



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 697 of 2006**

**BONIFACE MUIRURI KIMANI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(From original conviction and sentence in criminal case Number 4803 of 2003 in the Chief Magistrate's court at Thika - L.W. Gicheha (SRM) on 23<sup>rd</sup> November, 2006)***

**JUDGMENT**

The appellant was charged jointly with two others with the offence of attempted robbery with violence contrary to Section 297 (2) of the Penal Code. After a full trial his co-accused were acquitted but he was convicted and sentenced to death. This appeal arises from the said conviction and sentence.

In his grounds of appeal he has faulted the learned trial magistrate on the ground that, she erred in relying on the evidence of visual identification by the complainant which was not possible under the circumstances, and which was not supported by first report to police or tested on a well conducted identification parade. The evidence of P.W. 1 was also not corroborated by any other independent evidence, and therefore was unsafe in the circumstances. He also complained that the learned trial magistrate failed to warn herself before relying on the evidence of a single witness. Finally that his defence was not considered.

This appeal was heard by Judge Khaminwa and Judge Warsame on 3<sup>rd</sup> May, 2010 who reserved judgment for 29 June, 2010. The judgment was not delivered on the scheduled date and another date was set for 18<sup>th</sup> August, 2010. Regrettably, that Judgment was never written or delivered. At the instance of this court, the appellant was produced and indicated that, having filed his submissions, his judgment could be written by any other Judges. This is the said Judgment. As the first appellate court we are required to go through the entire evidence adduced before the learned trial magistrate, evaluate that evidence and come to independent conclusions.

The complainant was walking home after escorting his neighbour to a hospital. On the way, he was accosted by three people. He was hit on the leg with a metal bar and started struggling with them. He had a slasher which he waved while at the same time screaming. He hit one of the three people on the face using the slasher. Just then, a motor vehicle came by and with the aid of its lights he was able to recognize one Muiruri who is a neighbour in the village. Some people came to his aid and he informed them that Muiruri was one of his attackers and that he had hit him with a slasher. Together, they went to the home of Muiruri and found him being cleaned on the head where he had been hit with a slasher.

A report was made to the police and Muiruri was subsequently arrested. He named his two

accomplishes. It is the complainant's evidence that these three people intended to rob him but nothing was stolen from him. The emergence of a motor vehicle at the scene helped him.

The charge sheet in the particulars stated that the people who attempted to rob the complainant were armed with pangas and that they attempted to rob him of cash Kshs. 500/=. It is worth noting however that, in the evidence of the complainant he specifically said he was hit on the leg with a metal bar and that nowhere has he said that he had Kshs. 500/= on him or that the assailants wanted to rob him of that sum.

It was the duty of the prosecution to adduce evidence to conform to the particulars of the offence as set out in the charge sheet. The attack on the complainant is said to have taken place at night. Indeed, it was with the aid of the motor vehicle lights that the complainant is said to have recognized one of his attackers. There is no evidence on record as to the intensity of the said lights or the speed at which the said motor vehicle was travelling. We note however that, when the complainant and the other villagers went to the home of the appellant they found the appellant being cleaned on the head at the place where he was allegedly hit by the complainant. That evidence would have been the best to connect the appellant with the incident and place him at the scene. It was soon after the alleged offence and the complainant had named him to the other villagers. However, no medical evidence was produced by the prosecution to confirm the injury on the appellant and that in itself was fatal to the prosecution case. So, what remained was the evidence of the complainant alone as to the attack which was not corroborated by any material evidence. It is unsafe to rely on the evidence of a single identifying witness and that is why, as a matter of practice courts have to warn themselves of the danger of so doing before a conviction is arrived at. It will be remembered that, it is the duty of the prosecution to prove the case against the appellant beyond any reasonable doubt. It may be true that the complainant was sure that the appellant was one of his assailants. But one can be honest yet mistaken, and that is why corroboration was necessary in this case.

Even if we were to believe the evidence of the complainant and, assuming without deciding that the appellant was one of the attackers, the particulars of the charge were not established by evidence and if any offence was disclosed then it would be assault causing actual bodily harm. The evidence on record fell short of the charge as framed and we hold the conviction was unsafe in the circumstances.

Accordingly, we allow this appeal by quashing the conviction and setting aside the sentence imposed. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

**Dated and delivered at Nairobi this 12<sup>th</sup> Day of March, 2013.**

**A. MBOGHOLI MSAGHA**  
**JUDGE**

**L. A. ACHODE**  
**JUDGE**