**Huka and others v Republic**

**Division:** Court of Appeal of Kenya at Nyeri

**Date of Judgment:** 7 May 2004

**Case Number:** 114/03,117/03 and 135/03

**Before:** Tunoi, O’kubasu JJA and Onyango Otieno AJA

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**Summarised by:** C Kanjama

*[1] Crime – Robbery with violence – Accused persons identified – Whether evidence of identification*

*had been properly scrutinised by trial and first appellate courts – Whether first appellate court was justified in taking judicial notice at the time of dawn in that part of the country – Whether other contradictions in the case had been properly analysed. [2] Criminal Procedure – Appeal – Whether first appellate court had properly scrutinised the evidence – Whether contradictions in the prosecution case had been adequately considered by the first appellate court. [3] Evidence – Judicial notice – Judicial notice taken as to the time when dawn breaks in a particular season in the* locus in quo *– Whether the judicial notice taken as an element necessary for discharge of the burden of proof was appropriate in a criminal case.* **Editor’s Summary**

The evidence against the three appellants was that they attacked the complainant with the aid of three other persons at 5:30am in the morning. When the complaint was leaving his house in the morning of the next day, he was accosted by the three appellants who robbed him while armed with a knife and injuring his neck and left leg. Apart from the complainant, the appellants were also identified by an associate of the complainant who responded to the alarm and encountered the appellants, whom he also knew and recognised. A third witness, a watchman from the area, also encountered six people whose faces he saw but did not know their names. Each appellant was later arrested separately and charged with the offence. There were some contradictions about the clothes that the third appellant was wearing, and also about how the knife which was allegedly used in the offence got to the police station. The appellants were convicted by the trial court. Their convictions were upheld on first appeal to the superior court. An issue was taken regarding the identification of the accused with the appellants argued that it was pre-dawn and dark at the time of the alleged offence. The superior court took judicial notice of the fact that dawn broke early at the *locus in quo*, and proceeded to affirm the convictions. On second appeal:

**Held** – The first appellate court ought to have examined afresh the evidence of visual identification of the accused to ensure that any possibility of error was eliminated. The Court must act with caution in accepting evidence of identification where it is the main basis of the case against the accused. While recognition is more reliable than identification of a stranger, the Court should take account of the possibility that mistakes in recognition of close relatives or friends can occur. *Wamunga v Republic* criminal appeal number 20 of 1989, *Okeno v Republic* [1972] EA followed; *R v Turnbull* [1976] 3 All ER 549 applied. The first appellate court ought not to have advanced its own theory by way of judicial notice on the amount of light at the *locus in quo*. *Okale and others v Republic* [1965] EA 555 followed. There were some contradictions in the prosecution’s evidence regarding the clothes being worn by the third accused and the sequence of events in respect of the knife alleged to have been obtained from the scene of the offence. The superior court failed to perform its duty to analyse and resolve this evidence. If the superior court had analysed this evidence, it may have come to a different conclusion on the entire case. The second appellate court cannot undertake that exercise as it can only deal with matters of law. The appeal would therefore be allowed and the convictions quashed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Okale and others v Republic* [1965] EA 55 – **F**

*Okeno v Republic* [1972] EA – **F**

*Wamunga v Republic* criminal appeal number 20 of 1989 – **F**

***United Kingdom***

*R v Turnbull* [1976] 3 All ER 549 – **AP**

**Judgment**