



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)**

**CRIMINAL APPEAL NO. 63 OF 2014**

**BETWEEN**

**NICHOLAS NDUBI CHOSIMBA alias OCS..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from the judgment and conviction of the High Court of Kenya at Kakamega  
(Dulu & Chitembwe, JJ.) dated 9<sup>th</sup> October, 2013***

*in*

**H.C.CR. C. NO.195 of 2012**

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**JUDGMENT OF THE COURT**

1. The appellant was charged and convicted of robbery with violence and being in possession of public stores; namely, one police coat. The robbery was said to have been committed on 3<sup>rd</sup> August 2011 at Kegoye village, Wamuluma location in Vihiga County. The appellant, jointly with others not before court, while armed with dangerous offensive weapons, were alleged to have robbed Lina Muloma of her four mobile phones, a DVD, two speakers, a briefcase and cash Kshs.10,000/=.
2. The appellant was sentenced to death on the count of robbery with violence. His first appeal to the High Court was unsuccessful hence a second appeal to this Court.
3. The brief facts that gave rise to this appeal were that on 2<sup>nd</sup> August, 2011 at about 12.30 a.m. **Lina Muloma, PW1**, was sleeping in her house while her husband, PW2, was watching television with their son in the sitting room. Two people armed with pangas and flashing torches, entered her bedroom. They took Kshs.10,000/= from her handbag and three mobile phones. They struck her with the panga and she started bleeding. According to PW1, one of the robbers was tall and the other one was short. She said that she had seen their faces. After the robbers left, she went to the sitting room and found her husband lying unconscious in a pool of blood.
4. PW2 had taken his son outside the house when they were attacked and robbed of cash and a

mobile phone by two people who alleged to be police officers. He was not able to identify any of the robbers.

5. On the same night at about 2.00 a.m., **Johnson Lumumba, PW3**, a neighbor of PW1 and PW2, was also attacked by robbers. The robbers were over ten. Security lights in his house were on. He said that he recognized some of the appellant's co-accused but not the appellant.

6. Following several complaints of robbery, the police carried out a raid and arrested several people, among them the appellant, who was found in possession of a police jacket. Following the arrest, PW1 and PW3 were called by the police to see if they could identify any of the robbers. They identified the appellant.

7. In his defence, the appellant testified that on 20<sup>th</sup> August, 2011 he was woken up by police officers who arrested him. He said that he was not found in possession of any stolen item or a police jacket.

8. The first appellate court held that PW1 was able to identify the appellant because the torch light was sufficient and the robbers who entered her bedroom were only two.

9. In his memorandum of appeal, the appellant through his learned counsel, **Mr. Mochere**, faulted both the trial court and the High Court for holding that PW1 had positively identified the appellant, for failing to consider the gravity of the appellant's defence and for failing to properly evaluate and analyse the evidence on record.

10. Mr. Mochere submitted that there were no favourable circumstances for a positive identification of the appellant by PW1. PW1 was asleep when she was woken up by two robbers. There were no lights in the room. The only source of light was from torches that were held by the robbers. The light was pointed towards PW1 and there was no evidence that the torch light was ever directed at the appellant.

11. Regarding the identification parade, Mr. Mochere submitted that it was done on 22<sup>nd</sup> August, 2011 whereas the robbery had taken place on 2<sup>nd</sup> August, 2011. The complainant did not describe the appellant in her statement to the police. The identification parade was worthless, counsel added.

12. As regards the police jacket that the appellant was allegedly found in possession of, the appellant's counsel submitted that no inventory of recovered items was ever prepared and submitted to court. There was also no independent evidence of such recovery. The appellant had denied that he was in possession of such a jacket.

13. **Mr. Keter**, learned Prosecution Counsel, submitted that although there was only one identifying witness, her evidence was sufficient to convict the appellant.

14. We have anxiously considered the submissions made by counsel. The appellant's conviction was largely premised on the evidence of his identification by a single witness, PW1. In **KARANJA & ANOTHER v REPUBLIC [2004] 2 KLR 140**, this Court held that evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

15. The robbery took place at night. PW1 was asleep when she was woken up by two robbers who were demanding money. There was no light in the room. The robbers had torches that were on but evidence shows that the torch light was directed towards the complainant and even if she was able to see her assailants, she did not state how long the robbery lasted. It appears that the robbery took very few minutes. It is doubtful whether in those circumstances the complainant was able to positively identify her assailants.

16. When the complainant made a report to the police, she did not describe the appearance of the robbers. Her purported identification of the appellant 20 days after the robbery cannot be said to have been free of error. In **AJODE v REPUBLIC [2004] 2 KLR-81**, this Court held that before an identification parade is held, a witness should be asked to give the description of the person sought to be identified.

17. The trial court ought to have warned itself of the special need for caution before convicting the appellant in reliance on the correctness of identification of a single witness, see **WAMUNGA v REPUBLIC [1989] KLR 424**.

18. For these reasons, we think the appellant's conviction was unsafe. Consequently, we allow the appeal, quash the conviction and set aside the death sentence. The appellant is set at liberty unless otherwise lawfully held. Orders accordingly.

**Dated and Delivered at Kisumu on this 27<sup>th</sup> day of May, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**