



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 102 OF 2014

FELIX KINYANYA MARAKO..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment on conviction and sentence by Hon. P. K. Rugut, then Acting Senior Resident Magistrate in Rongo Senior Resident's Magistrate's Court Criminal Case No. 430 of 2014 delivered on 05/12/2014)

JUDGMENT

Background:

1. When SAMSON OYAGI ONGAYO left Nairobi on 03/10/2013 after attending the 2013 Nairobi International Trade Fair, little did he know that he would instead not reach his home at Nyabera Village in South Mugirango but spend the next two weeks in a hospital bed.
2. He had made elaborate prior arrangements for his said arrival as his usual motor cyclist was awaiting for him at Ranen Bus Stage where he was to be dropped by the bus from Nairobi. He safely reached Ranen at around 9:00 p.m. and met the motor cyclist who was accompanied by his colleague due to the lateness of the hour. The three men then started their journey to Nyabera Village aboard the motor cycle.
3. On reaching at Chamgiwadu Centre they decided to take some soft drinks so that Samson would get some change since he only had his money in one thousand notes and wanted to pay for the services rendered by the motor cyclist.
4. They only stayed for less than ten minutes and embarked on their journey. When they reached at the Nyabera junction they saw a white saloon car make Probox parked on the other side of the road. They passed it. The said car then followed them at a high speed and hit the motor cycle. As they fell down the occupants in the car came out and attacked the three men who had been on the motor cycle. That left Samson with serious injuries and he was to spend the next two weeks in hospital.
5. Upon seeking police intervention, two persons were arrested and arraigned before the Rongo Senior Resident Magistrates Court where they faced the charge of robbery with violence. They were Benard Otieno Genga and Felix Kinyanya Marako who appeared as the first and second accused persons respectively. The then second accused person is the appellant herein.

The Trial:

6. In a bid to prove the charge before the trial court, the prosecution called a total of ten witnesses. **Samson Oyangi Ongayo** was the complainant who testified as **PW1**. He took the court in great detail on how the whole ordeal unfolded and in the process he confirmed identifying one of the attackers being the appellant herein. PW1 likewise confirmed to have recognized the vehicle which was used in the attack as registration number KBW 529U make Probox white in colour, the property of the then first accused person Bernard Otieno Genga.

7. **PW2** was one **Charles Odero** who was the motor cyclist and who had a long working relationship with PW1. He is the one who picked up PW1 at Ranen in the company of his friend one Geya Odhiambo Okwani (PW5). Both PW2 and PW5 allege to have also identified the appellant herein as one of the attackers.

8. A butcher man at Chamgiwadu Centre one **Shem Anyie** testified as **PW3** and informed the trial court that he was among those who went to rescue PW1 and took him to hospital after the attack. He was in the company of **Ambrose Ochieng Ouma** who testified as **PW6** and **Godfrey Ouma Nyanaya** who testified as **PW7**. PW1's brother one **Michael Omweri Ayega**, a retired police officer testified as **PW4**.

9. The **Clinical Officer** who confirmed that indeed PW1 had been injured testified as **PW8**, the arresting officer testified as **PW9** and the investigating officer lastly testified as **PW10**.

10. At the close of the prosecution's case the court placed both accused persons on their defences. The appellant opted for a sworn testimony without calling any witnesses. He denied committing the offence and explained how he was arrested by the on 04/10/2013 at around 05:00p.m. at the Ribs Club in Chamgiwadu Centre. He was then taken to Kamagambo Police Station and later on arraigned in court without being informed of the accusations against him. He wondered why an identification parade was not conducted to confirm that he was among those who took part in the attack since he usually left his working place at 11:00 p.m. everyday including on the alleged day.

11. On consideration of the evidence before the trial court, the learned trial Magistrate in her judgment acquitted the then first accused person under Section 215 of the Criminal Procedure Code and found the appellant herein guilty as charged. He was convicted and sentenced to the only known sentence in law in capital offences being death penalty.

12. It is on that background that the appellant was aggrieved by both the conviction and sentence and preferred an appeal which the subject of consideration in this judgment.

The appeal:

13. The appellant lodged the Petition of Appeal in person but was represented by Mr. Anyona Mbunde at the hearing of the appeal. Counsel for the appellant argued the appeal on two grounds; that the appellant was not properly identified as one of the attackers and that the trial court failed to consider the appellant's alibi.

14. Mr. Ndung'u, Learned State Counsel opposed the appeal and relied on the record in calling for the dismissal of the appeal.

Discussion and Determinations:

15. This being the appellant's first appeal the role of this court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

16. In discharging the said duty, this court will first look into the twin issues of the identification of the

appellant as one of the people who took part in the said robbery and the *alibi* defence together.

17. The issue of the identification of the appellant was raised by PW1, PW2 and PW5. The three were riding on the PW2's motor cycle on the said date and time. All the three said witnesses agree that the offence took place in the night of 03/10/13 between 09:30 p.m. and 10:00 p.m. and that it was a night with bright moonlight. The three witnesses stated further that they were assisted by the moonlight and the lights from the motor cycle and the Probox car in identifying the appellant. Further the appellant was very well known to each of them.

18. We will for clarity purposes revisit the evidence of each of the three witnesses on the issue. **PW1** had the following to say in his testimony:-

“.....I arrived at Ranen at 9:00 p.m before arriving at Ranen I called boda boda person called Charles to come and take me. He came with another boy called Okwaro, they took me, we arrived at Chamgiwadu Centre. I had Kshs. 1,000/= and I had no change, we found a bar open. I went we took sodas for purposes of getting change. After 7 minutes we continued with our journey.... On arriving at Nyabera junction on my left, there was a probox vehicle that was facing the opposite direction. There was a man and a woman making a call and besides the vehicle there were other men. I did not know this people. We left the vehicle and went for about 500 meters the same vehicle came in high speed, the vehicle came and blocked us, we fell down, as I tried to stand up somebody asked us why we were coming from.....Suddenly, one person hit me on the left with a panga and another hit me. One person in police uniform demanded for money..... The person who hit me was just putting on plain clothes. The one in police uniform hit me with the knife.....The other people I was with had run away and were screaming....”

The incident happened at night but there was moonlight that was very clear and could identify a person. The motor cycle had lights and where the vehicle stood it had lights on.....Among the people who attacked us I knew the one who was talking in Kisii because he used to work at somebody at Chamgiwadu, the one talking in Kisii had served me he hit me on the head and had police uniform.... when I was attacked by 5 people, I managed to identify the person.....”
(emphasis added).

19. On cross-examination, PW1 confirmed that among the attackers he only identified the appellant and that no identification parade was conducted.

20. On the same issue of identification, **PW2** who was the rider had the following to say:-

“.....At the junction Nyabera we found a motor vehicle that had stopped the vehicle followed us, as it reached me, he did not pass. I gave it way but he didn't, it came and hit me on the left side in front, we fell down, one person alighted from the vehicle with something like a pistol, he had a trouser that resembles police uniform jacket, torch, shoes and had a round cap.....The vehicle moved ahead, the motor cycle's light was on, I saw the registration number

4 people came out armed with pangas and clubs. They asked where we were coming from, the one who had a pistol hit George Odhiambo left running, I also left running. The complainant could not stand because the motor cycle had fallen on him. I saw one from where I knew, he is the one who slapped George Odhiambo with a panga..... The person who hit George is the 2nd accused. I knew him as he was working at the center in a bar at Chamgiwadu.

During this incident it was night, I used the moonlight to see the accused. When the vehicle stopped it had full lights....

I saw the 2nd accused, he had not completely covered his face, he was standing close to the vehicle and he was speaking in swahili....” (emphasis added).

21. While being cross-examined PW2 had the following to say:

“..... The vehicle hit our motor cycle and we fell down, all of us. Somebody in police uniform came out. He was not a police officer, I knew him that person is the 2nd accused, the motor cycle fell on the complainant, I don't know if the motor cycle injured him. The person in police uniform slapped George when I started running away and two people followed me...

I saw you with the aid of moonlight motorcycle lights and the vehicle lights. You were the first to alight.... The other people had covered their faces leaving a small space for only the eyes. I knew you easily; you were working at a bar as a counter man...At the station I told the police that I knew one of the attackers. I didn't write their names...

...We were hit and we fell. We then started arguing and when other people alighted we started screaming. We started running because you were armed... when we were hit we ran as we made noise.....We returned after 5 minutes....” (emphasis added).

22. And PW5 expressed himself as follows:-

“..... At Nyabera junction, we passed a vehicle, it was stationary it was a Probox A vehicle followed us from behind it was a Probox. It was the same vehicle we left behind. It came with high speed and full lights, it forced us to the drain, we fell, the 2nd accused alighted from the vehicle and came to me, he was with a maasai sword and something that looked like a pistol. He put that thing on my chest and hit my back with the knife four other people alighted from the vehicle 2nd accused asked me in swahili where we were from. I got a chance and ran away screaming. The other four were armed with pangas. I struggled with the 2nd accused before running away I didn't know the other four I knew the 2nd accused before There was full moon and the lights from the motor cycle. Was still on and the lights for the vehicle. The 2nd accused had a police jungle jacket and police trouser...He also had a brown cap. We struggled for 3 minutes, I saw him very well.. He had a pistol and knife. I saw the 2nd accused's face, the cap did not cover his face.... he was crushing jaggery and he even worked in a bar in Chamgiwadu. I had known him for 7 months. I knew his voice, as we struggled, observed his face. I knew his voice before I ran into a sugarcane plantation screaming. I ran for 10 minutes then went back to the scene...” (emphasis added).

23. On cross examination, PW5 confirmed that he did not give the appellant's name to the Police neither did he record it in his statement.

24. From the foregone extracts of the evidence by PW1, PW2 and PW5 it is clear that the attack was preceded by the hitting of the motor cycle by the car. The motor cycle rolled and fell into a ditch. That motor cycle fell on PW1 and as a result he could not stand. Immediately people alighted from the vehicle; one was armed with a knife and a pistol and swiftly hit PW5. When four other people alighted from the car armed with pangas and clubs, PW2 and PW5 ran into the nearby sugarcane bush while screaming. The attackers had also covered their faces and only left the eye openings except for the appellant who wore a cap which had not fully covered his face.

25. The attack at that point in time was not expected by any of the witnesses. It was spontaneous. On realising that indeed they had been attacked, PW2 and PW5 hurriedly ran away leaving PW1 who could not stand as the motor cycle had fallen on him. And the attackers were heavily armed.

26. It is equally worth noting that whereas PW1 stated that when the appellant alighted from the car he spoke in Kisii language, PW2 and PW5 instead stated that the appellant spoke in Swahili language. Could the three people be referring to the same person given that they were several attackers at the scene? Put it in another way; was it possible for PW1 to hear the appellant speaking in Kisii language and at the very same time for PW2 and PW5 to hear the same appellant speaking in Swahili language?

27. All the three witnesses stated that they knew the appellant and that they were aided by the moonlight

and the lights from the motor cycle and the car. While we do agree that at times moonlight can be such clear and powerful to aid in identifying someone we remain alive to the fact that the attackers were masked and one of them wore a cap. Further it is on record that when the motor cycle was hit by the car it fell into a ditch. It is alleged that even in that state its lights were still on. We agree. However the witnesses did not state if the motor cycle lights shone on the faces of the attackers or at any other particular parts of their bodies or at all so as to aid in the recognition.

28. Turning to the lights from the car, it is on record that the car came from behind the motor cycle and hit it. When one of the occupants came out the car moved ahead. It therefore means that the lights of that car even if they continued to be on could only have shone ahead and not at the back of the car where the witnesses were. It is hence not practically foreseeable that the lights from the car would have aided the witnesses in the identification of the attackers.

29. Again all the eye witnesses stated that they had earlier on seen one of the alleged attackers work in a bar at Chamgiwadu. The appellant did not deny to have been working at a bar at Chamgiwadu centre during that period. He even went ahead and stated the name of the bar he worked at. However none of the witnesses mentioned the exact bar they allegedly saw the appellant working at. That raises various questions: Could the bar where the witnesses went for soft drinks been the same bar where the appellant worked? Was the appellant actually at work on the said day and time? If the appellant was at work, was it possible for him to have made it to the Nyabera junction after the witnesses left the bar so as to join the other attackers in the probox car? The questions seem to be unending.

30. There is also another issue which we cannot allow it to escape our attention. It is the alleged three-minute-struggle between PW5 and the appellant. Accordingly to PW5, the appellant was armed with a pistol on one hand and a knife on the other as he alighted from the car. He then went ahead and said that the appellant proceeded to hit him on his back as he placed the pistol on his chest. But more surprisingly is the allegation that the appellant and PW5 struggled for a whole three minutes before PW5 managed to run away into the sugarcane plantation with PW2. We wonder if during that struggle the appellant was still handling the knife and the pistol on each hand and if so how he managed to struggle with PW5 for three minutes. On the other hand, did the other attackers who had also alighted from the car and were armed with pangas and clubs join the struggle or just watched from a distance?

31. The issue of identification by voice also came up. The witnesses testified that they had known the appellant for some time and could easily recognize his voice such that when he alighted from the vehicle and engaged PW5, they readily recognized his voice. We have gone through the record and did not find anywhere where the aspect of the appellant's voice in aiding the identification was pursued.

32. We have also noted that despite the witnesses alleging to have clearly seen the appellant as one of the attackers and whom they knew by name, none of them gave his name to the police in the first instance and neither did they so put it down in their statements. The best way to identify someone by recognition is by giving the name at the earliest possible opportunity. That was expected to be done immediately the witnesses went to the police at the first instance or to at least put it down in their statements.

33. Closely linked with the foregone is what the appellant's Counsel submitted before us that the police seem not to have carried any meaningful investigations into the matter. PW10 was the investigating officer. He was a police corporal attached to Kamagambo Police Station. The case had initially been reported at the Okumba Police Post which was under the command of PW9 one corporal Benard Moroko. However, going by the gravity of the complaint, PW9 rightfully referred the matter to the mother station at Kamagambo Police Station. PW9 then played the role of arresting the car allegedly used in the attack and the suspects whom he handed over to the investigating officer.

34. PW10 stated that he decided to charge the appellant only on the statement of PW1, PW2 and PW5 who had mentioned him. He opted not to carry out an identification parade since the witnesses knew the appellant quite well and came from the same village.

35. But a look at how the appellant was arrested is worth revisiting. According to PW9, the appellant was

arrested by members of the public at Chamgiwadu centre and brought to him. He interviewed him and decided to re-arrest him and took him to Okunda Police Post. PW9 did not state if PW1, PW2 or PW5 were among the members of public who arrested and handed over the appellant to him. He further confirmed that none of the said members of the public recorded any statements with the police on the circumstances leading to the appellant's arrest by the citizens.

36. It was expected of a prudent investigator to record at least one statement from the members of the public on how and why the appellant was arrested just to put everything in place.

37. The offence which the appellant faced was a very serious one as it attracted a mandatory death sentence on conviction. That therefore called for thorough investigations. The police ought to commence investigations immediately a complaint is lodged. All efforts ought to be made to endeavour and connect the alleged perpetrator with the commission of the offence. Adequate statements from potential witnesses ought to be recorded in a bid to establish the offence.

38. And in instances where the attacks are at night, investigations ought to be more focused on the identification or recognition of the perpetrators so as to overcome the obvious danger associated with possible mistaken identities of even people known to someone. That may even call for the conduct of identification parades but depending on the circumstances of each case.

39. The issue of identification/recognition of alleged perpetrators in criminal cases is by now well settled in law. Times without number courts have been urged to treat such evidence with great caution so as not to lead to miscarriage of justice.

40. The Court of Appeal in the case of Wamunga Vs Republic (1989) KLR 426 had the following to say on the subject: -

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

It was also held in Nzaro vs Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739 by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

41. In the famous case of R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification albeit by a single witness. The Court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with 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 may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

42. The above does not however mean that there cannot be safe recognition even at night. The Court of Appeal in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and

emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

43. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

44. On the issue of the description and naming of the attackers the Court of Appeal in **Morris Gikundi Kamande Vs. Republic (2015) eKLR** at Nyeri had this to say.

“.....It is our considered view that failure by PW1 and PW3 to give a description of the appellant or mention his name or to state they were attacked by a person they knew weakens their testimony. Being a person known to them, PW1 and PW3 should have given the name or description of the appellants as was stated in the cases of Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987 and Juma Ngondia – v- R, Criminal Appeal No. 13 of 1983 and Peter Njogu Kihika & Another – v- R, Criminal Appeal No. 141 of 1986. In Lesarau – v- R, 1988 KLR 783, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In R – v- Turnbull, (1976) 3 All ER 551, Lord Widgery C.J. observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. In R – v- Alexander Mutwiri Rutere alias Sanda & 8 Others, (2006) eKLR, the High Court observed that “PW1 and PW2 and several other witnesses claimed they gave the manes of the attackers whom they claimed to know before the incident to the police; the Police Occurrence Book did not have any entry on the names of the attackers, ... a reasonable conclusion is that the names of the accused persons were not given because they were not known by the witnesses who therefore lied before the trial court.”

In the case of **Simiyu & Another vs. Republic (2005) 1 KLR** 192 at page 195, the Court of Appeal faced with facts similar to those in this instant case expressed itself as follows:-

“If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, the fact of there having been a description

given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See R – v- Kabogo s/o Wagunyuu, 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe.... Though the prosecution case against the appellants was presented as one of recognition or visual identification, is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification.... In the circumstances, we have no doubt that the appellants’ convictions are both unsafe and unsatisfactory”.

45. Upon re-consideration of the evidence and by taking the judicial precedents and foregone legal guidance into account we come to the conclusion that this was a case which called for in-depth investigations so as to clearly connect the appellant with the commission of the crime. Since the circumstances at the scene of crime were characterized by darkness, moonlight, masked attackers, one in a cap, knocking of the motor cycle by the car, immediate attack and injury on the witnesses using a pistol, pangas and clubs, the police ought to have conducted an identification parade to pre-empt all possible doubts. The parade would have further given the witnesses an opportunity to test if indeed the voice they heard at the scene was that of the appellant. This was not a straight forward case of recognition given the circumstances under which the attack took place. More needed to be done.

46. We cannot therefore find that the identification of the appellant was free from error. It is indeed manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification. Further the appellant's *alibi* defence punctured doubts on the prosecution's evidence. The appellant's conviction is hence both unsafe and unsatisfactory and cannot stand in law.

47. Having so found the appeal is hereby allowed and the conviction is quashed. The sentence is set-aside and the appellant set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 31ST day of MARCH 2016

D. S. MAJANJA

A. C. MRIMA

JUDGE

JUDGE