



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL 247 OF 2010**  
**CHARLES NGATHIKE LOMALIKALE.....APPELLANT**  
**V E R S U S**  
**REPUBLIC.....RESPONDENT**

*(An appeal against both conviction and sentence by Hon. P. Ngare Principal Magistrate in Chuka Criminal Case No. 227 of 2010 delivered on 20<sup>th</sup> July, 2010).*

The Appellant was charged together with another with three counts of robbery with violence contrary to section 296(2) of the Penal Code. The trial began on 4<sup>th</sup> April, 1997 and the case was partly heard by the trial court until 19<sup>th</sup> January 1999 when the two persons escaped from prison. The Appellant was eventually arrested together with his co-accused. The trial commenced afresh before a new trial magistrate on the 20<sup>th</sup> May, 2009. After the case the trial magistrate found the appellant guilty of three counts and convicted him accordingly. He was sentenced to death in count 1 and in counts 2 and 3 no sentence was passed. Being aggrieved by the sentence and conviction the appellant filed this appeal. The Appellant relied on the supplementary grounds of appeal in which the following grounds were cited:

- 1. That the learned trial magistrate erred in law and fact in not observing the right guaranteed by constitution section 77 rights to secure protection of law.**
- 2. That the learned trial magistrate erred in law and fact in not considering the principles of natural justice. Disclosure of information.**
- 3. That the learned trial magistrate erred in law and fact in not observing that I stayed in police cell more than stipulated time date of arrest 24/2/1997 dated to court 19.3.1997.**
- 4. That the learned trial magistrate erred in law under section 211 of CPC as the whole judgment was not explained to me in Kiswahili, and sentence of the charge was not explained to the accused.**
- 5. That the appellant's constitutional right to be afforded facilities to conduct his defence were infringed as he was not given adequate chance to summon his intended witness taking into consideration that he was in custody and the seriousness of the offence. That the learned trial**

**magistrate erred in law under section 72 of the evidence act where evidence is required of a document which is required by law to be attested. It must be proved by attesting witness that it is in hand writing. That the signature of the person executing the document is in the handwriting of the person.**

**6. That the learned trial magistrate erred in law and fact in failing to observe chapter 46 (C)(L) Force Standing Order that witness or witnesses will not see the accused before the parade.**

**7. That the learned trial magistrate erred in law and fact in failing to note that the time parade was allegedly conducted on 21.2.1997 I was not arrested by then, I was arrested on 24.2.1997.**

**8. That the learned trial magistrate erred both in law and facts when he failed to note that the circumstances prevailed at the scene of crime could not warrant a positive identification.**

**9. That the learned trial magistrate erred in law and fact in failing to consider that there was an existing grudge in between the appellant and the witness who led to my arrest.**

**10. That the learned trial magistrate erred in law and fact in dismissing my sworn defence without enough reason.**

**11. That the learned trial magistrate erred in law and fact in failing to consider the reason why the accused was released under section 87(A) of CPC by the same case in Isiolo Criminal Case No. 435 of 2007.**

The prosecution called seven witnesses. The facts of the prosecution case were that PW2 was herding goats at Gotu on the 23<sup>rd</sup> April, 1996. He was with one Hussein Osman Abdulahi the complainant in count 1 and the deceased in this case. The deceased was herding herds of cattle but it is not clear how many they were but they over 100 cows. The two were attacked at about 3 pm one day by men whom PW2 described as clothed like the Samburu people two of whom were armed with rifles. They shot dead the deceased who had engaged in gun battle. PW2 said that he was able to see and identify the appellant as the one who was armed with a rifle. He also said that he saw the appellant was the one who fired the fatal shot. PW3 was at Borji Dera in his house when he heard the gun shots. He claims to have run out of his boma to investigate when he saw the appellant sited on a log armed with a firearm and a knife. He said he hid for ten to fifteen minutes until the Appellant and two others left. That is when he went to the scene and found the body of the deceased.

The other evidence is on the 26<sup>th</sup> January, 1997 a lady by the name of Abdillazire was found with a hide bearing the marking "H" PW2 who saw the hide with the lady at her store said that he recognized it as belonging to one of the cows stolen from the deceased and then went and informed PW1 the father of the deceased. PW1 went to the store of Abdillazire where he also identified the cow hide as belonging to one of the cows stolen from his deceased son.

PW4 told the court that at 2 pm that day she saw her sister PW5 in the company of the Appellant and another carrying a cow hide. She said that after she heard that her sister had been arrested over the cow hide she lead the police to the Appellant and identified him as the owner of the cow hide. PW6 confirmed the evidence of PW5. She told the court that on the 26<sup>th</sup> January 1997 she left home with the accused and the accused sister one Lokolonyi. She said that the appellant was carrying a cow hide which he gave to her to sell on his behalf at the market store. She said that the store owner called the police the moment she saw the cow hide. The Investigating Officer of this case was PW7. He said that he was handed over the case to investigate but was not specific as to the date he started investigations. PW7 testified that on the 21<sup>st</sup> February 1997 he requested Inspector Kinyanga to carry out Identification Parade for the two suspects who were the Appellant and co accused. This witness Sgt. Githae was allowed to produce the ID parade forms as Exhibits because Insp. Kinyanga had since passed away and could not be called as a witness.

The Appellant gave a sworn statement in his defence he put forward an alibi as his defence completely failing to say where he was on the date of the alleged offence. Instead Appellant dwelt on the events from 10<sup>th</sup> February, 1997. He said that he was growing vegetables using irrigation at a place called Lewa when he had a quarrel with Damaris over the use of water. He stated that on 14<sup>th</sup> February, 1997 Damaris took police officers who arrested him for assault. He said that on the 17<sup>th</sup> February he was asked to clean the crime office where he met Abdi Isaac PW2. On the 21<sup>st</sup> February he was taken for an ID parade where PW2 identified him. He said that his protest fell on deaf ears.

This is the first Appellate Court and being so we have subjected the evidence which was adduced before the lower court to a fresh evaluation and analysis and have come to our conclusion and bearing in mind the limitation having neither seen nor heard any of the witnesses and giving the due allowance. See **AJODE VS REPUBLIC (2004) 2 KLR 81**. We are guided by the Court of Appeal Case of **OKENO VS REPUBLIC 1973 EA 32** where the role of the first appellate court was given as follows:

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) 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 finding and conclusion; 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 the advantage of hearing and seeing the witnesses. See Peters Vrs Sunday Post [1958] E.A 424.”**

The Appellant has challenged the conviction on technicalities which we do not think are of substance because they do not arise. He challenged his lack of protection of the law under section 77 of the Constitution (old) whereby he claims that the trial court believed the allegation by the prosecution that he escaped from custody yet no documentary was proof was placed before the court. He also complains that disclosure of information was against the rules of natural justice because it was not disclosed to him. In our view that piece of information did not prejudice the Appellant in any way since the learned trial magistrate did not place any consideration on that aspect as the basis of his conviction.

The Appellant also raised issue with the fact that the police over kept him in the police cells from the date of his arrest on 24<sup>th</sup> February, 1997 to the date he was brought to court on the 19<sup>th</sup> March, 1997. If it is correct that the Appellant was held in police cells between 24<sup>th</sup> February, 1997 and 19<sup>th</sup> March, 1997 it means the police over kept him by nine days. The investigations in this case involve a violent robbery in which someone was shot dead it is our view that being held for an extra nine days was not unreasonably inordinate period given the seriousness of the offence.

The Appellant complained against the language used to explain the charge to him at the time of plea. We do not think anything turns on that point since he entered a plea of not guilty and subsequently the proceedings were conducted in a language he understood. The appellant did not suffer any prejudice on grounds of language.

In grounds 6 and 7 the Appellant raises other technical points which are contradictory. In ground 6 he claims that he was exposed to a witness a few days before the ID parade was carried out. In ground 7 he claims that on the date the ID parade is alleged to have been conducted 21<sup>st</sup> February, 1997 he had not been arrested. On the issue of ID parade we agree that there is a lacuna in the prosecution evidence because the parade is alleged to have been conducted three days before the Appellant was arrested and the parade officer could not produce the parade forms because he was since deceased. We shall revisit this point when dealing with the critical issue of identification. The key issue and which was the basis of the conviction is that of visual identification. The prosecution adduced evidence of two eye witnesses PW2 and PW3. These two witnesses are alleged to have seen the appellant in company of two others at the scene of attack. The two eye witnesses were not together and therefore viewed the scene from different positions. PW2 Abdi Isaack testified that he was herding goats while the deceased Hussein Osman was

herding cows at the same place when three men attacked them. PW2 said when the three men approached they immediately started shooting at the deceased who also shot back at them. PW2 said that he hid himself in bushes a distance of 70 metres from the scene but insists he was able to see and identify the appellant. PW3 on the other hand was inside his boma when he heard gun shots. He said that he ran out of his boma in time to see the Appellant seated on a rock holding a rifle and a knife. PW3 said that he hid for 10 to 15 minutes until the attackers left. Unlike PW2, PW3 did not give the distance at which he saw the Appellant.

Regarding visual identification the following decision from the Court of Appeal is good law.

**CLEOPHAS OTIENO WAMUNGA –V- REPUBLIC KSM C.A. NO. 20 OF 1989 (UR)** the Court of Appeal observed:

**“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. 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. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, C.J., in the well-known case of R. –v- TURNBULL [1976] 3 All E.R. 549 at page 552 where he said:**

**“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”**

The evidence against the Appellant by PW2 and 3 was that of visual identification. There was a need for careful scrutiny of such evidence in order to minimize possibility of mistake or error in identification. The learned trial magistrate while assessing the evidence of PW2 observed:-

**“PW2 Abdi Isaack Mohammed who witnessed the said incident said that he was able to identify the accused persons as one of the attackers and identified him by facial appearance he even identified him later in an identification parade which was conducted on 21<sup>st</sup> February, 1997... PW2 said that he saw the accused persons properly from where he was hiding. He also attended an ID parade where he identified the accused person...I am satisfied beyond reasonable doubt that the accused person was properly identified by PW2. PW2’s evidence is further supported by the fact that the cow skin belonging to one of the stolen animals was later discovers in circumstances which pointed to the accused person.”**

The learned trial magistrate disregarded the evidence of PW3, and correctly so our view because his evidence of identification was not backed by identification in an ID parade. The learned trial magistrate correctly ruled that his evidence was that of dock identification. We wish to add that why the evidence of PW3 was valueless is because of the lapse of time between the time he allegedly saw the appellant at the scene of the attack, and the period he identified him in court. There was a lapse of 13 years. Further PW3 did not know the appellant before the incident and from his evidence watched him from some unknown distance. His evidence was unsafe due to the lapse of time and in the circumstances was of no use to the prosecution case.

PW2 said he could identify the Appellant by his facial appearance. We have perused the entire record of the proceedings including the evidence of the investigating officer, PW7. Nowhere is it shown that PW2 ever gave any description of the person or persons he could identify from the incident. The facial appearance referred to by the learned trial magistrate is mere conjecture as there was no description given in the evidence of PW2. The evidence of PW2 is therefore silent as to the exact appearance, facial or otherwise which enabled him to identify the Appellant.

We noted that the incident was in broad daylight but occurred in a bushy place. This can be inferred from PW2’s evidence where he said he was able to hide out of the sight of the three assailants, 70 metres from

them in some bushes at the scene. It was important for PW2 to be specific as to the actual appearance that enabled him to identify the Appellant. A distance of 70 metres in a bushy place is an obstructed view and without cogent evidence as to what about the Appellant PW2 saw that could enable him to identify the Appellant; such identification cannot be regarded as safe.

PW2 attended the ID parade where he identified the Appellant. According to PW7 that parade was on 21<sup>st</sup> February 1997. That was nine months after the incident. Nine months is a long period of time and the evidence of identification must be scrutinized keenly. In this case PW2 had not given any description of the Appellant to the police before he was taken for the ID parade. It is trite law that conducting an ID parade without a description of the person(s) the witness alleges he is able to identify is not a proper way to conduct ID Parade. In **Ajode V. Republic[2004] 2KLR 81** it was held:

**“1. It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.**

**2. It is trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then conduct a fair identification parade.”**

The ID parade conducted nine months after the incident, without any description of the suspect PW2 was alleging he could identify was of no probative value to the prosecution case. The evidence of PW2 was weak in the circumstances and could only be considered if there was other material evidence implicating the Appellant with the offence charged.

There was other evidence against the Appellant. It was the evidence of the cow hide recovered in this case. The recovery was made on 27<sup>th</sup> January, 1997 nine months after the robbery. The most important thing was the identification of the cow hide as the property of the deceased. We noted that the basis of the identification was a mark “H” on the hide. That mark was not visible to the court when the case was being heard and the court made an observation of that in court.

The prosecution needed to prove that the mark “H” was exclusively used by the deceased. No attempt was made to establish that fact. Indeed it is an impossible task to undertake. The letter H is a common letter. There are a myriad of names beginning with that letter and as many people who can adopt the letter as an abbreviation of their name. There was no way of showing that only the deceased could have used that letter to mark his animals. We find that the evidence of the marking on the cow hide was insufficient to establish ownership of the hide and to create a nexus with the robbery.

We have carefully considered the evidence adduced before the lower court and find it was dangerous to found any conviction on it without other cogent evidence implicating the Appellant. We find the conviction was unsafe and should not stand. We accordingly allow the appeal, quash the conviction and set aside the sentence. We order that the Appellant should be set at liberty forth with unless he is otherwise lawfully held.

**DATED SIGNED AND DELIVERED THIS 12<sup>TH</sup> DAY OF JULY 2012**

**LESIIT, J.**  
**JUDGE.**

**J. A. MAKAU**  
**JUDGE.**