



**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: AKIWUMI & SHAH J.J.A & BOSIRE AG. J.A.)**  
**CRIMINAL APPEAL No. 22 of 1991**

**BETWEEN**

**JAMES OTIENO NYAGILO..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at  
Nairobi ( Porter, Mbaluto JJ) dated 10th January  
1990**

**in**

**H.C.C.C. No.444 of 1994**

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**JUDGMENT OF THE COURT**

The appellant, James Otieno Nyagilo, was charged before the Senior Resident Magistrate's Court at Kisumu, jointly with another person who was acquitted, with robbery with violence contrary to S.296(2) of the Penal Code. He pleaded not guilty and was later tried, convicted and, on 26th March, 1990, sentenced to the mandatory death sentence. His first appeal to the High Court against both the conviction and the sentence was dismissed. In this second appeal to this court his main complaint is against the finding of both the trial and first appellate courts that he was properly identified as one of four persons who violently robbed Jayendra Premchand Guthaka (P.W.3) of motor vehicle registration No. KYM 970, Nissan Sunny Salon, on 30th August, 1989.

The appellant's conviction was substantially based on the evidence of a single identifying witness, Anil Kumar Devshi Shah (P.W.1).

There is abundant authority to the effect that where the only evidence against an accused person is evidence of identification or recognition, a trial court is enjoined to treat it with caution, examine it carefully after duly warning itself as to the dangers inherent in acting on such evidences, and, to act on it to found a conviction only upon being satisfied that the circumstances favouring a correct identification were good and free from the possibility of error.

The facts upon which the appellant's conviction was based are brief. On 30th August, 1989, P.W.3 stopped his car, registration No. KYM 970, Nissan Sunny Saloon, at the gate into P.W.1's residence situated at Milimani estate, Owuor Otiende Road, Kisumu. He had P.W.1 as passenger in the car and intended to drop him there before proceeding to his own residence, in the same estate, for lunch. The time

was about 1.15 p.m. As they waited for the gate to be opened they were surprised by four men, unknown to them, who descended on them, one armed with a gun and another with a knife, both of which are dangerous weapons, and shouted a command that both P.W.1 and P.W.3 disembark or else they would be killed. Neither P.W.1 nor P.W.3 saw whence the men emerged from. In fear, the two men got out of the car as they had been commanded to do, whereupon two of the four men entered the car, one of them sitting on the driver's seat. He started the car, reversed it on to the road, and as he set to drive off, the remaining two men who were outside the car started running ahead of it. Evidence was adduced that one of the two men managed to jump into the car and joined the two inside it. The car sped off. Only one man remained. His attempt to board the car aborted. He therefore attempted to escape on foot.

In the meantime, members of the public, who happened to be along that road, realized that the four men wanted to rob P.W.1 and P.W.3 of their motor vehicle. They decided to go to their aid. They picked stones and hurled them at the robbers ( we presume, with a view to scaring them off). However, the robbers were determined to escape with the car and in fact succeeded in doing so. The members of the public then decided to pursue the robber who failed to get into the car and who was escaping on foot. P.W.1 testified that he joined them in the chase, and that he never lost sight of that person until he was arrested about 50 or so metres from his gate. He did not, however, reach the exact place of arrest. He testified that he did not do so because he decided to return to his house to telephone the police to go for that man.

When Inspector of Police Beddha Kaaria (P.W.4) arrived at the scene in answer to P.W.1'S telephone report of the robbery, he found neither P.W.3 nor P.W.1 at the scene. It was his evidence that he found members of the public beating up a person whom he identified in court as the appellant. None of the persons who were at the scene when P.W.4 arrived was called as a witness. P.W.4 testified that he rearrested the appellant and took him to Kisumu Police Station.

Evidence was adduced that the appellant later led police to Kawere 1 sub-location in South Kanyamkago Location, in South Nyanza District, where he pointed out his co-accused as having been one of the four men who robbed P.W.3 of his car. The trial magistrate, Mrs S.C. Ondeyo, did not refer to this fact in her judgment. The High Court thought the trial magistrate did not place any weight on it, and we cannot but agree. We also think she, properly, ignored the appellant's confession statement, as we think it was improperly admitted in evidence there having been evidence that it may have been extorted from the appellant. The Assistant Deputy Public Prosecutor, Mr Bw'onwonga, urged before us, the view that because we don't know how much weight, if at all, the trial magistrate attached to the statement, we should consider it and rely upon it to corroborate the appellant's identification. We are unable to agree in view of the stated circumstances under which it was received. The appellant denied giving the statement and in fact added that at the time the statement was allegedly taken from him, he was sick. We have evidence on record that at the time of his arrest he was badly beaten up by members of the public. It is probable he was injured. He also alleged beating by the police. The circumstances obtaining at the time the statement was allegedly recorded lend support in that regard.

In her judgment the trial magistrate, after warning herself in the manner we stated earlier a court should do, nonetheless proceeded in a rather perfunctory manner, to consider the issue of the appellant's identification. She stated, inter alia, that the robbery occurred in broad daylight, that P.W.1 was able to identify the appellant, that in doing so he was not obstructed by anything, including crowds of people, as, in her view, Owuor Otiende road is not usually crowded with people, that P.W.1 was one of the people who chased the appellant and in the course of it never lost sight of him, and that in any case the appellant in his defence made statements which lent credence to the testimony of prosecution witness. On the basis of all that, she concluded that the appellant was properly identified and proceeded to find him guilty as charged. She did not, however, consider the possibilities of mistaken identification which present themselves from the evidence on record.

The robbery, no doubt occurred in broad daylight. We have no doubt, also, that P.W.1 joined the several people who chased one of the robbers in the course of his escape. However, as was rightly stated before us by Mr Onyango Otieno Counsel for the appellant, neither P.W.1 nor P.W.3 arrested the appellant. Nor was any of them present when P.W.4 rearrested him. None of the persons who arrested him was called to

testify in court.

Although, as we stated earlier, P.W.1 was one of the people who participated in chasing the robber who tried to escape on foot, he did not reach the spot where he was arrested. He did not indicate how far he was from that place when he decided to return to his house to telephone the police. The chase was for about 50 metres only. However, that notwithstanding, evidence was essential to exclude the possibility of mistaken identification. P.W.1 may have reached close enough to the place where the person arrested was being beaten up. It is also possible he did not go near enough as to have been in a position to identify him. There being no evidence to show a clear link that the appellant was the person who was chased and arrested without sight being lost of him, the circumstances as narrated by P.W.1 excite doubt as to the correctness of the appellant's identification.

Moreover, P.W.3, the other identifying witness, also, testified that he saw the appellant after his arrest. He did not state how near he went to where the appellant was. Assuming he did so, his identification of him later in court, as that of P.W.1, was no more than dock identification. Such evidence was held, by this court, in the case of Gabriel Kamau Njoroge .v. R. [1982 - 88] 1 KAR 1134 among other cases, to be simply dock identification which, without prior identification in an identification parade, is almost worthless. Identification of a suspect in such a parade lends assurance to the correctness of his subsequent identification in court by the same witness.

In addition to the appellant's identification in court by both P.W.1 and P.W.3, the trial magistrate also relied on circumstances generally obtaining along Owuor Otiende road as she knew them, and also on the appellant's statements in court in his defence, not only to buttress the prosecution case, but also as a basis for summarily rejecting the appellant's defence. The magistrate did not state whether the circumstances, which she alluded to in her judgment, were such as would be taken judicial notice of under S.59 of The Evidence Act, Cap 80 Laws of Kenya. We think it was highly undesirable for her to import into the case matters of personal knowledge, otherwise than is provided in the above section. That she did so clearly prejudiced the appellant's case. His defence was not fully and properly considered before being rejected.

For the foregoing reasons and the fact that both P.W.1 and P.W.3 admitted under cross-examination that the surprise attack on them instilled fear into them, which fear possibly affected their judgment, we come to the conclusion that the appellant's conviction is unsafe. We, therefore, are constrained to interfere. We, accordingly allow the appellant's appeal, quash his conviction of the offence of robbery with violence contrary to S.296 (2) of the Penal Code, and set aside the sentence which was imposed on him. He shall be set at liberty forthwith unless otherwise lawfully held.

We so order.

Dated and delivered at Nairobi this 25th day of November 1996.

**A. M. AKIWUMI**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**