REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU Criminal Appeal 220 of 2008

(From original conviction and sentence in Criminal Case No. 1038 of 2007 of the Principal Magistrate's court at Molo – S.M.S. SOITA, PM)

ALFRED ARAP KIRUI……..…….APPELLANT

VERSUS

REPUBLIC……...…RESPONDENT

JUDGMENT

ALFRED ARAP KIRUI, the Appellant, was charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge against him were that on the 2nd July 2007, at Keringet Area of Molo District within Rift Valley Province, jointly with another person not before court, he robbed Edwin Owala of his bicycle valued at Kshs.4,500/= and that at or immediately before or immediately after that robbery he used actual violence on the said Edwin Owala. He pleaded not guilty but after trial before SPM at Molo, he was convicted and sentenced to death. This is appeal is against both that conviction and sentence.

In his petition of appeal the Appellant raised four grounds of appeal namely that the learned trial magistrate erred in basing his conviction on improper evidence of identification by a single witness; that there was no sufficient evidence to support his conviction; that the learned trial magistrate shifted the burden of proof to him and that the learned trial magistrate failed to accord him an opportunity of calling his witnesses.

In his submissions, the Appellant contented that although the alleged robbery took place in broad daylight, the learned trial magistrate erred in relying on the evidence of the complainant who had not given his description to the police. He also faulted the trial magistrate for not warning herself of the danger of relying on the testimony of a single visual identification witness. Upon being put on his defence, he had told the court he wanted to call two witnesses but the trial court set the judgment date immediately after his unsworn statement without allowing him to call them. He said that was clear manifestation of the trial magistrate's bias against him.

Mr Mugambi, the learned state counsel, dismissed this appeal as unmeritorious. He said immediately after the complainant was robbed of his bicycle, he raised an alarm and members of the public chased and caught the Appellant with the stolen bicycle. His conviction was therefore based on the doctrine of recent possession.

Having carefully read the record of appeal and considered these submissions, we find ourselves uncomfortable with the conviction of the Appellant in this case for three reasons. One, at the time of arrest, the Appellant is alleged to have been with another person who ran away. It is not clear from the record who was pushing the bicycle. May be the person who ran away was the one who had it. So it can not be said with certainty that the Appellant was in possession of the bicycle. Secondly, the complainant did not give the description of his attackers to PW2 before the Appellant's arrest about two houses later. In **David Masinde & Another Vs Republic, Criminal Appeals Nos. 33 &34 of 2004 (consolidated)** the Court of Appeal stated:-

> **"In every case in which there is a question as to the identity of the accused, the fact of there being a description given and the terms of that description are matters of highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the**

accused, and then by the person or persons to whom the description was given."

He also did not say if the other person who ran away was the Appellant's confederate. That omission leaves us in doubt as to whether the complainant was sure of the identity of his attackers. This court and the Court of Appeal have repeatedly stressed that it is unsafe to uphold a conviction based on improper Identification. The law in this regard is well set out in the cases of **Abdallah Bin Wendoh –vs- R[1953] 20 EACA 166** and **RORIA –vs- R[1967] E.A. 583.** The holding in the case of **R-vs- Eria Sebwato [1960] EA 174** stated this point succinctly in the following words:-

"Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction".

As is clear from what we have already stated the evidence on the identification of the Appellant in this case cannot be said to have been watertight. His identification is therefore in doubt and we give him the benefit of that doubt. Consequently we allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 2nd day of March, 2010

D.K. MARAGA

JUDGE.

J. A. EMUKULE

JUDGE