



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GICHERU, KWACH & SHAH, JJ.A.)**

**CRIMINAL APPEAL NO. 79 OF 1992**

**BETWEEN**

**RICHARD OTIENO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a Conviction and Sentence of the High Court of Kenya at Nairobi (Mbaluto, Oguk JJ.)  
dated 19/6/92*

*in*

*H.C.CR.A. NO. 1277 of 1988)*

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**JUDGMENT OF THE COURT**

The appellant jointly with others not before the Principal Magistrate's Court at Kisumu was charged in that court with four Counts of robbery with violence contrary to "section 296(2) of the Penal Code. In the first count, the complainant was Peter Owino Okoth (P.W.1); in the second count, the complainant was Flesia Auma w/o Silvano Ouma (P.W.2); in the third count, the Complainant was John Juma Okong'o (P.W.3); and in the fourth Count the complainant was Joan Hongo Osieko (P.W.5).

On the evening of 28<sup>th</sup> June, 1987 between 8.00 p.m. and 9.00 p.m., P.W.2 was in her house at Dago Sub-Location near RIAT in East Kisumu Location of Kisumu District within the Nyanza Province preparing her four children to go to bed. Inside her house was a tin lamp that was burning and in whose light she was preparing her children to go to bed. Suddenly, the door to her house broke open and about ten people entered therein. P.W.2 had not seen those people before. In the light from her tin lamp, she was able to see that some of those people carried pieces of wood shaped like guns while others had torches, which they flashed inside her house. As soon as these people entered into P.W.2's house, one of them went straight to her and started tying her hands with a rope. According to her, she was able to identify This person as she claimed to have "marked him properly", to use Her words, as he tied her hands with a rope. These people then put off the light from the burning tin lamp and ransacked her house. As they did so, P.W.2 was struck with a piece of wood. She had earlier been slapped by one of these people when she was being tied with a rope. Two pairs of long trousers and one Kaunda suit belonging to her husband and K.Shs.300/© in cash were taken from this house by these people. Thereafter, P.W.2 was led to the nearby house of her mother-in-law (P.W.5) and in the process she again saw the person who had tied her hands

with a rope in the moonlight and the flashlight from the torches these people had. Already, there was another group of people inside P.W.5's house where P.W.2 was pushed by the people who led her there and was tied to P.W.5 whose hands were already tied with a rope. Inside P.W.5's house, four shirts, four pairs of trousers, a "panga", an axe, a "jembe" and K.Shs.260/© in cash were taken by the people who had broken there into. Although inside that house there was a burning tin lamp, P.W.5 was not able to identify any of her invaders who had struck her with an axe handle on the head and on the left lower arm and breast immediately they broke into her house. Nevertheless, after being tied together with P.W.2, the two were led to a nearby road by their assailants and in the process P.W.5 screamed whereupon the person P.W.2 claimed to have identified struck her (P.W.5) on the head with a piece of wood. Their assailants then disconnected the telephone line to RIAT and led them to the house P.W.1.

En route to the house of P.W.1 the gang of robbers met with P.W.3 who was coming from a local shop where he had gone to buy some provisions and was going to his home. They stopped him and although they were not wearing police uniform, they introduced themselves as policemen. According to P.W.3, there was moonlight and the robbers were flashing their torches all around. To him therefore, there was adequate light around him to enable him to see that although these people said they were policemen, they were not in police uniform. He was also able to see that they were armed with "rungus" and iron bars: and when they got hold of him and one of them searched his pockets and took from him K.Shs. 850/- in cash and an Oris wrist watch valued at K.Shs. 650/-, he was able to properly see the person who did this to him. Soon thereafter, that person struck him with a "rungu" when without success he tried to resist being tied with a rope. Meanwhile, P.W.2 and P.W.5 who were still tied together with a rope were seated close by as these robbers manhandled P.W.3. P.W.5 was bleeding from the head consequent to the blow she had received from one of the robbers as is outlined above.

The enroped P.W.2, P.W.3 and P.W.5 were led by the robbers to the homestead of P.W.1 who operated a kiosk near RIAT and took each day's unsold stock to his house every evening. They were kept at that homestead's gate which was about 20 paces away from the house of P.W.1 while the robbers walked in. Shortly thereafter, the door to P.W.1's house was smashed open and six of the robbers entered into its sitting room where P.W.1's wife, Phoebe Akumu Owino (P.W.6), was with her children. Inside that room was a burning tin lamp. Four of the robbers who entered into the room had torches while another one had a rope and a "rungu". The person with the rope and the "rungu" asked P.W.6 where her husband was and she told him that he was resting in bed. According to P.W.6, she was able to identify the face of this person, presumably in the light of the burning tin lamp. However, immediately she said that her husband was in the bedroom, the robbers proceeded there after knocking off the tin lamp. In the bedroom, they tied P.W.1 with a rope and then brought him to the sitting room where they beat him until he became unconscious. They then turned to P.W.6 whom they also beat but she managed to jump out of the house through the bedroom window with her 12 days old child. Outside the house, she found other members of the gang of robbers. Her hands were tied and then ordered to sit with the other people who had been held by the robbers.

Inside P.W.1's house, the robbers, took a total of K.Shs. 1,800/© in cash, two jackets and a Kaunda suit. They also took two loaves of bread, a carton of 500 grams packages of Kimbo cooking oil, two cartons of 1 kilogram tins of Blue Band and two cartons of dry-cell batteries. Thereafter, P.W.2, P.W.3, P.W.5 and P.W.6 were led by the robbers towards Kiboswa in the then Kakamega District of the Western Province but after a distance of about two miles they were abandoned. It was then about 10.00 p.m. They then walked back to their respective homes where the ropes tying them were untied by their relatives.

According to P.W.3, the person he claimed to have identified as is set out above was referred to by his companions as "Commander" and according to P.W.6, as the robbers abandoned them as is mentioned above, that person referred to himself as the "Chief Commander" and warned them that if they shouted he would return and kill them all.

P.W.1 and P.W.5 both of whom had been seriously injured by the robbers were taken to New Nyanza General Hospital, Kisumu where they were admitted. P.W.5 was discharged after three days as an in-patient in that hospital but P.W.1 who regained consciousness after four days in the said hospital and had

to undergo splenectomy of his ruptured spleen remained hospitalized for a total of 19 days. On the morning of the following day - 29th June, 1987 – P.W.2, P.W.3 and P.W.6 reported this incident to their Locational Chief, Joseph Omolo Ngadi (P.W.8), who visited the scenes of the robberies. P.W.2 and P.W.3 told him that they had each identified one of the robbers by his appearance and that they each would be able to point him out if they saw him again. P.W.8 reported these robberies at Kisumu Police Station on the same day.

On 14th July, 1987 a person was brought to P.W.8 by some of the residents of his Location who complained that that person and others were posing as policemen and were terrorizing "wananchi". P.W.8 informed Kisumu Police Station and thereafter took this person to the said Police Station. On the following day - 15<sup>th</sup> July, 1987 - I.P Ayub Mingalia (P.W.7) of Kisumu Police Station received information that one of the people held at that Police Station was a suspect in the robberies referred to above. He therefore arranged for an identification parade on 17th July, 1987 which was conducted by I.P. Mary Omwenga (P.W.9). At that parade which appears to have been regularly arranged and properly carried out, P.W.2, P.W.3, P.W.5 and P.W.6 were the identifying witnesses. Without hesitation P.W.2, P.W.3 and P.W.6 identified the person they had claimed to have identified as one of the robbers on the evening of 28th June, 1987 and who, according to P.W.3 and P.W.6, was referred to by his co-robbers as "Commander" and referred to himself as the "Chief Commander". That person was the appellant in the present appeal. P.W.5 did not identify him at the identification parade as would have been expected since during the robberies in question she was not able to identify any of the robbers. Subsequently, the appellant was arraigned as is set out at the beginning of this judgment.

The appellant's entire defence at his trial before the Principal Magistrate's Court at Kisumu was that on 29th June, 1987 he was in his house and on 15th July, 1987 he was arrested for theft and taken to Kisumu Police Station where the clothes he was wearing were taken by the police. According to him, he knew nothing about the robberies for which he was charged.

In his judgment, the learned trial magistrate observed that the identification of the appellant came from the victims who suffered during the material night and that that identification was made possible by the presence of moonlight on that night and the flash of torches which the robbers had. He also warned himself against accepting the evidence of identification of the appellant by his victims at night which was the only evidence against him. However, after thus warning himself, he concluded that there was no reason why the identifying victims of the robberies in respect of which the appellant was charged would give false evidence against him. At any rate, he accepted that the evidence of the moonlight and the flashing of torches by the robbers together with the duration of the four robberies when the identifying victims had the opportunity of seeing the appellant doing various acts made it possible for these victims to identify the appellant as one of the robbers. Accordingly, the learned trial magistrate found the appellant guilty on each of the four counts of robbery with violence contrary to "section 296(2) of the Penal Code. He convicted him on each of these counts and sentenced him to suffer death in the manner authorized by law.

Against that conviction and sentence, the appellant appealed to the High Court of Kenya at Nairobi his principal complaint being that of his incorrect identification in view of the difficult conditions under which such identification was alleged to have been made. To this, the first appellate judges (Mbaluto & Oguk JJ.) pointed out that in considering the appeal before them they were aware of the dangers of basing the appellant's conviction solely on the evidence of visual identification. However, according to them, the appellant had been identified by two of the four complainants (P.W.2 and P.W.3) who saw him at different places on the material night under the light of a burning tin lamp and flashing torches respectively. P.W.6 had also identified him with the aid of the light from her burning tin lamp and flashing torches. To these witnesses, although the appellant was a stranger, he had come close to them as he beat them or tied them and in the circumstances they were able to see his face clearly. Their respective identification of the appellant was not, according to the first appellate judges fictitious. To the first appellate judges, that identification was free from error and therefore correct. In the result, they dismissed the appellant's appeal in its entirety. That dismissal is the subject-matter of the appellant's second appeal to this Court.

In this second appeal, the appellant's real ground of complaint like in the superior court is that of his incorrect identification which he has expressed in these terms:

The learned trial magistrate and the judges of the High Court erred in law in their finding that the appellant was positively identified when taking into account the times, places, sequence and all the circumstances."

At the hearing of this appeal on 5th April, 1995, Mr. Mogikoyo for the appellant submitted that the robbery on each of the four complainants took place at night when the only source of light during those robberies was either a burning tin lamp, flashing torches and/or the moon. There was no evidence as to the intensity of such light and in view of the conflict as to the exact time when each of the robberies took place, the identification of the appellant could not be said to have been free from the possibility of error. Indeed, according to counsel, the subsequent identification of the appellant at an identification parade conducted 19 days after the robberies on the complainants was of no help to the situation as there was a possibility of the appellant having been shown to the identifying witnesses in the intervening period particularly after his arrest on 14th July, 1987 in the same Administrative Location where the said robberies were committed. To him therefore, had the two lower courts addressed themselves to these factors together with the details surrounding the identification of the appellant, they would probably have arrived at a different conclusion. Mr. Metho for the respondent was doubtful that the circumstances leading to the appellant's correct identification were favourable. He was therefore unable to support the appellant's conviction.

As has often been stressed by this Court, whenever the case against an accused person turns on visual identification evidence, the quality of that evidence is what matters in the end. If the quality is poor, then the accused should be acquitted, unless there is other evidence which goes to support the correctness of the identification. Such supporting evidence does not have to be, as was pointed out by Scarman, L.J. in "Peter Paul Keane v. Regina, (1977) 65 Cr. App. R. (C.A.) 247, what the lawyers call "corroboration" so long as its effect is to support the identification. The principle that emerges from the authorities in such a case is the special need for caution. And in that regard, the practice has to be the exercise of care which not only contains a warning of such need but also exposes the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case.

In the present appeal, the trial magistrate was alive to the inherent dangers of convicting the appellant solely on the visual identification evidence of his victims in the circumstances pointed out above. It was for this reason that he expressed himself to have "severely" warned himself against accepting such evidence. However, after such warning, he concluded that the quality of that evidence was good and gave reasons for such conclusion as are contained in the evidence of the identifying witnesses as is outlined above. He accepted that evidence and acted on it. The first appellate judges, being conscious of the dangers of upholding the appellant's conviction on the exclusive evidence of visual identification and for about the same reasons given by the trial magistrate, held that the appellant's identification was free from error and was therefore correct. They accordingly upheld the trial magistrate's conclusion and the appellant's conviction and sentence.

It is to be noted that besides the reasons given by the two lower courts for their respective holding that the appellant's identification was free from error and therefore correct notwithstanding the circumstances under which it was made as are narrated above, when P.W.2 and P.W.3 reported the robberies in question to their local Chief on the morning of 29th June, 1987, each of them told him that they had identified one of the robbers by appearance and that they each would be able to know and point him out if they saw him again. Nineteen days later at a regularly arranged and conducted identification parade at Kisumu Police Station on 17th July, 1987, these two witnesses without hesitation identified the appellant as one of the robbers who had tied their hands with a rope and/or beaten them on the material night. Although counsel for the appellant submitted in this appeal that the appellant may have been shown to the identifying witnesses before the identification parade was conducted, there is not the slightest reference in this regard in the record of the proceedings in the trial magistrate's court. Indeed, had the appellant been thus shown to the identifying witnesses, it was unlikely that P.W.5 who was one of the four such witnesses at that parade would have been unable to identify the appellant. The foregoing two factors were therefore

pointers to the consistency of P.W.2 and P.W.3 and under "section 165 of the Evidence Act, Chapter 80 of the Laws of Kenya, they showed that what these two witnesses swore before the trial court relating to the identification of the appellant was not an afterthought nor were they purporting to identify a person whom they did not recognize at the time of the robberies. This, together with the other circumstances which led to the concurrent holding by the two lower courts that the appellant's identification was correct leaves us with no room to hold otherwise. Consequently, the appellant's appeal to this Court must fail and the same is dismissed.

Dated and delivered at Nairobi this 10th day of May, 1995.

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**R.O. KWACH**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**