



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Criminal Appeal 34 of 2004

(From original conviction and sentence in the Criminal Case No.3470 of 2003 of the Principal Magistrate's Court at Kericho – J. K. NG'ENO, PM)

SIMON KETER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the 4th November 2003, at Seretut trading centre within Kericho District of the Rift Valley Province, the appellant jointly with others not before court, while armed with dangerous or offensive weapons namely guns, robbed George Chepkwony of his motor vehicle registration number KAG 793D, cash Kshs.10,000/- and a mobile phone all valued at Kshs.620,000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said George Chepkwon. The appellant also faced another count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, the particulars thereof being that on 4th November 2003, at Seretut Trading centre in Kericho District jointly with others not before court and while armed with dangerous or offensive weapons namely guns, robbed Benjamin Kimalel Kiplangat of cash Kshs.5,070/- and 110 packets of horseman cigarettes, all valued at Kshs.8,370/- and at or immediately after the time of such robbery used personal violence to the said Benjamin Kimalel Kiplangat.

The appellant denied the said charges and after a full trial, was convicted and sentenced to death. Being aggrieved by the said conviction and sentence, he appealed to this court against both the conviction and the sentence. He listed the several grounds of appeal which may be summarised as hereunder:-

1. That the learned trial magistrate erred both in law and facts by basing his conviction on the evidence of identification by recognition when there had been no advance report of such recognition made to the police.
2. That the learned trial magistrate failed to analyse the prosecution evidence properly.

During the hearing of his appeal, the appellant with permission granted by this court, relied on written submissions which he handed over to the court. The evidence that was tendered before the court briefly stated was as follows:-

On 4th November 2003, at about 10.00 p.m., **George Kiptoo Chepkwony, PW1**, was at Seretut trading centre where he had gone in his motor vehicle registration KAG 793D. He was sitting at the verandah of a shop owned by **Benjamin Kiplangat Cheruiyot, PW2** as they chatted. The verandah was well lit by an electric fluorescent tube. They were suddenly confronted by six men who were in groups of two. Two of the men had a short rifle, other two wore masks which covered their faces and the other two were neither armed nor wore masks. PW1 and PW2 were approached by two of the men who had no masks and were slapped. The others who had guns cocked them and stood next to PW1 and PW2. The masked men searched PW1 and took his mobile phone and a sum of Kshs.10,000/- from his pockets. As one of the masked men crouched to search PW2, a table knocked off his mask and PW1 was able to see the face of the man. He recognized him as a person whom he had seen twice at Kapsuser trading centre. PW1 said that the man had gone to ask him where he had purchased his motor vehicle and had also told him that he could sell to him spare parts for the same. That was one month before the robbery. PW1 identified that man as the appellant herein. PW1 said that the appellant also took his motor vehicle keys and took off and shortly thereafter PW1 saw his motor vehicle being driven away. PW1 also testified that one of the robbers pursued PW2 into his shop and robbed him of some money and cigarettes.

The following day PW1 reported the robbery at Kericho police station and then returned to Kapsuser trading centre to look for the appellant. PW1 learnt that the appellant was called "**Chebunyo**". He traced him within a period of three days and he caused the administration police to arrest him and was taken to Kericho police station.

PW2 corroborated the evidence of PW1 as regards the attack by the robbers. He also said that he was able to see the face of the appellant when his mask fell off. He testified that the scene was well lit by electric lights. He identified the appellant at the dock. PW2 further testified that the appellant took a sum of Kshs.5,070/- which he had kept in a drawer and some 11 bundles of cigarettes. When the appellant was busy picking the bundles of cigarettes, PW2 dashed out of the shop through the back door and shortly thereafter, saw the motor vehicle of PW1 being driven off. He later participated in an identification parade and said that he was able to identify the appellant although he had never seen him prior to the night of the robbery.

Geoffrey Cheruiyot, PW3, testified that on 4th November 2003, at around 10.00 p.m., he was mopping up a hotel at Seretut shopping centre. He heard a motor vehicle reversing outside the hotel and when he approached the motor vehicle, he was intercepted by a man who slapped him. PW3 said that the place was well lit by electric lights and was therefore able to see the man who slapped him. He identified him as the appellant. PW3 further testified that the appellant had a woolen hat in his hands. PW3 later participated in an identification parade and was able to pick out the appellant.

Administration police Constable Sammy Chepkwony (PW4) testified that on 10th November 2003, at around 8.00 p.m., PW1 reported to him that he had seen a suspect whom he alleged to have stolen his motor vehicle. PW1 pointed out to PW4 the suspect whom he arrested and took to Kericho CID offices. The person who was arrested by PW4 was the appellant.

Inspector Richard Korir, PW5, testified as to how the identification parade in respect of the appellant was carried out. He said that the appellant was identified by PW2 and PW3.

Chief Inspector Joseph Owiti, PW6, was the investigating officer. He testified that he received a report regarding the robbery on 4th November 2003 and on the following day the complainants went to Kericho Divisional CID offices and recorded their statements. The complainants said that the robbers were armed and that they could identify them if they saw them again. PW6 further testified that on 10th

November 2003, a suspect was taken to his offices and he organised for an identification parade. PW2 and PW3 identified the appellant and thereafter he charged him with the said offences.

When the appellant was placed on his defence, having been explained his rights under **Section 211** of the **Criminal Procedure Code**, he chose to keep quiet and leave the matter to be decided by the trial court.

The learned trial magistrate held that the appellant was properly identified by PW1 and PW2. He noted that there was sufficient electric light at the scene to enable the two witnesses to see the appellant properly. The learned trial magistrate rejected the evidence of PW3 as he found him to be incredible. He therefore proceeded to convict and sentence the appellant to death.

We have carefully studied the record of appeal. It is not in dispute that the complainants were robbed on the material night. The question that required determination was whether the appellant was among the people who robbed the complainants and if so, whether he was properly identified. The robbery took place at night but there were powerful electric lights which lit the area. The complainants said that they were fluorescent electric tubes. Such tubes usually have very brilliant light. Both PW1 and PW2 said that the appellant had worn a mask but the same fell down and they were able to see his face clearly. PW1 testified that he had seen the appellant about a month prior to the date of the robbery when the appellant was enquiring about his motor vehicle and trying to sell to PW1 spare parts. In his investigations, he got to know that the appellant was known as "**Chebunyo**". It is not clear whether this was his real name or a nick name. The appellant is known as Simon Keter and it was not suggested to him that he was also known as "**Chebunyo**". The trial court could not therefore tell who "**Chebunyo**" was. When PW1 made his report to the police, he did not give to them the above information. He merely stated that he could identify the person who had robbed him if he saw him again. If PW1 had given that detailed report to the police, the investigating officer, PW6 would have said so to the court. The evidence of PW1 regarding his identification by recognition of the appellant was very important but it was vitiated by the fact that he did not describe the appellant to the police when he made his report. Although PW2 and PW3 said that they were able to identify the appellant during the identification parade, their evidence was not as valuable as that of PW1. This is so because they had seen the appellant for the first time on the night of the robbery for a very brief period of time when they were obviously in a state of shock following the robbery incident. They did not state for how long they had observed the appellant after his mask fell off.

In a case where a witness testifies that he saw and recognized his attacker, the first report of the witness to the police regarding the attacker is very important as it enables a court to determine the accuracy of the purported identification by the witness. It is also trite law that dock identification is generally worthless and a court should not place much reliance in it unless it has been preceded by a properly conducted identification parade. Before the identification parade is conducted, an identifying witness should be asked to give the description of the accused so that the description can be matched with the witness' identification of the accused, see **FREDRICK AJODE VS REPUBLIC Criminal Appeal No. 87 of 2004 at Kisumu (unreported)**. In the case of **PETER KIMARU MAINA VS REPUBLIC Criminal Appeal No. 111 of 2003 at Nyeri (unreported)**, it was held that before a court could base a conviction on the evidence of identification at night, such evidence should be water tight. Visual identification of an accused person is always supposed to be treated with the greatest care to avoid the possibility of a wrongful conviction.

We are not satisfied that the conviction of the appellant was safe. We therefore allow this appeal, quash the conviction and set aside the sentence that was pronounced by the trial court. The appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment delivered in open court in the presence of the appellant and Miss Oyata for the state.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE



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