal.

This being a first appeal, we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences, taking into account that we did not have the opportunity to see the witnesses testify and determine their demeanour. See the case of **Okeno -vs- Republic [1972] EA 32**.

The conviction of the appellant herein is grounded on evidence of visual identification. The identification was by a single identifying witness, PW1. In the case of **Abdalla bin Wendo & Ano. Vs R. [1953], EACE 166**, the East African Court of appeal stated as follows -

***"Subject to certain well known exceptions it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult."***

The identification of the appellant herein was from the evidence of single witness, that is PW1 Leonard Wanjala Wanyonyi. The circumstances of the identification were difficult. It was at night. There was a power black-out. In addition, PW1 must have been scared by the sudden attack by robbers. He did not describe whether the torches were flashed towards the face of the appellant and for how long. In our view, in the normal course of events, a person who is flashing a torch flashes it away from his own face. Since the torch under reference was that of the appellant, in our view it was most naturally flashed away from his face. Since PW1 did not give any evidence that the torch was flashed on the face of the appellant and for how long, we are of the view that it was not possible for him to identify the appellant through that torch light.

In addition to the above, three identification parades were conducted, in which the appellant was put in two parades for the same witness, PW1 to identify him. In our view, the procedure adopted by the

identification Parade Officer in conducting three parades was irregular. A person identified in one parade will easily be pointed out in a subsequent parade because he or she has been seen by the witness before. The error diminished the evidential value of the identification parade results. In our view, the identification of the appellant herein is not free from the possibility of an error. If there was positive identification in the first parade, there would be no need to hold another parade.

The appellant was also arrested by one Pamela Nyandusi. This witness was offered many chances to come to court and testify, but she did not. She was a crucial witness. She could have explained the circumstances and reasons on which the appellant was arrested. The failure of this witness to testify creates a doubt as to the reason why the appellant was arrested. It is possible that he was arrested for a reason other than the offence he was convicted with. We give the benefit of that doubt to the appellant.

In conclusion, we find merits in the appeal. 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 and delivered at Kakamega this 11<sup>th</sup> day of February, 2014*

**SAID J. CHITEMBWE**

**JUDGE**

**GEORGE DULU**

**JUDGE**