**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL APPEAL 57 OF 2008**

**(Lesiit and Makau JJ)**

**JAMES KARANI BOORE.....................................................................................................................APPELLANT**

**V E R S U S**

**REPUBLIC..........................................................................................................................................RESPONDENT**

***(Being an Appeal against both conviction and sentence of the learned trial magistrate***

***Hon. P. Ngare Gesora Chuka SRM. Case No. 1280 of 2007)***

**JUDGEMENT**

The Appellant was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on the 14th October, 2007 at Chogoria Township while with others the Appellant robbed Millicent Kananu of a mobile phone worth 5,000 and cash Ksh1,300/-. The Appellant was found guilty of the offence, was convicted and sentenced to death. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He has raised four grounds of appeal which are as follows:

**1.That the learned trial magistrate erred in law and fact when he based and sustained the conviction and sentence on purported visual identification without observing that it was not free from possibility of error or mistake.**

**2.That the learned trial magistrate erred in law and fact when he convicted and sentenced the Appellant to death in the instant case without observing that the charges as drawn against me were defective.**

**3.That the learned trial magistrate erred in both law and fact when he relied on the allegations that lack proof.**

**4.That the learned trial magistrate erred both in law and fact when he dismissed my plausible defense contrary to section 169(1) CPC.**

The Appellant has filled written submissions which we have carefully considered.

The state was represented by Mr. Mungai learned State Counsel. He opposed this appeal on behalf of the state.

This is the first appellate court. The duties for the first appellate court are now well set out. In the case of **Okeno Vrs. Republic 1972 EA 32** it was stated 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."**

As expected of a first appellate court we have carefully considered this appeal and have subjected the evidence adduced before the lower court to a fresh evaluation and analysis while bearing in mind we did not see or hear the witnesses and have drawn our own conclusions thereto.

The evidence adduced by the prosecution was by four witnesses who should have been treated as complainants. Among these complainants was PW1 in respect of which the charge of robbery with violence was preferred against the Appellant. PW2 and PW3 who were wife and husband complained that their bedroom window was broken but nothing was stolen from them. PW4 had his windows damaged and some Ksh.1000/- and a mobile phone taken from him. We do not understand the reason why no charges were preferred in respect of the theft committed against PW4 and the malicious damage committed against PW2 and P3.

From the evidence of the investigating officer PC Ngeera he received a report of theft from the four complainants who complained that the offence was committed against them the night before the report was made to them. From the evidence of PW5 it is clear PW1, 2, 3, and 4 live in neihbouring houses and that the thefts and damages complained of were committed the same. night. There was one identifying witness and that was PW2. The facts of the prosecution case were that some people went to the premises where the four complainants lived in separate houses. The account of PW1 was that she was asleep in her house where she heard screams at 3 am. She woke up and switched on the lights and saw 3 people running away from her neighbour's house wearing masks. She said the security lights were on. One of the people came to her window and demanded for her mobile phone and also for money he saw on her table. She gave away both but said she was not able to identify or recognize anyone. PW2 and PW3 were husband and wife. Their evidence was that someone hit their bedroom window and damaged it prompting both of them to wake up. PW2 went for their child and as she was walking towards the sitting room she slid and fell. She said that she could see outside and that through flushes of torch light she was able to see the Appellant who was outside their house. PW3 who was also with PW2 said that through the torch lights which were being flushed at their house he was only able to see a toy pistol. He said that he was not able to identify anyone.

PW4 was asleep in his house when somebody hit and damaged his window. He said someone flushed a torch light and demanded for money and mobile phones. He said that he gave Ksh.1000/- and one phone but was not able to see or identify the thief.

The Appellant has challenged the visual identification adduced by PW2 and urged the court to find that it was not free from error or mistake and was unreliable and ought to have been rejected by the learned trial magistrate. Mr. Mungai learned state counsel urged the court to find that the evidence of identification was that of recognition and that though it was by one identifying witness it was sufficient to sustain a conviction because there was enough light at the scene to enable PW2 identify the appellant.

The learned trial magistrate by considering the evidence of identification stated as follows:

**"PW.2 had sufficient time to observe and see the attackers they even talked and she heard his voice. It is also critical to observe that accused was known to PW2 before the attack. She even saw the clothing he wore in that night which was a black jacket. I hold that PW2 recognized the accused herein and I cannot fault her testimony on this."**

We have carefully considered the circumstances of identification and the conditions of light which enabled PW2 to identify the Appellant. The identification was made at night. Since PW2 claimed that she knew the Appellant before the evidence of identification was that of recognition.

In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

**"Subject to certain well known exceptions it is trite law that a fact may be proved by a 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 respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."**

The conditions of light were clearly stated by PW2. Her evidence was that she saw the Appellant through the window outside their home on the material night. She said that she was able to see him through torch light flushed by others who were in the Appellant's company. We noted that PW2 slid and fell down inside her house and that it was after that fall that she looked out through the window and claimed to see the Appellant. The distance from where she was to where the Appellant was standing at the time she alleges to have seen is not given. The intensity of the light from the torches was not also given. The distance from which the torches were flushed at the Appellant was not also disclosed. More importantly, no evidence was adduced of the length of time PW2 had to see and observe the Appellant. It is not clear whether PW2 had a fleeting glance at the Appellant or a long gaze at him.

The conditions under which PW2 saw the Appellant cannot be said to have been good and therefore did not favour a correct identification of the attackers. We have considered that the only evidence of identification was that of PW2 and therefore the only evidence linking the Appellant to the offence is the visual identification made at night. Given the conditions of light we have explained, we find that there was a need to test the correctness of identification by PW2 through other evidence whether direct or indirect. We have considered the entire evidence in this case and find no other evidence linking the Appellant to this offence. Such other evidence could have included recovery of the stolen items from or through the Appellant or some other evidence connecting him to the offense. We found none.

The Appellant vehemently denied committing the offence and indirectly put forward an alibi as his defence. He also said that the charges were a frame up and challenged the identification against him by PW2.

In the learned trial magistrate judgment, after considering the prosecution evidence, he had this to say about the defence case.

"**The defence of frame – up put up by the accused was not well explained and proved and it remains a mere denial. He never laid any basis for the same**."

We have considered the observation made by the learned trial magistrate. There is a clear shifting of burden of proof against the Appellant. It is well settled in law that the burden of proof in criminal cases lies on the prosecution and never shifts to the accused except in few cases set by statute. An accused person has no burden to prove his defence or to prove his innocence. It is sufficient if the accused person

denies the offence charged if in so doing he introduces into the mind of the court a doubt that is not unreasonable. In this case the appellant denied the offence. He challenged the evidence of visual identification adduced against him. We think that the burden placed on him by the learned trial magistrate to explain and prove his case was unreasonable in the circumstances and is not one recognized by the law.

Having carefully considered this appeal we have come to the conclusion that the conviction entered against the appellant was unsafe and should not be allowed to stand. Consequently we allow this appeal quash the conviction and set aside the sentence. The appellant should be set at liberty unless he is otherwise lawfully held.

**DATED SIGNED AND DELIVERED THIS 12TH DAY OF JULY 2012**

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

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