REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

[CORAM: KOOME AND AZANGALALA,JJ]

CRIMINAL APPEAL NO. 79 OF 2009

BETWEEN

NAWAR LONGECHEL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

[An appeal from the Judgment of the Senior Resident Magistrate's Court – { T.Nzyoki (SRM)}

dated 30/12/2009 at Lodwar in Lodwar SRMC CRC. No. 291 of 2009]

JUDGMENT

Nawal Longechel, the appellant herein was charged with two counts of **Robbery with Violence Contrary to section 296 (2) of the Penal Code (Cap 63, Laws of Kenya).** It was alleged in count one, that the appellant, jointly with another not before the court, and while armed with a dangerous or offensive weapon namely, AK 47 rifles, on 24th April, 2009, at 9.00 p.m., at Kalemongorok Location of Kiritu Division in Turkana South District within the Rift Valley Province, robbed **Musa Ejore** of his cash sum **of Kshs 1,200/=** and at the time of such robbery threatened to use violence to the said **Musa Ejore** (hereinafter **"the 1st Complainant").**

On the second count, it was alleged that on the date, at the material night and at the place aforementioned, the appellant, while in consort with another not before the court, while armed with a dangerous or offensive weapon namely, AK 47 rifles robbed **Beatrice Ekeno** of her mobile phone make Nokia 2360 and a cash sum of **Kshs 400/=** all valued at **Kshs 7,400/=** and a national identity card **No. 23466438** and at the time of such robbery threatened to use violence to the said **Beatrice Ekeno** (hereinafter **"the 2nd complainant"**).

The State called four witnesses and after hearing their evidence, the learned trial Magistrate (**I. Nzyoki, SRM**) found that the appellant had a case to answer and put him on his defence. He made an unsworn statement and called no witness. In the statement he denied committing the offence.

On the basis of the evidence adduced by the prosecution, the learned trial Magistrate found the appellant guilty as charged and sentenced him to death. He has appealed before us against both conviction and sentence.

In his grounds of appeal, the appellant raises three issues: Unsatisfactory identification; insufficient evidence and defective charge. During the hearing of the appeal, the appellant appeared in person and relied upon pre-written submissions. On the other hand, **Mr. Onderi** appeared for the Republic and orally submitted that the appellant was positively identified and therefore the conviction and sentence imposed upon him should not be disturbed.

As the first appellate court, it is our duty to analyze, re-examine and re-evaluate the evidence upon which the appellant was convicted and arrive at our own independent conclusion bearing in mind that we did not see and hear the witnesses testify and must give allowance for that (See **Okeno –vrs- Republic [1972] E.A 32).**

The State's case was that, the 2nd complainant was on the date and time mentioned in the charge, being taken home by the 1st complainant on his motor cycle when at Kapelo drift (between Katilu and Kalemungorok) they met two men. One of them aimed a firearm at the complainants as the second man hid by a tree and urged the armed man to shoot. The complainants stopped. The 1st complainant was robbed of Kshs 1,200/= and the 2nd complainant was robbed of Kshs 400/=, her mobile phone and her identity card. The thugs ran away when another motor cyclist approached. The complainants then continued with their journey and reported the robbery to their Chief and Katilu Police Post.

On 26th April 2009, **Josephat Lochii Alakwa (P.W.3)** arrested the appellant and escorted him to Katilu Police Patrol Base where the appellant was re-arrested by **CPL David Mwangangi (P.W.4).** The appellant was then charged as already stated.

In his unsworn statement the appellant stated that as he searched for food, he went to a place where local alcohol (busaa) was being consumed. He was offered some but before he could drink it, he was arrested by the Chief and later escorted to Lodwa where he was arraigned.

The learned trial magistrate considered all the evidence and expressed belief in the veracity of the accounts given by the complainants. In his own **words:-**

"The evidence of P.W.1 and P.W.2 tally. Both witnesses P.W.1 and P.W.2 gave a consistent account of what had happened. P.W.2 further said the accused person attempted to lead her into the bushes and they both struggled before the other motor cycle appeared. It is clear from the evidence of P.W.1 and P.W. 2 that during the alleged robbery, the accused person came close to both P.W.1 and P.W.2 and that there was amble time for both complainants to identify him. P.W.1 and P.W.2 picked out the accused person when they saw him at the Chief's Office at Lokapel after being arrested by P.W. 3. I find that the identification of the accused person by P.W.1 and P.w.2 is in the circumstances of this case good and sufficient."

It is evident from the accounts of the witnesses that the key witnesses were the complainants themselves. Their accounts of the events of the night were however somewhat different. Whereas the first complainant stated that it was the appellant's companion who first held the 2nd complainant as the appellant ordered and led him away, the 2nd complainant herself stated that it was the appellant who took her mobile phone and identity card and ordered her to get off the motor cycle. It is the same appellant, according to her, who held her by the leg and struggled with her in an attempt to rape her. She was also categorical that it was the appellant's companion who led the 1st complainant away from where she was. Their accounts of the events therefore did not agree as to which of the thugs did what and to whom. That does not surprise us because by that time, there was no light since the only source of light which they had relied upon could not be trained on both thugs after the two complainants got off the motor cycle. We also think that the circumstances surrounding the robbery were not conducive to a positive identification.

The robbery took place at night. The appellant was a total stranger to the 2nd complainant and was not very well known to the 1st complainant as he acknowledged that he had only seen him once before the robbery. He did not state for how long he had seen him and in what circumstances. In those circumstances, we think his identification was not free from the possibility of error.

It is also significant that it was not the description of the complainants which led to the arrest of the appellant. **Josephat Lochii Alakwa (P.W.3)** carried out his own investigation after receiving the report of the robbery from the 2nd complainant and arrested the appellant. The complainants then allegedly identified the appellant at the Chief's Office. We do not think that any identification parade was mounted under the Police Standing Orders and the alleged identification at the Chief's Office was really of no evidential value. We say so, because, in our view, the complainants would easily be tempted to point to the person in the Chief's custody as one of the thugs who had robbed them. It is significant that the Assistant Chief had arrested the appellant pursuant to a complainant made by the 2nd complainant. We believe that it is to avoid such a result that there are elaborate rules which govern identification parades.

In view of what we have said about the identification of the appellant by the complainants, our conclusion is that the purported identification by them in the dock was of no significance. Our conclusion is buttressed by the Court of Appeal decision in **Fredrick Ajode –vrs- Republic [Criminal Appeal No. 87 of 2004 (UR)].** There, the Court said the following on dock identification:-

"It is trite 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. It is also trite 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 arrange a fair identification parade."

As we have already observed, no identification parade was held in this case. In the premises, we do not have to consider the other complaints made by the appellant. We cannot uphold the conviction of the appellant on the basis of the evidence adduced. We allow the appeal, quash the conviction of the appellant for robbery with violence and set aside the death sentence imposed upon him. He is accordingly set free unless he is otherwise lawfully held.

DATED AND DELIVERED AT KITALE THIS 4TH DAY OF MARCH 2011.

M. KOOME

JUDGE

F. AZANGALALA

JUDGE

Read in the presence of:-

M. KOOME

JUDGE