



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Criminal Appeal 84 of 2003**

**MUSYOKI NDOETHANI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**MUSYOKI NDOETHANI** was charged with five counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. After a full trial, the learned trial magistrate convicted him in all five counts and sentenced him to death as by law prescribed. Being aggrieved by the conviction and sentence the Appellant lodged this appeal in which he raises five grounds of appeal.

We summarize the grounds as follows: -

One, that the learned trial magistrate erred in relying on the evidence of recognition without warning himself of the dangers of doing so; two that the conviction was manifestly unsafe since no investigating officer gave evidence; three that the learned trial magistrate's judgment was tainted with misdirection; four that the learned trial magistrate failed to resolve contradictions in the prosecution case and finally that the learned trial magistrate erred in failing to consider the Appellant's alibi defence.

The learned counsel for the State, **MR. OMIRERA** has conceded to the appeal in respect of counts 1 and 2 but opposed it in regard to the last three counts.

We have carefully considered this appeal, re-evaluated the evidence adduced before the lower court and formed our own conclusions bearing in mind that we neither saw nor heard the witnesses and gave due allowance for same as mandated of us as the first appellate court in line with the court of Appeal decision of **OKENO vs. REPUBLIC [1972] EA 32.**

In brief the facts of the prosecution case was that on the night of 15<sup>th</sup> and 16<sup>th</sup> August 1999, the Appellant, while in company of others and while armed with dangerous weapons robbed five businessmen of cash and properties at Kali Market in Mbooni. These five Complainants were Felix and Christine Mulatya who were PW1 and PW2 and Complainants in counts 1 and 2, Julius Nzula Complainant in Count 3, Boniface Mainga Complainant in count 4 and Alice Mainga Complainant in count 6.

Both Felix and Christine Mulatya, a man and wife said that five people broke into their house which was also their business premises and robbed them of Kshs.20,000/- and Kshs.30,000/- respectively. Felix was hit on the head and seriously injured causing him to be admitted in hospital for one week. They

recognized one man in the group of five attackers whose name they gave as Dominic Kijalo. They said that they knew the Appellant before but that he definitely was not in the group which robbed them.

Julius Nzula, PW3, told the court that he too was attacked in his house which is next to his butchery. It was 2.00 a.m. He said that the robbers had bright torches and were armed with Somali swords. Before opening for them he peeped through the window and saw 8 people. Among them he recognized the Appellant whom he had known for a long time as working in a Matatu. On opening, it was the Appellant who pulled him into his bedroom where a lamp was lighted and demanded for money. The Appellant took Kshs.5300/- from him. PW3 said that he recognized the Appellant both from his appearance and his voice.

PW4 and PW6 Boniface and Alice Mainga were a man and his wife. They too were attacked in their house during the same night. PW4 said that he first heard his name being called out. Then the door was smashed open and six torches were flashed in all directions by the intruders. PW4 said he also shone his torch and lighted the face of one of the robbers whom he recognized as the Appellant. That the Appellant was not happy and consequently he cut him with the simi he was carrying. The scars sustained by the Complainant PW4 were seen by the Court, a cut on the forehead and on the right arm. That when PW4 ran out, one of those outside hit him with a rungu and he fell down. The Appellant then cut him again on the head before he was robbed of Kshs.39,500/-. He was later admitted in hospital for one week.

PW6 in her evidence repeated what her husband said concerning the attack except that at the point that PW4 went out, she was locked inside their shop. PW6 said that she saw the Appellant in the group of robbers when a torch shone on his face before the husband PW4 went out.

PW5, the watchman on duty at the Kali market that night recognized only one of the robbers but one who was never arrested.

The Appellant challenges the evidence of recognition by PW3, PW4 and PW6 stating that it was not water tight and could not justify a conviction. In regard to PW3's evidence the Appellant submitted that his source of light which he claimed he saw the Appellant with was a lamplight. In cross-examination, PW3 denied that there was any lamp on inside his house at the time of the robbery. In regard to PW4, the Appellant submitted that since he said that the beam of light from his torch was shone on the Appellant as he, PW4, stood behind the curtain, then it was impended by the curtain and was therefore unreliable. In regard to PW6, the Appellant submitted that even though she stated that a torch light aided her in identifying the Appellant, she was not vivid in her evidence to state exactly which torch that was and neither was its brightness revealed.

**MR. OMIRERA** submitted that PW3, PW4 and PW6 saw the Appellant sufficiently long enough to be able to recognize him. As for PW3, learned counsel submitted that despite failing to mention in his statement to the police that there was a lamp on in the children's bedroom as he did in evidence, that the court should disregard the anomaly. That since the evidence of PW3 was that of recognition, despite being a single evidence, it was safe and sufficient to convict despite the learned trial magistrate's failure to warn himself before convicting on it. The learned counsel submitted that since PW4 and PW6 both saw and recognized the Appellant, their evidence corroborated each other and was safe.

On the issue of recognition of the Appellant by PW3 separately and by PW4 and PW6 together, we agree that the conviction of the Appellant was based solely on recognition evidence. In the case of **CLEOPHAS OTIENO WAMUNGA vs. REPUBLIC CA No. 20 of 1989** in Kisumu the Court of Appeal stated as follows:-

***“We now turn to the more trouble some part of this appeal namely the Appellant's conviction on counts 1 and 2 charging him with the robbery. Indakwa (PW1) and Lilian Adhiambo Waguda (PW2). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them. what we have to decide now is whether the evidence was reliable and free from possibility of error as to find a secure basis for the conviction of the Appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that***

*such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification. The way to approach the evidence of visual identification was successfully stated by Lord Midgery. CJ. in the well known case of Republic vs. Turnbull [1976] 3 ALL ER 549 at page 552 where he said;*

*“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”*

Applying the principle in the above two cases, it is clear that the evidence of recognition should equally be treated with caution. We have set out as fully as we could the evidence of the three identifying witnesses PW3, PW4 and PW6. In regard to all these witnesses, we found their evidence sketchy and devoid of necessary detail that could vividly demonstrate the basis of their conviction that they saw and recognized the Appellant during the robberies. PW3 for instance said he saw and recognized the Appellant outside his house before the robbers broke into his house. PW3 did not describe the light that enabled him to recognize the Appellant outside. PW3 then said that the Appellant entered his house and entered the Child’s bedroom where a lamp lighted the room. In cross-examination as correctly observed by the Appellant in his submission, PW3 admitted that at the time he made his statement to the police, he made no mention of a lamp being on in the bedroom.

**MR. OMIRERA** asked us to ignore the omission of the mention of a lamp light inside PW3’s house. However, we cannot be persuaded to ignore that glaring fact for two reasons. One, a first report is very important information especially where it was made when the Complainant’s mind was still fresh after the incident. Such report serves two purposes as stated in the case of TEREKALI & ANOTHER vs. REPUBLIC 1952 EA.

*“Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”*

In the instant case, the first report of PW3 clearly omitted mention of a lap. Applying the test as stated in the above case, we find that the statement which was made 3 weeks after the incident was more likely to be accurate and to reflect the truth than this witness’ evidence in court. The first report would in the circumstances of this case carry more weight. We therefore doubt that there was any lamp lighted in the house of PW3 at the time of attack.

The second reason why we cannot ignore the omission is because in the evidence of PW3 the only time he referred to any light having aided him to identify the Appellant was the questioned lamp inside his child’s bedroom. So apart from that lamp, no other source of light was mentioned in that regard.

PW3 also said he recognized the Appellants voice when he demanded for money. PW3 did not however State the actual words spoken by the Appellant and which he recognized. That means we have nothing to go by to determine whether indeed those words were sufficient to enable recognition by PW3. In regard to PW3 therefore, his evidence fell far short of the required standard and was therefore insufficient to base any conviction on.

Turning now to the evidence of PW4 and PW6, we shall start by stating that from their evidence, it did not come out clearly whether the two of them were together at the time of the purported recognition of the Appellant. PW4 said that when the robbers broke open his door, his torch was on and the beam of light fell on the nearest man whom he said was 2 metres from him. He recognized him as the Appellant. That was the only time he flashed his torch at the Appellant and immediately thereafter the Appellant cut him twice with a simi before PW4 fled outside. If PW6 saw the Appellant before PW4 ran out, it means it

was just before PW4 was cut twice and just before he fled outside. None of the two witnesses gave a time frame of the period under which they had the Appellant under observation. However, from the account of the descriptions each gave at the time the recognition was made, it is very clear to us that they had a fleeting glance at the person each thought was the Appellant under a torch light whose intensity was not described. Being at night, the identification by the flash of torch light in our view can be described as identification under difficult circumstances which in our view was not free from mistake or error. Those circumstances were not in our view favourable for positive identification by recognition even by two witnesses.

We took note of the fact that PW5. Paul, the man who was guarding the premises the night the attack took place had the best opportunity to see the robbers since he was outside under moonlight at the time. He recognized some people whose names he gave. He was however very categorical that he did not see the Appellant in that group. He knew the Appellant very well before this incident. In fact PW5 was the one the robbers used to call out PW4's name. He was present when PW4's door was broken and witnessed the attack on him. He also opened for PW6 after the robbers left. If PW5 did not see the Appellant and he was best placed to see all the robbers that night, it puts to question the evidence of both PW4 and PW6.

We are aware that the Appellant raised other issues of importance especially that of the misdirection in the trial magistrate's judgment and the failure to resolve contradictions in the prosecution case. Even without going into these other issues we believe that this appeal can be disposed off on that issue of identification by recognition alone.

We find that the evidence of recognition by PW3, PW45 and PW6 unsafe. The circumstances of identification were unfavourable for positive identification. The period under which each of these witnesses said they saw the Appellant was very brief and insufficient for safe and positive identification. The conviction in all five counts was solely based on the identification by the three witnesses. These convictions are unsafe for the reasons given and consequently cannot be allowed to stand. We allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Machakos this 5<sup>th</sup> day of April 2006.

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**D. ONYANCHA**

**JUDGE**

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**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

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**D. ONYANCHA**

**JUDGE**

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**LESIT, J.**

**JUDGE**