**Nyambura v Republic**

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

**Date of judgment:** 10 November 2006

**Case Number:** 119/05

**Before:** O’kubasu, Waki and Deverell JJA

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

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*[1] Criminal procedure – Charge of robbery with violence – Whether failure to indicate accused armed*

*with a dangerous weapon fundamental.*

*[2] Evidence – Number of witnesses required to convict – Whether the court can convict based on the*

*evidence of only one witness – Need for court to warn itself before convicting on one witness’ evidence.*

**Editor’s Summary**

This is a second appeal against the conviction of the appellant for the offence of robbery with violence contrary to section 296(2) of the Penal Code. The issue at appeal was identification of the accused by a single witness. There were also other complaints relating to the failure to consider the appellant’s defence and a defect in the charge sheet by omitting to state that the appellant was armed with a dangerous weapon. The complainant was able to positively identify the appellant as his assailant. Counsel for the appellant however argued that the two courts made an error of law in finding that the identification of the single witness was free from error. He contended that there was no report made to the police by the complainant about the injuries the appellant had suffered and yet he purported to testify that the appellant had a gap in his mouth. There was no evidence from a doctor to confirm that the appellant had such a gap and that it was sustained in the beating during the robbery. There was no exhibit of any jacket to support the finding that the appellant wore the same bloodied jacket which helped the complainant identify him.

**Held** – It is trite and lawful for a court to convict on the evidence of a single witness. Indeed there is no number of witnesses required to prove any fact and section 143 of the Evidence Act expressly so provides. As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive. The Superior Court found that there was no oblique motive in the prosecution’s failure to produce other witnesses from the group of motorists and the mob which attacked the appellant on the two occasions narrated by the complainant. (*Oloo s/o Daitayi and others v R* (1950) 23 EACA 493 applied). The law requires that in relying on a single witness to convict, the evidence of identification must be weighed with the greatest care and the court must satisfy itself that in all the circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. The two courts below were alive to the dangers of relying on the evidence of a single witness on identification. The trial magistrate particularly clearly warned herself and examined the demeanour and credibility of the complainant before examining other factors favouring correct identification and was the best judge of this examination. Thus, the court was satisfied that there was no error. (*Peters v Sunday Post* [1958] EA 424 followed). The defence put forward by the appellant was displaced by the prosecution evidence which was accepted as truthful. It may appear however that in stating as she did that the appellant did not call his brother or the woman they disagreed on as witnesses and further that he did not produce medical documents to support the allegations of injury the trial magistrate may unwittingly have been shifting the burden of proof which in law never shifts, to the appellant. The Superior Court made no reference to those statements. It seems they were made in the context of assessing the credibility of the appellant which was found wanting. The law, at any rate, allows shifting of evidential burden where any fact is especially within the knowledge of the accused person. That is section 11 of the Evidence Act. Failure to state in the charge sheet that the appellant was armed with a dangerous weapon did not make the charge sheet irregular. In any event, in view of the provisions of section 382 of the Criminal Procedure Code, no prejudice was caused to the appellant. (*Juma v Republic* [2003] 2 EA 471 distinguished; *Moneni Ngumbao Mangi v R* criminal appeal number 141 of 2005 (UR); *Johana Ndungu v R* criminal appeal number 116 of 1995 (UR) applied).

Appeal dismissed.

**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***

*Juma v Republic* [2003] 2 EA 471 – **D**

*Maitanyi v Republic* [1986] 2 KAR 75

*Moneni Ngumbao Mangi v R* criminal appeal number 141 of 2005 (UR) – **AP**

*Ndungu v Republic* criminal appeal number 116 of 1995 (UR) – **AP**

*Oloo s/o Daitayi and others v R* (1950) 23 EACA 493 – **AP**

*Opoya v Ug*anda [1967] EA 752

*Peters v Sunday Post* [1958] EA 424 – **F**

*Roria v*