



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CRIMINAL APPEAL NO. 106 AND 107 OF 2010**

**LIVINGSTON ALUSIOLA KHERI .....)**  
**FREDRICK PALANGA MUTAMBO .....) APPELLANTS**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Appeal arising from the decision of Hon. D. M. Ochenja, Principal Magistrate  
in Kitale Chief Magistrate's Court in Criminal Case No. 1881 of 2008)*

**J U D G M E N T**

The Appellants were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars of the offence are that on the 24th day of December, 2007 at Muungano Kapkoi in Kwanza District within the Rift Valley Province, jointly with others not before Court robbed Jane Wanjiru Gichure of one cloth material, one long trouser, one bika, one skirt, one pair of rubber shoes, one handbag, one mobile phone make Nokia 1100, national identity card No. 4368003, Equity bank plates, a calculator all valued at Kshs. 14,730 and cash Kshs. 2,500 and at or immediately before or immediately after the time of such robbery wounded the said Jane Wanjiru Gichure.

The Appellants were convicted and sentenced to death. Being dissatisfied with the conviction and sentence, they preferred an appeal to this Court in which they raised several grounds which may be summarized as follows:-

1. *That the Trial Magistrate convicted them based on identification which was not free from error.*
2. *That the conditions obtaining during the alleged incident were not conducive for proper identification.*
3. *That there was no P3 form produced in evidence.*
4. *That there was no corroboration of the complainant's evidence.*
5. *That the Trial Magistrate did not give due consideration to the defence of the Appellant.*
6. *That the Trial Magistrate did not address himself to the possibility that the phone and trouser which were recovered may have been mistakenly identified by the complainant to be her properties.*
7. *That the Trial Magistrate erred in convicting the Appellants on contradictory evidence.*

The brief facts of this case is that Jane Wanjiru Gichure the complainant in the lower Court had boarded a matatu on 14/12/2007. At around 8.00pm, she alighted at Muungano junction along Kitale Endebess Road. She started walking towards her home. She had a bag which contained one maroon cloth, one pair of bed sheets, bika, one pair of rubber shoes, one skirt, one mobile Nokia 1100, a notebook, calculator, ID

card, Equity ATM and Kshs. 2,500 in cash. After going for about 10 metres from the junction, she met two people. She greeted them and proceeded on. She saw two others seated beside the road. The two whom she had greeted came from behind and went ahead of her and stopped. They demanded that she drop the bag which she had. Before she could do anything, she was hit on the head thrice with a metal bar. She identified the person who had hit her as a short and black man. She testified that she recognized the voice of the other person when he spoke to the others. During her testimony, she identified the black and short man as the 3rd accused who is the first Appellant. She said she was able to identify him through moonlight. She testified that she recognized the voice of the first accused who is the second Appellant as he used to buy kaimati from a kiosk near her home.

The appeal by the first Appellant was conceded by Mr. Onderi State Counsel but he opposed the appeal by the second Appellant arguing that the second Appellant was recognized by the complainant and that he was found in possession of a long trouser which had been stolen during the robbery.

As a first appellate Court we are expected to analyze and evaluate the entire evidence that was adduced before the lower Court and reach our own conclusion. Our role as a first appellate court was stated in the case of **Okeno Vs Republic [1972] EA 32** as follows:-

***“An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination [Pandya Vs Republic [1975] EA 366] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions [Shantilal M. Ruwala Vs Republic [1975] EA 570]. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had advantage of hearing and seeing the witnesses, ( see Peters Vs Sunday Post,[1958] EA 424).”***

We have evaluated the evidence of the complainant and the other witnesses. The complainant's evidence before the lower Court was that she identified the person who attacked her with an iron bar as short and black. She did not indicate in her evidence in chief whether she knew the short and black man whom she identified as the first Appellant. In her evidence she stated that she never gave out any names of the suspect. While the complainant was being cross-examined by the first Appellant, she stated that she never knew how he was arrested. She was only called to the Police Station to go and identify the first Appellant who had been arrested.

Pw 4 Mackenzie Ombundo a Police Reservist is the one who arrested the first Appellant. He testified that he arrested the first Appellant because he had been implicated by the complainant. The evidence of this witness contradicts that of the complainant who had testified that she did know how the first Appellant was arrested. She was only called to the Police Station to go and identify a suspect who had been arrested.

The identification of the first Appellant at the Police Station was not proper. There should have been an identification parade conducted where the complainant should have participated to pick out the “black and short” man who attacked her. It is apparent that the complainant did not know the first Appellant prior to the robbery. This is so because, had she known him she would have given out his name as the person who attacked her at the earliest opportunity. The circumstances under which she alleges to have identified the first Appellant were not conducive for proper identification. She was hit on the head three times. She lost consciousness. Though she says that there was bright moonlight which enabled her identify the first Appellant, her evidence is doubtful as Pw 2 Joseph K. Macharia who rushed to the scene of robbery upon hearing screams from the complainant testified that when he heard screams from the roadside, he took his panga and a torch and on arrival at the scene, he used a spotlight to observe the complainant who lay on the ground bleeding from the head. The evidence of Pw 2 shows that there was darkness otherwise if there was bright moonlight there was no need of flashing his torch. If there was any moonlight, then the same would not have been bright enough to have enabled her to identify a short black

man whom she claims to be the first Appellant.

In **Roria Vs Republic [1961] EA 583**, it was held that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, there is need for other evidence.

In the present case, the Trial Magistrate did not address himself to the evidence of Pw 2 who said in his evidence that he used a torch to see the complainant who was lying on the ground bleeding. Had he addressed himself to this evidence, he would not have reached a conclusion that the conditions obtaining at that time were conducive to proper identification. There was no any other evidence to support the evidence of the complainant as regards the first Appellant. We find that the evidence of identification on the part of the first Appellant cannot be sustained. The conditions for identification were not conducive and the subsequent identification of the first Appellant by the complainant at the Police Station was not done according to the requirements of identification. We have said hereinabove that there is no evidence on record to show that the complainant knew the first Appellant. There was therefore need for a proper identification parade to be conducted. It was not enough for the complainant to go to the Police Station to confirm that the person who was in custody was the one who robbed her. The State Counsel rightly conceded the first Appellant's appeal.

As regards the second Appellant, the complainant testified that she recognized him through his voice. The law regarding evidence of voice identification was set out in the case of **Mbelle Vs Republic [1984] KLR 626**. In dealing with evidence of identification by voice, the Court should ensure that:-

- a. *The voice was that of the accused.*
- b. *The witness was familiar with the voice and recognized it.*
- c. *The conditions obtaining at the time it was made were such that there was no mistake in testifying as to what was said and who said it.*

The complainant in this case testified that she recognized the voice of the second Appellant as she used to see him buying kaimati from a kiosk near her home. There was no evidence adduced to show that the complainant was familiar with the voice of the first Appellant. The only evidence recorded is that she used to see the second Appellant buying kaimati from a kiosk near her home. The complainant is not the one who was selling in that kiosk and it is not clear how she would have become familiar with the voice of the first Appellant. Her evidence is that she used to meet the second Appellant at the kiosk. There is no evidence as to how often the meeting was to have enabled her to recognize his voice. Without evidence as to how frequent the complainant used to meet the second Appellant, it will be difficult to appreciate that she had become accustomed to his voice as to recognize it at night. Besides this, there was no evidence adduced by the complainant as to what was said that she recognized as having been said by the second Appellant. It was only during cross-examination that she said that she recognized the first Appellant's voice when he uttered the following words in Swahili, "*piga yeye kichwa*". We find that the Trial Magistrate was wrong in accepting the evidence of voice identification in the circumstances.

The Trial Magistrate accepted the complainant's evidence regarding a trouser which was found on the second Appellant. This trouser was found with the second Appellant eight (8) months after the robbery. The person who arrested the second Appellant is Pw 4 Mackenzie Ombundo, a Police Reservist. According to his evidence, he had information that a stolen mobile phone was being sold at the home of Divas Mutambo. Divas Mutambo is father of the second Appellant who was charged alongside his son the second Appellant but was acquitted. When Pw 4 arrested Divas Mutambo, he took possession of a phone Nokia 1100. After he had arrested Divas Mutambo, he also arrested the second Appellant who was wearing a khaki brown trouser. This is the trouser which was subsequently identified by the complainant as being one of the items which was stolen from her during the robbery. The complainant in her evidence stated that she identified the trouser from the stains which were on it. There was no evidence adduced as to the nature of the stains on the trouser which would have survived for 8 months since the trouser was stolen. Though the complainant testified that she is a business lady as well as a farmer, there was no evidence adduced to show how long she had been with the trouser to have noticed the stains. Was the

trouser bought on the day it was stolen or was it a trouser she had taken to the market to sell but could not be sold? It is not enough for one to say that she has identified the trouser as one of the items which were stolen from her. There should have been evidence leading the court to believe that indeed the trouser had been positively identified. There is no evidence adduced from Pw 4 who arrested the second Appellant on how he concluded that the trouser which he found the second Appellant wearing was the one which was stolen from the complainant. Pw 4 was a Police Reservist. There is no evidence to show that the complainant had given him the description of the stolen trouser for him to have made an instant decision that the trouser he found the second Appellant wearing was the one that was stolen. The evidence of the complainant was that she was told that a trouser had been recovered and that when she went to the Police Station, she identified it as hers. We find that the trouser was not positively identified and that the circumstances under which it was found would not have been incompatible with the innocence of the first Appellant. Clothes are fast selling items and we do not think it was proper for the Trial Magistrate to have applied the doctrine of recent possession to a trouser found 8 months after the robbery and furthermore which was not properly identified.

Pw4 had gone to the second Appellant's father's home on being tipped that there was a stolen mobile being sold. He arrested the second Appellant's father who was subsequently charged alongside the second Appellant. The complainant identified the mobile phone as belonging to her and that it was one of those items stolen from her. According to the complainant's evidence, she identified the phone through a crack. She testified that its cover had been changed. The Trial Magistrate accepted the evidence of identification. This was not sufficient evidence of identification. The mobile's cover had been changed and we doubt that the complainant would have been able to detect a crack beneath a mobile cover and say that it was hers. There is evidence that she had been having the phone for three years. It was possible for the Prosecution to show that indeed the phone was hers through modern technology even if the sim card had been removed. We do not think that the Magistrate was right in simply accepting identification of a crack on the phone as sufficient proof that it was the Complainant's phone which was stolen during the robbery.

It took over 8 months for the second Appellant and his father to be arrested and over one year for the first Appellant to be arrested. There was no explanation as to why it took 8 months to arrest the second Appellant and his father, if indeed it is true that the complainant had recognized the voice of the second Appellant. There is no evidence on record to show that the second Appellant had disappeared from home. There are contradictions on the date when the recovery of the items was made including the date of the commission of the offence. The complainant testified that the robbery took place on 14/12/2007. The charge sheet indicates that it happened on 24/12/2007. Pw 4 who arrested both the second Appellant and his father testified that recovery of the phone and trouser was made on 24/12/2007. The alternative charge facing the father of the Appellant states that he was found in possession of a stolen phone on 13/08/2008. On cross examination by the second Appellant, Pw 4 stated that he arrested the first Appellant on 14/08/2008. The trial Magistrate did not address himself to the contradictions on the dates.

There was evidence from Pw 4 that some 5 girls were arrested with some items which the complainant lost. It is not indicated when they were arrested. Pw 4 testified that he took the girls to the Police Station. These girls were neither charged nor called to testify as to where they found the stolen properties.

The second Appellant complained that the Trial Magistrate never considered his defence. We indeed find that the Magistrate never considered the second Appellant's defence. He dismissed it in a few lines. Even though the second Appellant's defence was not given on oath, the Trial Magistrate ought to have considered it in view of the recorded evidence. The second Appellant had stated that he was arrested when he questioned why his father was being arrested. There is evidence from Pw 4 that he had gone to arrest the second Appellant's father when he also arrested the first Appellant. The Trial Magistrate should have considered the second Appellant's defence in light of the evidence recorded in the proceedings particularly given the fact that there was no explanation given why the arrest of the second Appellant took long when there is no evidence to show that he had gone underground.

For the reasons given hereinabove, we find that the conviction of the Appellants herein was not safe. We

quash the convictions and set aside the sentences. The Appellants should be set free forthwith unless otherwise lawfully held.

**Dated and delivered at Kitale on this 6<sup>th</sup> day of November, 2013.**

**E. OBAGA**

**JUDGE**

**L. NDOLO**

**JUDGE**

**In the presence of:**

**Appellants:** .....

**Respondent:** .....