Case Number:	Criminal Appeal 51 of 1988
Date Delivered:	04 Nov 1989
Case Class:	Criminal
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Johnson Evan Gicheru, Richard Otieno Kwach, Joseph Raymond Otieno Masime
Citation:	John Stelen Ole Mwenda v Republic [1989] eKLR
Advocates:	-
Case Summary:	**John Stelen Ole Mwenda *v* Republic** **Court of Appeal at Nakuru** **November 4, 1989** **Masime, Gicheru & Kwach JJ A** **Criminal Appeal No 51 of 1988** *(Appeal from a judgment of the High Court at Nakuru (Tunoi J) in High Court Criminal Appeal No 232 of 1986 dated 17th July, 1987)* ***Evidence** – identification evidence – how court should treat such evidence before basing a conviction on it – dock identification – identification ofaccused in court – no previous identification parade conducted – whether accused's identification sufficient to support conviction.* The appellant and three others were convicted of robbery contrary to section 296 (2) of the Penal Code (cap 65). They were alleged to have robbed the driver of a bus and his passenger on the night of October 24, 1984 at Elementaita Junction on the Nairobi – Nakuru road.

The appellant, whose appeal to the High Court was dismissed, appealed to the Court of Appeal raising the issue of his identification as one of the robbers. He had previously raised this issue both at the trial court and the High Court claiming that the prosecution witnesses were made to see him in the cells prior to testifying against him. Further the police did not conduct any identification parade prior to court appearance.

Held:

1. Whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, special need for caution before convicting in reliance on the correctness of the identification is necessary.

2. Recognition might be more reliable than identification of a stranger but even then the courts should remind itself that mistakes in recognition of close relatives and friends have been made sometimes.

3. The practice of inviting a witness to identify a defendant for the first time when the defendant is in the dock is undesireable. Here the appellant complained that prosecution witnesses were made to see him before they continued their testimony in the course of trial.

4. The witnesses who were allegedly made to see the appellant had not previously identified him at an identification parade and no sufficient evidence was given to show why no parade was held.

5. The identification evidence was tainted and the appellant's conviction was unsafe.

Appeal allowed.

Cases

1. Republic v Cartwright (1914) 10 Cr Appeal R 219

2. R v Turnbull & others [1976] 3 All ER 549; [1976] 3 WLR 445; [1977] QB 224; (1976) 63 Cr App R 132

	Statutes Penal Code (cap 63) section 296(2)
Court Division:	Criminal
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	Criminal Appeal No 232 of 1986
Case Outcome:	Appeal allowed.
History County:	Nakuru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAKURU

(Coram: Masime, Gicheru & Kwach JJ A)

CRIMINAL APPEAL NO 51 OF 1988

Between

JOHN STELLEN OLE MWENDA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a judgment of the High Court at Nakuru (Tunoi J) in High Court Criminal Appeal No 232 of 1986

dated 17th July, 1987)

****

November 4, 1989, the following Judgment of the court was delivered.

John Stellen Ole Mwenda (hereinafter referred to as the appellant) and three other persons were charged jointly with the offence of robbery c/s 296(2) of the Penal Code. They were alleged to have robbed the driver of a bus and his passengers on the night of October 24, 1984, at the Elementaita junction on the Nakuru-Nairobi road. They had denied the charges but were after a trial in which the prosecution called fourteen witnesses convicted and sentenced to terms of imprisonment. This appellant's appeal to the High Court against the conviction and sentence was dismissed hence his appeal to this court.

The appellant, who was not represented before us, has put forward eight grounds of appeal but the main issue raised therein is that of his identification as one of the robbers. The appellant had raised this issue throughout the trial and his appeal to the superior court. The trial court said of it:

"The accused 1 had repeatedly, during crossexamination of prosecution witnesses who claim to have identified him told that they were made to see him in the cells before they testified again. Here in his statement he said that it was sgt Saisi who in fact took witnesses to the cells before giving evidence against him, although he denies to have seen him there".

The trial court analysed the evidence relating to the identification of the appellant as follows:

"With regard to the accused 1 all the eye witnesses, (PW1, PW2, PW3, PW6, PW7, PW8 and PW9) said that they saw him in the bus and that he was one of the men who robbed them. The witness said, that there was light in the bus when they saw him. PW 1 said that he saw him first when he (A1) jumped into the driver's cabin to order him to stop the vehicle and secondly when he took him to the rear portion, of

the vehicle where he ordered him to remove his clothes. He said that he saw the face of the first accused well. The question is whether he is telling the truth. Considering that this witness saw the accused 1 at least twice – and for sufficiently long time I hold that he is not mistaken as to his identity. I am fully conscious that he had never seen the accused before that night and that the police don't seem to have conducted an identification parade in connection with this accused or any other. But I am satisfied that he was adequately seen and identified in proper and full light which illuminated the bus on that night. PW 2 had a better advantage of seeing and identifying the accused 1 and accused 2 because he sort of quarreled with them for having flouted his directive that people who would alight behind Gilgil should board the bus. He said that earlier on he had assisted the accused 1 to climb onto the bus because he had appeared to be unwell. He had after reprimanding the accused 1 and accused 2 taken their fares before he rang the bell for the driver to stop the bus. I have no hesitation in coming to the conclusion that this witness had the best opportunity of seeing and identifying the accused 1 and accused 2 and I am (satisfied") in his identification.

For the accused one to suggest that PW2 only identified him after he had seen him in the dock, was not being serious. PW 3 said that she saw accused 1 when he was removing her overcoat from her. She said that at that time she looked directly at his face as she feared that he might beat her. I find this evidence cogent and truthful. I accept it. PW 6 said that he had looked at the accused 1 before he lay down. His description of the attire which accused 1 had on his head, tallies with what other witnesses said. He said that his head was not covered. I believe PW 6, PW7 impressed me to be a truthful witness when he said that he saw the accused 1 when the accused 1 was in the driver's cabin where he was threatening the driver. The light was on … PW8 vividly described how he saw the accused 1 and accused 2 … As for accused 1 he (PW8) said he looked at him severally when accused 1 was standing near him. He (PW8) was sitting in the driver's cabin. PW9 was also near the driver's seat and from that position he was able to see the accused 1 clearly. I believed him. It is remarkable that this witness's description of the head attire of the accused 1 is the same as that of other witnesses. It is important that PW 9 was truthful and frank enough to say that he had not seen accused 2 on the bus. If he had been a liar as accused 1 wanted the court to believe he would surely have implicated accused 2 in the matter. It is important to note that all other witnesses never concerned themselves with accused 3 and accused 4. As far as they were concerned there were only 2 robbers on the bus and they have consistently and candidly identified accused 1 and accused 2. I am satisfied that they were accurate in this identification.

In the first appeal the superior court noted that the appellant's main ground of appeal was his contention that the learned trial magistrate had failed to consider the fact that the complainants PW1 and PW2 never identified the appellant either at the identification parade or anywhere else and that a police officer pointed him out to the witnesses PW 1 and PW 2 just before the start of the hearing. The superior court therefore considered the learned trial magistrate's analysis and evaluation of and findings on the evidence adduced before him and stated guidelines which are to be observed by the court when identification is in issue as follows:

"Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused special need for caution before convicting in reliance of correctness of the identification is necessary. The court should warn itself of the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could be mistaken. The court should further examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and

his actual appearance" Recognition might be more reliable than identification of a stranger, but even then the court should remind itself that mistakes in recognition of close relatives and friends have been made sometimes."

The learned judge – of the superior court was here setting out the guidelines laid down by the English Court of Appeal in *R v Turnbull* (1976) 63 Cr App R 132. Applying the principles to the trial court's handling of the evidence before him the learned judge held that the trial court had properly convicted the appellant and so he dismissed the appellant's appeal. We have carefully considered the appellant's complaint in the light of the evidence and are, with respect, of the view that the two lower courts misapprehended the appellant's objections and consequently came to a wrong conclusion. The most serious complaint of the appellant was that the prosecution witnesses who claimed to have identified him were made to see him in the cells before they purported to identify him. To this was added the fact there was no identifying witnesses. In *Republic v Cartwright* (1914) 10 Cr Appeal R 219, it was held that the practice of inviting a witness to identify a defendant for the first time when the defendant is in the dock is undesirable and should be avoided if possible. Here the appellant complained that the prosecution witnesses were made to see him in the cells before they continued their testimony in the course of the trial. Such witnesses had not previously identified the appellant at an identification parade and no evidence was led that the holding of such a parade was impracticable or unnecessary or that there were any exceptional circumstances. So despite the fact that a large number of witnesses testified, in all the circumstances, the quality of the identification evidence was in our respective view poor – see *Archbold* 42nd ed. Ch 14p 998 ff. The learned trial magistrate in this case appears to have been concerned mainly with whether the prosecution witnesses appeared to him to be telling the truth and whether he believed them rather than the possibility that there was mistaken or induced identification. It is the latter suggestion that the appellant had consistently and persistently put forward. Upon full consideration of the matter we are of the view that the identification evidence was tainted and that the conviction of the appellant was consequently unsafe. For the above reasons we allow the appellant's appeal, quash the conviction and set aside the sentence.

Accordingly we order that unless he is otherwise lawfully held he shall be released from custody forthwith.

Dated and Delivered at Nakuru this 4th Dayof November 4, 1989

J.R.O MASIME

.....

JUDGE OF APPEAL

J.E GICHERU

.....

JUDGE OF APPEAL

R.O KWACH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR