



**IN THE HIGH COURT AT KIAMBU**

**CRIMINAL APPEAL NO. 9 OF 2018**

**BETWEEN**

**PETER NJOROGE MUHUHU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the original conviction and sentence dated 4<sup>th</sup> July 2017 in Criminal Case No. 3582 of 2012 at Chief Magistrates Court in Thika before Hon. S.N Mbungi, CM)*

**JUDGMENT**

1. Even though the respondent has conceded this appeal, this court has a duty to review the evidence and satisfy itself of the propriety or otherwise of the concession.
2. The appellant, **PETER NJOROGE MUHUHU**, was charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the laws of Kenya)**. The particulars of the charge were that on 5<sup>th</sup> July 2012 at Kagongo village, Gatanga District within Murang'a county, jointly with others not before the court while armed with dangerous weapons namely pangas and crow bars robbed Simon Ngugi Mwaura of Kshs. 13,000/- and his coat and immediately before the time of such robbery wounded Simon Ngugi Mwaura.
3. The fact that a robbery took place on the material night is not really disputed. Simon Ngugi (PW1) testified that on the night of 20<sup>th</sup> July, 2012 at about 2.00 am, while asleep, he was woken up by people who cut him using pangas. He sustained injuries on his right hand and above the left eye. During the incident he raised alarm and several people came and assisted to take him to hospital. The included Peter Gitau Njoroge (PW 2), Peter Kariuki Ngugi (PW 3) and Julius Kinyanjui Karanja (PW 4). Doctor Samuel Ndegwa (PW 5) examined PW 1 and confirmed that he had sustained injuries which he classified as grievous harm.
4. The main issue before the trial court and this court is whether the appellant was involved in the robbery. Since the incident took place at night, the trial court was enjoined to consider carefully the nature and source of light, the distance between the light, the assailant and complainant and all other factors that would go towards satisfying itself that the identification was positive and free from error (see **Wamunga v Republic [1989] KLR 424** and **Maitanyi v Republic [1986] KLR 198**). Further, the courts have noted that in the case of recognition when the assailant is previously known to the complainant then the test is more relaxed nevertheless the court must exercise the necessary caution (see **Anjononi & Others v Republic [1980] KLR 59**).
5. The trial magistrate convicted the appellant on the basis that he was a person known to PW1. I have read the testimony of PW 1 and although he states he recognized the attacker, he does not state how he saw him and the nature of their relationship. Further, the trial magistrate failed to analyse the nature of light and circumstances of recognition.
6. In a case of recognition, further assurance is given where the complainant names the assailant at the earliest opportunity. PW 1 did not name the appellant to PW 2, PW 3 and PW 4 when they came to assist him. PW 1 also admitted that he did not identify the appellant in his first report to the police.
7. The totality of the evidence is that the circumstances of identification were not favourable for positive

recognition of the appellant. The appeal is allowed and the conviction and sentence are therefore quashed.

8. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KIAMBU this 20<sup>th</sup> day of February 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Mbiyu Kamau, Advocate for the appellant.

Ms Maundu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.