



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NUMBER 13 OF 2012**

**EDWARD KIOKO WAMBUA ..... APPELLANT**

**VERSUS**

**REPUBLIC OF KENYA ..... RESPONDENT**

(Being an appeal arising from the conviction and sentence in CMCC 1313 of 2011 by Hon. D.K. Mikoyan)

**JUDGMENT**

1. The Appellant, **Edward Kioko Wambua**, was charged with the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code**. Particulars of the charge are that on the 6th day of April, 2011 at Ahero Trading Centre, Bahati in Nakuru District of the Rift Valley Province jointly with others while armed with dangerous weapons namely swords robbed Phylis Wanjiru Waithaka of one DVD machine, radio cassette, mobile phone torch, jacket and cash all valued at Kshs. 36,050/= and immediately before or immediately after time of such robbery threatened to use personal violence to the said Phylis Wanjiru Waithaka.
2. Judgment was delivered on 19th January, 2012 by Hon. D.K. Mikoyan, Senior Resident Magistrate. He found the Appellant guilty and convicted and sentenced him to death.
3. The appellant being aggrieved by the conviction and sentence preferred this appeal. In his Petition of Appeal, the appellant lists five grounds of appeal *inter alia*:-
  - i) **That the Learned trial Magistrate erred in law in finding the prosecution had proved its case beyond all reasonable doubt;**
  - ii) **That the Learned trial Magistrate erred in law and fact in convicting the Appellant based on uncorroborated evidence of a single witness;**
  - iii) **That the Learned trial Magistrate erred in law in shifting the burden of proof to the Appellant;**
  - iv) **That the Learned trial Magistrate erred in law and fact in finding that the appellant was identified by the complainant during the occurrence of the offence;**
  - v) **That the sentence is unjustifiable, excessive and harsh**
4. The brief facts of the case before the lower court are that on 6th April, 2011 at about 7.30 in the evening an elderly couple, namely **Phylis Wanjiku Waithaka (PW1)** and **Charles Waithaka**

- were in their home when they were attacked by a gang of about five men armed with pangas. **PW1** who was in the kitchen cooking was accosted by one of the gang members and was led to the bedroom where they demanded money. **PW2** had also been moved from the sitting room to the bedroom. He gave the robbers Kshs. 1500/=. The robbers also stole a mobile phone and home electronics. One of the robbers, kept vigil for about 10 minutes as the others took off with the loot. He later left the elderly couple unharmed.
5. P.C. George Murita (**PW3**), P.C. Gitonga and P.C. Loropeta visited the elderly couple at about 10 p.m. **PW1** gave the description of one of the robbers as a “**young boney man with rasta hair style**”. P.C. Gitonga appeared to know someone who fitted that description. The Appellant was subsequently arrested and **PW1** identified him as the robber who had escorted her to the bedroom and kept vigil as the others fled.
  6. When put to his defence, the appellant opted to remain silent and to await the judgment of the court.
  7. The appeal was canvassed before us on 15th October, 2013. The Learned Counsel, **Ms. Nancy Njoroge**, submitted on behalf of the Appellant while **Mr. Gitongo** represented the State.
  8. **Ms. Njoroge**, submitted that the lower Court failed to caution itself on the danger in basing its conviction on the evidence of a single witness; that the robbery occurred at night and the lighting may not have been conducive for identification. Counsel further faulted how **PW1** identified the Appellant at the police station before recording her statement; that there was no identification parade conducted. For these reasons, she argued that there was a miscarriage of justice as the totality of the evidence did not meet the threshold for a court to convict on a charge of robbery with violence. She relied on the case of **Wafula & 3 Others V. Republic, 1986**.
  9. **Mr. Gitonga**, for the state conceded to the appeal. He admitted that the prosecution relied purely on identification of the appellant. However, the identification of the appellant was not satisfactory as it was done immediately before the complainant recorded her statement with the police.
  10. This being the first appellate Court, it is duty bound to re-assess and re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to the case of **Okeno V. Republic, 1972 EA 32**.

### **ISSUES FOR DETERMINATION**

11. In so doing, we have considered the submissions by both parties and find that the issues for determination are as follows;
  - i. Whether an identification parade ought to have been conducted?
  - ii. Whether the trial court cautioned itself before convicting on the evidence of a single witness?

### **ANALYSIS**

12. In all cases of robbery with violence identification of the robbers and the circumstances of identification are of crucial importance.
13. We note that the incident occurred at night at about 7.30pm and that the witness **PW1** stated that there was electricity in the room, that the Appellant escorted her from the kitchen to the bedroom and thereafter kept watch for ten (10) minutes. She further stated and that the robber's faces were not covered and this witness was able to give a description to the police (**PW3**) of a boney man and described the robbers' hairstyle, as 'rastas.'
14. In this particular instance the witness was not able to see the appellants face but only saw the hair and body frame and we find that the observations by **PW1** were made at night, under difficult conditions and she did not testify on the intensity of the electric light and we find that the evidence of identification on the basis of a common hairstyle cannot be said to be strong and positive evidence that could support a conviction as persons who sport these type of hairstyles are commonplace. We also note from the evidence on record that upon arrest the appellant was not found in possession of any of the stolen property.
15. Upon perusal of the proceedings we find no other corroborative evidence by any of the other prosecution witnesses on the issue of identification and we note that the evidence on identification was that of a single witness.

16. From the reading of the judgment it is apparent that the trial court was satisfied that the witness **PW1** was able to identify the appellant and this identification formed the basis of his conviction.
17. We make reference to the Court of Appeal decision **Charles Maitanyi vs R [1986] KLR 198** where Nyarangi, Platt and Gachuhi JJA held;

**‘...The court must warn itself of the danger of relying on the evidence of a single witness. It must do so when the evidence is being considered and before the decision is made...’**

18. We are guided by the above decision and find that it would therefore have been prudent upon the trial magistrate to have included a warning on the need for caution and an explanation as to why he believed **PW1**'s evidence before convicting the appellant.
19. The failure by the trial court to undertake such a caution as to the dangers of a conviction based on evidence on identification by a single witness is an error in law and such evidence cannot safely support a conviction and this leaves us with no option but to allow this ground of appeal.
20. Another point of contention on the issue of identification is that the appellant was not arrested at the scene of crime but was arrested at a later date and that he was not subjected to an identification parade.
21. We reiterate the fact that the identification of the appellant by **PW1** was not that of recognition therefore we concur with the appellants submissions that the police ought to have conducted an identification parade. We note also that the court record does not reflect any evidence giving an explanation by the investigating officer as to why an identification parade was not conducted.

### **FINDINGS**

22. We find that failure to conduct an identification parade means that appellant was not positively identified.
23. We find that the trial court ought to have cautioned itself before convicting and that upon such failure the evidence cannot sustain a conviction.

### **CONCLUSION**

24. The appeal is found to be meritorious in its entirety and is hereby allowed.
25. The conviction is hereby quashed and the sentence set aside.
26. The appellant to be set at liberty unless otherwise lawfully held.
27. It is so ordered.

**Dated, Signed and Delivered at Nakuru this 3rd day of February, 2014**

**A. MABEYA**

**JUDGE**

**A. MSHILA**

**JUDGE**