**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MACHAKOS**

**Criminal Appeal 55 of 2007**

**JAMES MULWA MUTUNGI …….....……..APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(*Being an appeal from original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No.1517 of 2006 by S. A. Okato Senior Resident Magistrate on 21st March 2007)*

**JUDGMENT**

The Appellant, **James Mulwa Mutungi**, was charged before the Chief Magistrate's Court at Machakos with robbery with violence contrary to section 296(2) of the Penal Code. Particulars were that on the 14th July, 2006 at Kamuthini Village Makueni District of the Eastern Province while armed with dangerous weapons namely; a knife and rungu robbed **Josiah Mutungi Nguli** of cash Kshs. 1500/= and at or immediately before or immediately after the time of such robbery wounded the said **Josiah Mutungi Nguli .** The Appellant denied the charge, prompting the case to proceed to trial.

The prosecution called a total of seven witnesses in its effort to prove the charge against the appellant. In brief, PW1 **Josiah Mutungi Nguli** "*the complainant*" on 14th July, 2006 at about 8.00p.m was from the home of one **Paul Mulandi** having attended a funeral headed home when he encountered the appellant who is his younger brother seated off the path near his home. He saw him clearly because there was moonlight and also he had flashed the torch he had at him. He asked the appellant what he was doing there and without answering him the appellant rose suddenly and hit him on the head with a stick and he fell down. The appellant then lay on him, frisked his pockets and robbed him of cash Kshs. 1500/= which was in his wallet. The appellant reached for a knife from his pocket trouser and stabbed him below the left nostril, eye and also on the upper left eye. The complainant called him by his name **Mulwa** and pleaded with him to spare his life and begged for forgiveness. His family members heard his screams and they too started screaming as they rushed to the scene. The appellant hit him with a panga on the right hip and disappeared when he saw the light from the torches that the family members had as they approached the scene.

Among those who came to his the rescue was his wife, **Rhoda Josiah** (*PW2*) who led him to their house where many people thronged among them **Willy Musembi Kiatu** (*PW3*) and **Julius Mbithi Mulinge** *(PW4*). The appellant later joined the group but the complainant pointed him out as the one who had assaulted him and robbed him of cash Kshs. 1500/=. The group interrogated the appellant and noticed that his long trouser had fresh blood stains which had apparently oozed from the cut injuries he had inflicted on the complainant. The appellant then ran away. Family members escorted the complaint to Salama Police Station where he reported the incident before seeking treatment in a private hospital

nearby. The appellant disappeared from home for three weeks but when he resurfaced, the complainant, led the police, **PC Samuel Koskei** (*PW5)* to where he was burning charcoal and had him arrested. After arresting the appellant, he escorted him to Salama Police Station. The appellant who apparently is the complainant's immediate follower does not relate well with him.

PW6 **PC Agnes Mwania** of Salama Police Station received the appellant and investigated the case. She issued the complainant with P3 form and referred him for treatment. After he was treated he was examined by **Dr. Ndunge** of Machakos General Hospital who assessed the degree of injury as harm. The P3 form was tendered in evidence by **Dr. John Mutunga** (*PW7*) on behalf **Dr. Ndunge.** She then charged appellant with the offence.

Put on his defence the appellant in a sworn statement stated that on 14th July 2006 he was in his house preparing to go to bed at about 8.00p.m when he heard screams at the home of the complainant who is his brother. He rushed there and found the complainant's wife screaming whilst the complainant was on the ground. The complainant told him that he had been assaulted by a person he did not identify. He observed the complainant and noted that he was bleeding from the mouth. He accompanied one **Mbithi** to the Riverside where they found the complainant's torch which **Mbithi** took. They also saw blood stains on sharp stones. They returned to the complainant's home and he retired to his home. In August, 2006 he was arrested while burning charcoal. He denied robbing the complainant nor assaulting him adding that he once differed with the complainant over a parcel of land but they solved the problem before their father's demise.

The learned magistrate after carefully evaluating the evidence that was before him by both the prosecution and the defence reached the verdict that the evidence against the appellant was clear, that the same had proved the prosecution's case beyond reasonable doubt and convicted the appellant accordingly. The appellant was then sentenced to suffer death as by law circumscribed.

The appellant was aggrieved by both conviction and sentence and now appeals to this court for intervention. In his home made grounds of appeal, the appellant laments that the evidence of recognition was not free from possibility of error or mistake, prosecution evidence was contradictory, the case was not proved beyond reasonable doubt and finally, his plausible defence was not given due consideration.

When the appeal came before us for plenary hearing on 2nd May, 2012, the appellant who appeared in person elected to prosecute his appeal by way of written submissions. We have read and considered those submissions.

On his part, **Mr. Mukofu,** learned State Counsel opposed the appeal and submitted that the appellant was positively identified by the complainant. The conditions obtaining were favourable for positive recognition. Being a case of recognition and the victim and assailant being brothers, the possibility of mistaken recognition is remote.

As first appellate court, it is our duty to re-reconsider and evaluate the evidence on record with a view to reaching our own conclusions and determination whether the judgment of the trial court was based on sound legal principles. This requirement was thrust upon by the decisions in **Pandya vs Republic [1957] E.A 336, Okeno vs Republic [1972] E.A. 32** and **Patrick & Another vs Republic [2005] 2 KLR 162.**

We have now reconsidered and evaluated that evidence. We have also considered the submissions made by both the appellant and the state. Upon such reconsideration and evaluation, we are satisfied that the appellant's recognition at the scene of crime cannot be faulted. The complainant was an elder brother of the appellant. They are siblings and know each other very well. Recognition of each other is thus no so much of a problem. The offence was committed at night, at 8.00p.m to be precise. In the absence of any light it would have been difficult for the complainant to recognize the appellant even if he was his brother. Luckily, there was moonlight which the complainant described as bright. Besides, the complainant had a torch which he directed at the appellant when he came across him on his way home from a funeral. Ofcourse courts require that where the identification of an assailant depends on light in the dead of night, such light must be sufficient. *See* **Maitanyi vs Repulic** *[1986] KLR 198* and **Abdalla Bin**

**Wendo** vs **Republic [1953] 20 EACA 166.** And as stated by the Court of Appeal in the case of **Wamunga vs Republic [1989] KLR 424-**

***"…whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification…"***

In this case, we are satisfied that the complainant was able to recognize the appellant since;-

§ One, there was bright moonlight

§ Two, the complainant was armed with a torch which he flashed at the appellant. The fact of the complainant having a torch is confirmed by the appellant himself in his defence when he stated that he accompanied one, **Mbithi** to the scene of attack and recovered the complainant's torch thereat. According to the complainant he had loaded the torch with new batteries and it emitted intense light.

§ Three, the appellant was not disguised at all as to make his recognition well nigh impossible.

§ Four, the appellant came into close proximity with the complainant when he hit him and he fell down. Thereafter he lay on him as he allegedly frisked his pockets for valuables.

§ Fifth, the appellant was also seen by PW2 as he fled from the scene. Ofcourse we appreciate that PW2 was the wife of the complainant and therefore her evidence ought to be treated with caution.

§ Sixth, the subsequent conduct of the appellant following the incident does not point at his innocence. Immediately, the complainant was brought home from the scene of attack, the appellant suddenly appeared covered in a blanket. During the attack, the complainant had screamed drawing the attention of family members and neighbours who ran to the scene. Considering the manner, the appellant appeared, he must have been in his house which was hardly 30 metres away from the scene; why then couldn't he have heard the screams and joined other family members and neighbours in a bid to rescue the complainant from his attackers.

§ Seventh, when the complainant pointed at him as the culprit, he ran away after those present interrogated him and saw fresh blood stains on his clothes.

§ Eighth, the appellant disappeared from his home for over a month before he re-appeared and was arrested.

§ Ninth, above all, this was a case of recognition as opposed to visual identification. As stated in the case of **Anjononi vs Republic [1980] KLR 59-**

***"…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…"***

In this case and as already stated, the appellant and complainant were siblings. Considering the circumstances obtaining at the scene of crime, we are satisfied that the appellant was recognized at the scene. His conviction on that basis cannot be faulted.

However, we entertain doubts as to the offence committed and for which the appellant was charged. The circumstances do not point to the offence of robbery with violence. On the contrary it points to a much lesser offence. On his way home, the complainant came across the appellant who was sitting on a path leading to his house. It is the complainant who confronted the appellant wanting to know what he was doing there. Considering their bad blood, that question must have instigated the encounter. We doubt very much that the complainant was candid with the circumstances leading to the confrontation. Our

aforesaid observation is buttressed by the complainant's own testimony. He stated that as the encounter ensued, he pleaded with the appellant to forgive him. What did the complainant do to him so as to seek forgiveness? We think that he was the one who instigated the fight. The issue of the appellant robbing the complainant was to our mind an afterthought calculated to fix the appellant with a much heavier crime that attracts a penalty whose execution is to lock away the appellant forever.

The foregoing notwithstanding, we are of the view that the appellant went too far in his attack on the complainant. Going by the evidence of **Dr Mutunga,** the injuries he inflicted on the complainant were classified as harm. In the premises we would invoke the provisions of section 179 of the Criminal Procedure Code and reduce or substitute the charge preferred on the appellant, of robbery with violence to assault occasioning actual bodily harm contrary to section 251 of the Penal Code and convict him accordingly.

The upshot of the foregoing is that the appeal is allowed, conviction quashed and sentence of death imposed on the appellant set aside. Instead the appellant is now convicted of the minor and cognate offence of assault occasioning actual bodily harm contrary to section 251 of the Penal Code. Considering further that the maximum sentence of this kind of offence is 5 years imprisonment and considering that the appellant has been in prison since 21st March, 2007 when he was convicted and sentenced, we feel that he has been sufficiently punished. Accordingly, we commute the sentence we would have imposed to the term so far served by the appellant with the consequence that he should be set at liberty forthwith unless otherwise lawfully held.

**JUDGMENT DATED**, **SIGNED** and **DELIVERED** at **MACHAKOS**, this **15TH** day of **JUNE**, 20**12**.

**ASIKE-MAKHANDIA** **GEORGE DULU**

**JUDGE** **JUDGE**