IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 93 OF 2008

BETWEEN

GEORGE MUKABANE INJAKHA ….....1st APPELLANT

GEORGE MUKOLO KHALWALE ….....2nd APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kakamega,(Ombija & Kariuki, JJ) dated 4th June 2008

in

HCCRA NO. 130 & 131 OF 2005)

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JUDGMENT OF THE COURT

Violet Isiaho (PW4) (violet) is the mother of **Doughlas Isiaho (PW1) (Douglas)** and **Evans Isiaho (PW6) (Evans),** she is also the sister of **Rispa Kakonde (PW2) (Rispa)** and the aunt of **Sacha Lucila (PW3) (Sacha).** In the month of April 2004, they lived at Masava Village, Ichina Sub-location, Shivakala location of Kakamega District, Western Province.

On 10th April, 2004 Violet left home for Nairobi, leaving Douglas, Rispa, Sacha and Evans in the house.

On the 14th April, 2004 at about 8:00 p.m. all save Violet were in the house. Sacha asked Evans to take him outside to relieve himself. As they were going out, Rispa followed them to close the door behind them. Evans had a torch. On reaching the banana shamba nearby, they saw some three people. Those people also had a torch. They told Evans they were "Jeshi la Mzee" and before any further exchanges they set on Evans, beating him with clubs. Sacha ran away to the house of one Philiciasas where he stayed till next morning when he returned home. In the meanwhile, Evans tried to run back to the house but he found the door closed as Rispa had closed it when the two of them went outside. The attackers continued beating him till he ran to a nearby maize plantation and thereafter to a neighbour's

home where he hid himself. The attackers lost trace of him but turned to their home where Douglas and Rispa were.

Evans said in evidence that he recognized two of his attackers as the two appellants as he said he had known them physically and by their names. Douglas, while in the house, heard Evans shouting outside that there were thieves within the vicinity. He headed out but met one attacker and he ran back to the house and hid there till the time Evans went silent and he assumed the attackers had left. After a short while he heard people breaking the front door. Those people entered the house, broke the door of the room where Douglas was hiding and demanded to know where their mother was. On his response that she was on safari, they took him to the sitting room from where he saw them take a panasonic radio cassette from the drawer. They broke other rooms and ordered Douglas to take them to their mother's room from where they took a Sony radio, mobile phone make Nokia and some money. Meanwhile Rispa had hidden in the ceiling and was raising alarm for help. The attackers went to Douglas's room and took a radio Douglas was listening to. During all this time the robbers were inflicting physical injuries to Douglas, cutting him on the head and beating him all over the body. Douglas also recognized two of their attackers whom he maintained, had worked for them but he did not know their names. In court he identified the attackers as the two appellants. As a result of the alarm raised by Rispa and Evans, neighbours went to the scene and the thieves ran away. Douglas was taken to Provincial General Hospital at Kakamega where he was admitted for six (6) days.

On his being discharged from the hospital, Douglas went to Police and wrote his statement confirming as well that he recognized two of the attackers physically. He said where the attack took place was well lit with hurricane lamps at the sitting room and that is what helped him identify and recognize the attackers. Neighbours reported the attack to the police and **Eustus Muyi Buitichi (PW5),** the Assistant Chief of the Sub Location, whose home is nearby heard the noises of a metal door being hit and aware that only the home of Violet had metal door, rightly suspected that the home of Violet was under attack. He telephoned Violet's husband, who was also in Nairobi as he knew their numbers. He also contacted Violet and the Police plus the Acting Chief and reported the attack to each of them. On his enquiry, Douglas told him, he had recognized the attackers.

Rispa could only recognize the voice of the first appellant among the attackers. She said the first appellant had worked for them for two days cutting trees and as he did so they would talk and so she was familiar with his voice. That allegation of the first appellant having worked for Violet was confirmed by Violet but Violet could only remember giving first appellant work of one day. Violet however on return checked and found that many other items and cash were stolen.

Sang Chelule (PW7), a clinical officer, Kakamega Provincial Hospital examined Douglas and Evans and confirmed that they were indeed injured.

P. C. James Kiogora (PW8), of Kakamega CID was at the Station on 11th April 2004, when he received communication from 999 control of a robbery at Violet's home . In company of a driver, and other officers they went to the scene, found Douglas and Evans with injuries, the doors were demolished and Evans told him he had recognized the appellants out of the group who attacked them. Evans gave him the names of the appellants. He then took Douglas and Evans to Kakamega Provincial General Hospital for treatment.

The Assistant Chief arrested the appellants together with a villager and they were taken to Police Station and thereafter charged with the offence of robbery with violence the particulars of which were that:-

> ***"On the 11.4.04, at Masava Village, Ichina Sub-location, Shavakala location in Kakamega District within Western Province, jointly with others not before court being armed with offensive weapons namely pangas, swords, slasher, hammer, torches and rungus robbed Douglas Isiakho Musabi of two radio cassettes, ordinary radio, a mobile phone, make Sagem, six shirts, two long trousers and a jacket, Turkey and cash Kshs. 5,000/= all valued at Kshs. 42,900/= and at or immediately before or immediately after such robbery used actual violence***

to the said Douglas Isiakho Musabi".

The appellants were further charged with assault causing actual bodily harm contrary to **Section 251** of the Penal Code in that on 14th April, 2004 at Masava Village they, jointly with others not before court, unlawfully assaulted Evans and occasioned him actual bodily harm.

The appellants together with a third person, who was the first accused at the trial court and who was acquitted by trial court, pleaded not guilty to the charge. As we have stated, the third person was acquitted on both charges and set free by the trial court whereas, the two appellants were acquitted in respect of the second count which charged them with assault.

In his defence, the first appellant who was the third accused in the subordinate court stated in unsworn statement as follows:-

"On 12.4.04, I was at home when I saw three (3) elders come

and told me Assistant Chief wanted me, I went there and

Assistant Chief told me I was wanted at Isulu Police Post,

then I was brought to Police Station and charged with an

offensive I did not know. That is all".

The second appellant stated, again in the unsworn statement as follows:-

On 12.4.05 (sic) I was at home when I saw Assistant Chief and village elder who is my father coming my home. They took me to police station with the 5 litres of liquid that they found me with. At the Police Station they joined me with other people I did not know about. I had quarreled with my father over land. That is all".

The learned principal Magistrate, after full trial of the case acquitted the appellants on the second count, but convicted them on the first count and after hearing mitigating circumstances, sentenced each of them to suffer death.

In convicting the appellants, the learned Magistrate had this to say:-

"I have carefully considered all the testimony tendered in this case and it is clear at the home of PW4 were PW1, PW2, PW3 and PW6 where the robbery took place. PW1 and PW6 have clearly told how they managed to see and recognize some of the robbers as 2nd and 3rd accuseds. It is not in doubt there was sufficient light from the lamps in the home and the torch PW6 had, This had been confirmed by PW2 and PW3, PW1 and PW6 knew the 2nd and 3rd accused even before as people from the locality who had been given casual work by PW4 in the past and hence he knew them well.

The information they gave the Police in the investigation by PW5 the Assistant Chief led to their arrest and as I filed (sic) the prosecution has proved their case on their the (sic) recognition of the 2nd and 3rd accused to have been among the robbers.

The defence offered by the 2nd and 3rd accused does not in any way challenge the evidence adduced by the prosecution against their recognition during the robbery and their investment (sic)."

The two appellants were naturally not amused. They filed appeal against their conviction and sentence in

the High Court. The High Court (Ombija and Kariuki, JJ) after consideration of those appeals, in a judgment dated and delivered at Kakamega on 4th June 2008, dismissed them, both on conviction and sentence stating:-

"Against that backdrop of evidence, we are persuaded that it-was recognition of the appellants as opposed to identification. There was enough light both in the house and in the banana plantation. PW1 and PW6 thus recognized the appellants. The assailants were persons who had worked at their home on one or more occasions. PW6 recognized even the voice. The whole episode took place about I hour. PW1 was taken from room to room to show where the money and other items were. The assailants in the house did not wear masks".

Having carefully re-evaluated the evidence before the lower court, we have come to conclusion that both the appellants were properly convicted and sentenced. The evidence was that of recognition and on the whole overwhelming".

The appellants are still dissatisfied and hence this Appeal premised on three similar grounds advanced in each Memorandum of appeal filed by each appellant. As the grounds are similar word for word in their contents we will reproduce the grounds in one Memorandum of Appeal. They are that:-

1. ***The learned judges erred in law in finding that the evidence tendered supported a conviction based on recognition.***
2. ***The learned judges erred in law by failing to adequately re-evaluate the evidence on record.***
3. ***Had the learned judges properly and adequately re-evaluated the evidence on record, they would have found that the principal (sic) of presumption of likely facts weighed heavily in favour of the appellant."***

In his submissions before us, Mr. Ochieng Ochieng, the learned Counsel for the appellants, contended that although the trial court and the first appellate court relied on identification by recognition, that was because the two courts did not analyse and evaluate the evidence that was before them properly for had they done so, they would have appreciated that the witnesses who alleged to have recognized the appellants did not mention their names to anybody that night, neither did they or any of them tell anybody, that they or any of them could identify the two or any of the two appellants physically till after some days, later. In his contention, that meant they did not know the appellants and hence their evidence of recognition could not stand as in any event, as the witnesses did not mention their attackers io the night of the attack, it was not certain as to how the Assistant Chief knew who to arrest and his arrest of the two appellants was in his view not proof that the appellants were the correct people who committed the offence. Further Mr. Ochieng stated that the conditions for proper identification such as the strength and the source of light, the distance between the attackers and the witnesses were not properly spelt out. He asked us to allow the appeal.

On the other hand, Mr Meroka, the Prosecuting Counsel supported the decision of the two courts maintaining that the judgments by them were well founded and were proper, as the appellants were recognized by witnesses who had known them for a considerable period and one of the witnesses had talked to the first appellant and recognized his voice. He added that the conditions for proper identification of the appellants were that night conducive to proper identification as lights from the two lamps in the house were bright and the appellants stayed with the witnesses particularly Douglas and Rispa for close to one hour. He emphasized that the appellants were well known to the witnesses and that removed the possibilities of any doubt on their identification which was by recognition. He urged us to dismiss the appeals.

In any criminal case where the prosecution points at an accused person as the perpetrator of an offence, whereas the accused denies any involvement in the offence, a court is enjoined to consider the evidence on the same with greatest care whether the alleged identification is of a stranger or of somebody known to the witnesses. This is because as is stated, in the well known case of

R vs. Turnbull (1976) 3 ALLR.449, possibilities of mistaken identification of accused persons often

occurs even where a witness purports to identify a relative or a friend he had known earlier which is identification by recognition. Much as identification of a stranger requires greater care before a conviction is entered nonetheless, even in cases of recognition, there is need to exercise care as in any event, before a witness can say he recognized a perpetrator, the witness need to have physically seen and marked the physical features of the accused in order for the witness to be able to say with certainty that the person he saw was a person known to him either physically only or both physically and by name. In order to be able to identify such an accused person conditions for such identification need to be conducive. For example, there must be sufficient light, and the distance between the two must allow for proper identification whether by recognition or of a stranger. In cases of identification by voice, the witness need to demonstrate that he had previously talked to the accused to such an extent that he could be familiar with the accused's voice.

However, when all is said and done, the law recognizes that identification by recognition is more certain and more assuring than identification of a stranger. In the case of **Anjononi and Others vs. The Republic (1976 -8) 1 KLR 1566,** this Court, faced with a similar issue had the following to say:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions of identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of assailants, recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We draw attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported)."

Thus much as Mr. Ochieng is right that even in recognition conditions required must be conducive for proper identification, once the court establishes that such conditions did indeed exist and were demonstrated, recognition is much more assuring than identification of a stranger. In the case before us there is evidence that robbery took place at night much as such witnesses such as the Assistant Chief put it at 7:45 p.m all other witnesses state the robbery took place at 8:00 p.m. which is night time. There was thus need for establishment of a source of and strength of light that enabled the witnesses to identify the appellants. Douglas said there were two well lit hurricane lamps at the sitting room and that enabled him to identify the appellants without any difficulties. Evans says, as he was approaching banana plantation near the house, he had a four battery torch (we think he meant a torch with four cells), and hence there was enough light to see and recognize the appellants well. The trial court and the first appellate court, in our view analysed the same evidence on the two sources and the strengths of light and having done so, accepted it. These were matters of fact and by dint of the provisions of **Section 361 (1) (a)** of the Criminal Procedure Code, we are in law unable to disturb the two concurrent decisions on that issue as we have no jurisdiction on a second appeal on matters of fact. Thus we are satisfied as the two courts were, that there was proper light at the scene to afford proper recognition of the appellants.

Rispa was not able to see any of the robbers as she was hiding in the ceiling of the same house where the robbery was taking place. However, from there, she said she could hear the voices of the robbers and recognized the voice of the first appellant. That evidence was also accepted by the two courts. The principles on the guidelines in respect of acceptability of voice identification were given by this Court in the case of **Mbele vs. Republic (1984) KLR 626** where it stated, inter alia:-

"The court should ensure that the voice was that of the accused; that the witness was familiar with the voice and recognized it, and lastly that the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it".

Rispa in explaining how she recognized the first appellant's voice said:-

"I was not able to see any of the robbers but I could hear their voices and I recognized one voice ass (sic) that of Ikhali. I knew Ikhali who is the 3rd accused in the dock as he had worked at home on two days cutting trees and as he was talking with me when he needed anything. I had

known his voice".

And in cross examination she said she had known the first appellant for one year and that the robbery took about one hour and further that although she did not tell anybody that night of the identity of the robbers she told the police about her being able to identify one robber the next day. This evidence was also accepted by the two courts below and we see no reason to interfere with that as the trial court saw the witness and her demeanour and thus had advantage over us and further the first appellate court, as we have stated complied with the law in revisiting, analysing and evaluating that evidence afresh.

Mr. Ochieng in his submissions urged us to accept that as the witnesses never mentioned to anybody that they could identify the appellants and certainly not to the Assistant Chief, the arrest of the appellants by the Assistant Chief proceeded upon no foundation and thus the alleged recognition of the appellants as the perpetrators of the offence cannot stand. That argument looks attractive, but with respect, when the record is properly scrutinized, it transpires, that although the Assistant Chief was not informed that night by Douglas, or by Rispa or Evans that they could in one way or the other identify their attackers, nonetheless, he had every reason to know who they were and did know. The record shows that on the night from the time the robbery commenced, the Assistant Chief heard of the door being broken and contacted Violet's husband, Violet, Police and the Acting Chief that night. He was thus alert to what was going on and was anxious to save the situation much as he did not go to the scene that night. As a result of his effort, P. C. Kiogora visited the scene that night and P. C. Kiogora said Evans told him he had recognized the appellants. Although Evans said in cross examination that he did not tell the Police that night about the attackers, he went on in that same vein and said:-

"I have given Police your names as one of the two suspects I had recognized. I knew you even before and I told the Police I had seen you among the robbers...."

It is possible Evans was confused when he gave his evidence but it is clear that having said he did not tell police that night about the robbers, he also says he told them and gave them the names of their attackers and that version is confirmed by P. C. Kiogora who in fact is the person who took them to the hospital. Considering the totality of the evidence, and noting that the Assistant Chief was the one who informed the police of the attack and thus initiated the procedure that led to the appellants being arrested by himself, we think the Assistant Chief, had basis for arresting the appellant. In any event, arrested, or not, the three witnesses namely, Douglas, Evans and Rispa recognized the appellants and described them in details, at times saying they even knew some of their relatives.

We think, we have said enough to indicate that these appeals have no merit and must be dismissed. Each appeal is hereby dismissed.

Dated and Delivered at Kisumu this 10th day of May 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR