JOHN MBIVI KIMWELI …………….......……………................APPELLANT

VERSUS

REPUBLIC ……………………………………………………….RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 433/2007 by Hon. E. Juma Osoro–SRM on 4/2/2010)

JUDGEMENT

The Appellant, **John Mbivi Kimweli** was charged alongside, **Henry Muli Muithya** and **Mukwekwe Makau** with 3 counts of capital robbery. **Mukwekwe Makau** also faced an alternative count of handling stolen goods. In respect of count I of capital robbery, it was alleged that the trio;

"***on the night of 18th and 19th March 2007 at about 2.00 a.m at Katyethoka village, Changwithya East Location in Kitui District of the Eastern Province*** **jointly with others not before the court and while armed with dangerous weapons namely iron bars, pangas, bows and arrows robbed Stephen Mwangangi Ngoku two mobile phones (1)Nokia 8210 and (2) one Motorolla all valued at Kshs. 10,400/=, cash Kshs. 9,650/= and at immediately before or immediately after the time of such robbery used actual violence to the said Stephen Mwangangi Ngoku"**.

As for capital robbery, count II it was alleged that the 3 on the same night, time and place and in similar fashion robbed **Assumpta Mwangangi Ngoku** of a handbag, cash Kshs. 6,000/= and one electric sewing machine valued at Kshs. 18,000/= and immediately before or immediately after the time of such robbery used actual violence to the said **Assumpta Mwangangi Ngoku**.

In the 3rd and final count of capital robbery, it was again claimed that the 3 at the same place, time and in similar fashion robbed **Raphael Munuve Mwangangi** of cash Kshs. 300/=, one solar battery and one mattress and at or immediately before or immediately after such robbery used actual violence to the said **Raphael Munuve Mwangangi.**

In the alternative charge facing the Appellant's 3rd Co-accused (*Mukwekwe Makau*) of handling suspected stolen goods contrary to section **322(1) (2)** the **Penal Code,** it was suggested that on 3rd April 2007 at Kalundu Market, Changwithya East Location in Kitui District of the Eastern Province otherwise than in the course of stealing dishonestly handled one mattress knowing or having reasons to believe it to have been unlawfully obtained. The trio entered a plea of not guilty and they were subsequently tried.

The entire case of the prosecution was heard by **Mr. Omburah,** Senior Resident Magistrate who was however succeeded by **E. Juma,** SRM when he left the station on transfer. The incoming magistrate aforesaid then heard the defence, respective final submissions crafted and delivered the judgment.

The prosecution case in brief, was that on the night of 18thand 19th March, 2007, PW1, his wife PW3 and their son PW4 were asleep in their home when at about midnight robbers struck. PW1, the Complainant in count 1, PW3 Complainant in count II and PW4 Complainant in count III heard their dogs barking.

They peeped through the windows and saw a crowd of people in their compound. They were calling out the names of PW3 asking her to give out all the money she had collected as treasurer of a Self Help Group or merry-go-round known as Musyi Mweu. They also wanted the money she was using to vie as a councillor of Kaveta Kunine ward, failing which they would kill her. PW1 got up and told the crowd not to break into the house since he was willing to give them the money anyway. He passed to them through the window a total of Kshs. 9,650/=. As he did so he was able to see and identify the Appellant and Co-accused in the crowd courtesy of the torches they had and which they flashed on each other as they asked and scrutinized the money. They stood in a row. The robbers then demanded his wife's (PW3) purse, wrist watch and their mobile phones which he also gave. Though he pleaded with them not to enter the house, they nonetheless went ahead and broke the window and forced themselves in. Upon entering the house they set upon both witnesses and beat them senseless. In the process they also raped PW3 in turns. When PW1 came to his senses, he found himself at **Kitui District Hospital** with a fractured lower jaw which was wired. PW3 and 4 were however both treated at the same hospital and discharged.

PW2, **Lawrence Wambua Francis** and PW5, **Musyoka Kitunga** were members of the local vigilante group. They were on patrol duties on the same night when they encountered a group of people with torches. PW2 and his group flashed their torches at them and immediately recognized the Appellant among them. Their torches were very bright as they had just been charged. The Appellant's group was armed with pangas, bows, arrows and catapults. They ordered the vigilante group to sit down. However, the members for the team including PW2 and PW5 ran away. They were pursued by the appellant's group but they managed to elude them and hid in the vicinity. They then saw the gang proceed to the home of PW1, PW3 and PW4 and break-in. PW2 and PW5 saw and recognized the Appellant the 2nd time. Apparently the robbers detonated an explosive device and from the resulting light, they were able to see and recognize the Appellant a 2nd time. They had hid 20-30 metres from the complainant's house.

After the robbery the gang left. They then went to the home of the complainants and took them to hospital and contacted the police who immediately came to the scene. PW4 who was the only complainant who was conscious informed them of the items stolen from him. When called by the police to record their statements they informed them that they had seen the appellant among the robbers.

PW6, **PC Japhert Mulumo** received the report of the robbery from **Sgt Mdogo** and proceeded to the scene. He found the complainants already taken to Kitui District Hospital**.** He went to the hospital and interviewed them who told him of the attack and how they had lost several items including cash, mobile phones and mattress to the robbers. In the course of his investigations, members of the vigilante group gave him the names of some of the robbers. With the assistance of other police officers, they rounded up the appellant and co-accused. In the process they recovered a mattress which was positively identified by the complainant as being one of the items they lost to the robbers during the incident.

PW7, **Peter Wambua Muthengi** and PW8 **Evelyne Makau,** both were clinical officers then based at KituiDistrict Hospital. Having examined PW3 and PW1, they assessed the degree of the injuries inflicted upon them as harm, and grievous harm respectively. The Appellant and his co-accused were then arraigned before the Principal Magistrate's Court, **Kitui** for the offences.

When placed on his defence, the Appellant denied committing the offences or being involved at all. He gave unsworn statement in which he detailed the events leading to his arrest. In effect he blamed his woes on a police officer who had on previous occasion ordered and had meat cooked for him from his butchery but failed to pay for the same. When confronted by the appellant in a bar days later for payment, he swore to teach him a lesson for embarrassing him in public. Hence the charges.

The learned magistrate having carefully evaluated the evidence on record both for the prosecution as well as the defence was persuaded that the evidence linking the appellant's co-accused to the crime was weak. Accordingly she acquitted them pursuant to **section 215** of the **Criminal Procedure Code.** But as for the appellant, the learned magistrate was satisfied that he had been positively identified at the scene of crime by PW1, PW2 and PW5. Accordingly, she convicted him on all three counts of capital robbery and sentenced him to death as required by law. However and rightly so in our view, the learned magistrate ordered that the execution of the sentence in respect of counts II and III be held in abeyance pending the

execution of the sentence in count I.

The Appellant was aggrieved by the conviction and sentence. Accordingly, on **16th February, 2010**, he lodged the instant appeal. He faulted the learned magistrate for his conviction and sentence on the grounds that the evidence of his alleged recognition was of the weakest kind, prosecution evidence was full of contradictions, the trial magistrate relied on hearsay evidence to convict him and finally, that his defence was not given due consideration.

When the appeal came before us for plenary hearing, the appellant elected to canvass the same by way of written submissions which he tendered with the permission of the court. We have carefully read and considered the same.

The appeal was opposed. **Mr. Mukofu,** learned State Counsel orally submitted that the appellant was positively identified by PW1, PW2 and PW5. The circumstances obtaining favoured such positive identification. The robbers had torches which they occasionally turned to themselves as they scrutinised the money handed to them by PW1. They were standing in a row. As for PW2 and PW5, they knew the appellant very well. He was among the group that they encountered as they went about their vigilante duties that night. Using their powerful torches, they saw the appellant in the crowd. They also saw him entering the home of the complainants. Therefore the recognition of the appellant could not be faulted. He therefore urged us to dismiss the appeal.

We have anxiously considered the evidence on record, the judgment of the learned Senior Resident Magistrate, the grounds of appeal, rival submissions of the Appellant and the State Counsel. This is a first appeal. In such an appeal, this court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words a first appeal is by way of a retrial and facts must be revisited and analysed. Second, in considering the appeal, we must bear in mind that the standard of proof in criminal cases is different from that of civil cases. In criminal cases, the standard of proof required is proof beyond reasonable doubt as opposed to proof on a balance of probability in civil cases.

Bearing the above principles in mind, we note that the conviction of the appellant turned on the evidence of recognition by PW1, PW2 and PW5. These witnesses knew the appellant very well. Indeed PW1 is on record as having known the appellant for over 25 years. He was a neighbour as well and he knew his home. Again according to this witness, the robbery took over 3 hours. Under cross-examination by the Appellant, the witness is recorded as stating that he had never had any grudge with the appellant. He went on to state that;

"***There were many torches and you were standing in a line and that is when I saw you from the reflections of the torch which was being shine*** *(sic)* ***by one of the robbers…"***

Finally from the house of this witness to the appellant's is about 2 ½ - 3kms.

With regard to PW2, his testimony is to the effect that he knew the appellant very well as he was even married close to his home. Their homes are a kilometre apart. Infact they were friends and had no grudge between themselves. The witness was emphatic that the appellant was among the crowd that his vigilante group encountered on that fateful night. He was able to see the appellant in the crowd when his team flashed their torches at the Appellant's team first. The vigilante torches were very bright as they had just been charged. This enabled him to see the appellant clearly. The next time he saw the appellant was in the home of the complainants. This was after the Appellant's group confronted the vigilante team and the latter scampered for their dear life. The witness however found a place to hide which was near the house of the complainant. In fact he was only 20 metres away from the appellant's team but the appellant's team could not see him though they flashed their torches around as he was in a hole. In the compound of the complainants, they detonated some explosive and with aid of the light emitted therefrom, he again saw the appellant. This witness therefore saw and recognised the appellant twice; on the road and in the compound of the complainants'. He mentioned his name to those who came to the compound of the complainants in answer to their screams and after the appellant's group had left. He also gave the

appellant's name to the police. This comes out quite clearly in the appellant's cross-examination of the witness. He stated thus in answer:-

"…Those who came I told them that I had seen you. I even mentioned your name at the station. I did not accompany the police to your home. I told the police your name immediately they came and I even recorded the same in my statement…"

PW5 too was among the vigilante team. He had known the appellant for about 15 years, and had also married from his area. When they came face to face with the appellant's team they flashed their torches at them and he was able to see the appellant among them. The vigilante team then ran away and hid themselves when confronted by the appellant's team. This witness hid 20–30 metres from the complainant's homestead. He saw appellant's team approach the complainant's compound where they detonated an explosive and from the light emitted, he again saw the appellant. He too told the police that he saw the appellant among the robbers. Apparently at the request of the appellant when cross-examining the witness, his statement was read out aloud in court and his name featured.

These are then the circumstances under which these three witnesses claimed to have recognized the appellant. In the case of **Mohamed Rama Alfain & 2 Others vs Republic Msa C.A. Cr. App. No. 223** of **2007[UR**] the Court of Appeal reiterated the well known principle that where the prosecution was entirely relying on the evidence of identification at night in unfavourable circumstances, then such evidence should lead to a conviction only when it is found to be watertight. **See** also **Republic vs Eria Sebwato [1960] EA 174** and **Kiarie vs Republic [1984] KLR739** cited with approval in the **Mohamed Rama** case above. In the same case, the court stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken.

The case of **Maitanyi vs Republic [1986] KLR 198** emphasises that in testing the reliability of the evidence of identification at night in the circumstances that appear difficult, the court is under a duty to make an inquiry of the relevant circumstances such as the nature and strength of light, the size of such light, the position relative to the suspects and such other matters. In our view the learned magistrate bore all these considerations in mind when she came to the inescapable conclusion that the appellant had been positively identified among the robbers. But again, this was not a case of visual identification but recognition. Though recognition is more reliable and assuring than identification of a stranger, such evidence of recognition should be testified carefully knowing that mistaken recognition of close relatives and friends are sometimes made. See **Anjononi & Others vs Republic [1980] KLR 59** and **Wamunga vs Republic [1989] KLR 424.**

With these principles in mind, can we say that the identification nay, recognition of the appellant was so watertight so as to exclude possibility of mistake? We think so. The Appellant was recognized by 3 different witnesses at different times. It could not have been mere coincidental. There is no evidence that the appellant was disguised as to make his recognition difficult. All these witnesses had no grudge against him as would have propelled them to testify falsely against him. They had nothing to gain for so doing. The Appellant himself confirms that much. Apart from PW1, the other two witnesses, PW2 and PW5 who recognised the appellant in the act can be said to be independent witness. The only person that the appellant had a grudge with was a police officer to whom he had apparently sold boiled meat but had refused to pay for the same. It appears that the said police officer is the one who arrested him. This could be PW6, **PC Japhat Mulumo** although he does not specifically state so in his statement of defence**.** However, it is instructive that he never raised the issue of the grudge between the two in his cross –examination of the witness. That defence was in our view a mere afterthought and it was rightly rejected by the learned magistrate. Even assuming that indeed there was such a grudge, the police officer is not the complainant. Further we do not think that the police officer would have pulled of such a feat of having PW1 fracture his mandible (jaw) and loose two teeth merely to settle scores with the appellant, if the P3 form tendered in evidence by PW8 is anything to go by. Similarly, he could not have persuaded PW3 to be raped and physically assaulted so as to set up the appellant. The same goes for the injuries suffered by PW4. Again, we cannot see how the police would have stage managed a violent robbery merely to fix the appellant.

PW1 also saw the appellant twice, first at window as he was passing money to the robbers and also when he subsequently entered the house. The evidence on record is that there was no light in the house and that the witness was able to see the appellant with the assistance of torches held by the appellant and his cohorts. They were using the torches which were many to scrutinize and count the money which PW1 was passing to them through the window and which were in notes. PW3 was therefore in close proximity to them. The robbers were apparently standing in a row; thereby making it easy for PW1 to recognise them. Since the only source of light were torches and were many, it would have been easy for someone standing inside the house which was in darkness to easily see and recognise the appellant who was outside and in the glare of the torchlights, more so, when the Appellant was a person he knew very well. The same goes for his recognition of the appellant in the house. According to this witness, the robbery took over 3 hours. If this be the case, then the witness was with the appellant for a long time, sufficient for him to be able to recognize him, considering their proximity, much as he was violently assaulted afterwards. The question of mistaken recognition cannot therefore arise.

With regard to PW2 and W5, they encountered the appellant and his team twice, on the road as well as in the compound of the complainants. On the road, they flashed at the appellant's team and managed to pick out the appellant and the co-accused. Much as there is no mention, for how long their torches remained focused on the appellant's team, it would appear that they were in close proximity, if the fact that they were ordered to sit down by the appellant's team is anything to go by. It would appear again, that some discussions ensued between the two teams. There is evidence that a member of the appellant's team ordered his team to flash their torches at the vigilante'steam. However, the vigilante's team reacted first and flashed their torches at the appellant's team. If the vigilante team which consisted of 5 members, **Kinyithi Mulunga, Muinde Peter, Kavoi Musyoka, PW2** and **PW5** had torches which they flashed at the appellant which torches are said to have been bright, then they must have produced sufficient light to enable them see the appellant and his co-accused to be able to recognize them.

In equal measure, the appellant's team is said to have also flashed their torchlights at the vigilante team and on recognising PW2 they agreed that he should be spared, whereupon they ordered him to sit down. Instead he ran away. This evidence lends credence to the fact that the two teams were in close proximity and discussions ensued. That being the case it is highly unlikely that these witnesses will have failed to recognize the people they were familiar with.

Again, these witnesses saw the appellants in the homestead of the complainants. They detonated some explosives device which lit the compound with light. They were hiding 20-30 metres from them. The light emitted again enabled them to see the appellant and his team. This evidence of some explosion in the compound of the complainants was corroborated by the evidence of PW3. One is tempted to ask though, if they were hiding from the appellant's team, and having heard the explosion, could they have mastered the courage to see the appellant and his team? Our response is that it is possible, considering that they had first noticed the appellant and his team on the road. Much as PW2 is said to have hid in the hole, it is not suggested that the hole was so deep as to swallow him completely. In any event, the appellant's team remained in the complainant's compound for a considerable length of time, thereby affording these witnesses sufficient time to see and recognise the appellant on and off as they hid. It is also instructive that when these witnesses made their reports to the police, they gave to them the name of the appellant amongst others. That formed the basis upon which the appellant was subsequently arrested and prosecuted.

The totality of the evidence on record is that the appellant was positively recognized during the commission of the offence. The said recognition cannot therefore be said to have been mistaken.

The defence offered by the appellant did not at all dent the otherwise strong evidence adduced by the prosecution in support of the charges. Upon evaluating the said defence, we form the opinion that the same did not at all challenge the cogent evidence that was adduced by the prosecution that indeed established that the appellant was in the team that robbed the complainants of their valuables violently.

We therefore find no merit in this appeal which is accordingly dismissed in its entirety.

JUDGEMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **JUNE 2012.**

ASIKE – MAKHANDIA	**GEORGE DULU**
JUDGE	**JUDGE**