



**REPUBLIC OF KENYA**

**Kimani v Republic**

High Court, at Mombasa

March 18, 1991

Wambilyangah J

Criminal Appeal Case No 266 of 1990

(From original conviction and sentence in Criminal Case No 269 of 1990

of the Resident Magistrate's Court at Voi, JM Manyasi (Miss) RM)

**Evidence** – *identification evidence – accused momentarily encountering his attacker who later blindfolds him – whether circumstances conducive for proper identification - whether known foot marks can be used to support allegation of the presence of an accused at scene of crime.*

The appellant was tried and convicted in the subordinate court for the offence of robbery.

It was alleged that on the material day the appellant in the company of others forcefully held and blindfolded the complainant who was a herdsboy and drove away 71 head of cattle and 290 goats.

The efforts to recover the stolen animals by the police were fruitless but the appellant was arrested some 2 1/2 months later.

The herdsboy was the sole identifying witness but it was alleged in support of the prosecution's case that the appellant who lived in the area had his foot marks around where the herdsboy claimed to have been attacked.

**Held:**

1. Proper identification of the accused is always an important issue in a case of robbery emphatically so in a case like the present one where no stolen property is found in possession of the accused.
2. The robber was a stranger to the identifying witness and it is clear that their encounter was momentary before the attack.
3. The identifying witness does not describe any peculiar or unique feature on the appellant which could have enabled him to remember him as the man who attacked him.
4. There is no probative value in the allegation that the appellant's known sandals had left their prints on the soil where PW1 was attacked.

*Appeal allowed.*

## Cases

1. *R v Turnbull* [1976] 3 All ER 549; [1976] Crim LR 565; sub nom [1976] 3 WLR 445; 120 SJ 486
2. *Anjononi v Republic* [1980] KLR 59

## Statutes

Penal Code (cap 63) section 296(1)

March 18, 1991, **Wambilyangah J** delivered the following Judgment.

The appellant was charged before the Resident Magistrate Voi for the offence of robbery Contrary to s 296 (1) of the Penal Code in that on the 12th December 1989 at 1.30 pm at Salaita Village he jointly with others not before the Court robbed Mutua Nzioka of 71 head of cattle, and 290 goats valued at Shs 258,500/- and at the time of such robbery threatened to use actual violence to the said Mutua Nzioka.

It was the prosecution case that at the material time being 1 pm of 12th December, 1989 PW 1 who was the herdsboy for all the animals charged as robbed from him, took the herd and flock of sheep to water. It is his evidence that as this was going on the "accused" approached him and initially asked him whether he "had seen some men at that place". PW 1's reply is that he had not. Then he the accused asked him for a cigarette and as the PW 1 went to his shirt pocket for a cigarette, the accused got hold of his right hand and forced him to sit down. He then blindfolded the PW 1 using PW 1's own shirt before he called another person who brought the strings with which the PW 1's hands were tied together. They detained him until 5.30 pm before they abandoned him with his hands tied, his mouth gagged and he was blindfold. Slowly, he succeeded in disentangling himself after which he went to report to the owners of the animals what had befallen them. It was already at night. The efforts by the Taita Taveta police and the owners of the animals to track the animals ended in vain. The animals were never recovered. The next time that the PW 1 gets another opportunity to see the accused was 28/2/89 which is after an interval of about 2 1/2 months. This was on an identification parade at Taita Taveta Police Station. He was the sole identifying witness. What is the quality of the identification evidence" It is this evidence which has to be considered in the light of the guildeliness regarding evidence of identification which were set out in the case of *Turnbull v R* [1976] 23 WLR 445 see also in *Anjozi v Republic* [1980] KLR 69 where it was said that:-

"The proper identification of the accused is always an important issue in a case of robbery emphatically so in a case like the present one where no stolen property is found in possession of the accused."

In the instant case the robber was a stranger to the identifying witness and it is clear that their encounter was momentary before the attack was launched by the assailant upon the identifying witness. Then there was long spell or interval before the assailant was viewed again. The identifying witness does not describe any peculiar or unique feature on the appellant which could have enabled him to remember him as the man who attacked him.

There is no probative value in the allegation by PW 2 that the appellants known sandals had left their prints on the soil where the PW1 was attacked. It is in evidence that the appellant was a resident of the area – and who knows, he could have walked on that ground either earlier on or after the incident – and therefore PW 2's evidence in respect of those sandals (foot) marks is wholly on the realm of conjecture.

In the ultimate this Court is left in enormous doubt as to the quality of the prosecution evidence against the appellant. The possibility of mistaken identification has not adequately been excluded by the recorded evidence. There was not even an effort by the prosecution to explain why in the first place the appellant had to be arrested.

In the circumstances I am constrained to allow this appeal. I accordingly quash conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise held on a lawful warrant.



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