



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIM APP 69 OF 1996
(CORAM: CHESONI, C.J. OMOLO & SHAH, JJ.A.)

BETWEEN

PASCAL NKALA TUBULAAPPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a Judgment of the High Court of Kenya at Kakamega (Justice Tanui) dated 8th
December, 1993 in**

H.C.CR.A. NO. 82 OF 1992)

JUDGMENT OF THE COURT

The appellant Pascal Nkala Tubula was convicted of robbery contrary to section 296(1) of the Penal Code and sentenced to four years imprisonment with three strokes of the cane. His appeal to the superior court was dismissed. He has appealed to this court against both conviction and sentence. There were only two grounds of appeal that deserved consideration. These are that:

(a)there was no identification parade held for the complainant to positively identify him; and (b)the alleged search of his house was conducted in his absence.

The robbery at the house of James Nakoje Mulama, with which Tubula was charged and convicted took place in the very early morning hours of 22nd January, 1991 (about 1 a.m.). There were at least five people who attacked mulama and his wife Catherine Mutsetsi Nakoje. Mulama was cut on the hand and head during the robbery and ran under the bed where he hid himself. This witness told the court:

"when lying under the bed I recognized one when they were busy collecting things. Recognized him by appearance. The powerful torch lights enabled me to see his feet and boots first and then I saw his face. He is in court. He had a torch and a panga. It was the accused who cut me on the head and hand."

when cross-examined by the appellant he said: "I had not known you before attack. I saw your face and recognized you." The conditions in which the robbery took place were not favourable to positive identification because: (a)it was at night;

(b)Mulama and his wife were under attack by an armed gang; and

(c)Mulama had been injured on the hand and head and was under fear hiding under the bed.

Nakoje (Mulama's wife) also hid under the bed before she was pulled from there and taken to the banana plantation where she was sexually assaulted. Her claim that she could identify the appellant by appearance and hence pointing to him in the dock could not be reliable.

The appellant was not arrested till about two months later on an unspecified date. He denied being at the scene of the robbery. Senior Sergeant of Police Ezekiel Wangila alleged that on 19th March, 1991 at 2.25 a.m. the appellant saw him at a distance and ran away. He (appellant) was not apprehended so it cannot be positively said that the appellant was the man Wangila saw running away. Indeed the appellant denied seeing a policeman at his home on 19th March, 1991. The appellant further said that he had been taken to the police station on 24th April, 1991 for another case. The police had the appellant in their custody but they never held any identification parade for Mulama and his wife to pick the robber they alleged they could identify and for Senior Sergeant Wangila to pick the man he saw running away on 19th March, 1991. The trial magistrate relied on the dock identification of the appellant by Mulama and his wife Catherine Nakoje.

This court considers identification of an accused person in the dock for the first time at the trial to be a most unsatisfactory method of proof. We would therefore discourage this mode of identification of defendants. In the case of PATRICK NABISWA V. REPUBLIC Criminal Appeal Mombasa No. 80 of 1997 (unreported) we said and we say it again that: "Where the police arrest a suspect on the basis of other evidence, and there are witnesses who might be called to identify the suspect it is prudent to arrange for and hold an identification parade." In this case an identification parade was not just ideal but necessary for reliable identification of the appellant, but that was not done.

The police conducted a search in the house which they believed the appellant ran out from. There was no other person in that house besides the police. The court was not told whether the police had search warrant as required by the law (section 118 of the Criminal Procedure Code). The way the search was carried out rendered that search of no evidential value regardless of whatever was alleged to have been recovered during the search.

The reasons we have given show that the conviction of the appellant was on shaky grounds. We are unable to uphold that conviction. Consequently, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set free unless he is for some other lawful cause held.

Dated and delivered at Kisumu this 26th day of March, 1998.

Z. R. CHESONI

.....

CHIEF JUSTICE

R. S. C. OMOLO

.....

JUSTICE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.