



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

**AT MERU**

**CRIMINAL APPEAL 59 OF 2002**

**FRANCIS NGOLUA KABUE .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, Francis Ngolua Kabue was tried and convicted on one count of robbery with violence contrary to section 296(2) of the Penal Code. He had been charged that on the night of the 16th/17th day of January 2001 at Kianjai Location in Meru North District within Eastern Province jointly with others not before court and being armed with dangerous and offensive weapons namely guns robbed Bernard Gituma of 2 bundles of wheat flour, 15kg of maize flour, 2 boxes of radio batteries and cash money Kshs. 17,000/= and at or immediately before or immediately after such robbery used actual personal violence on the said Bernard Gituma.

The appellant appealed against both conviction and sentence. In his Petition of Appeal, the appellant set out six grounds of appeal. The condensed version of those six grounds in our view raises the following complaints by the appellant against the judgment of the learned trial magistrate:-

- (a) That the learned trial magistrate erred in both law and fact in convicting the appellant on the evidence of identification when the identification of the appellant was not free from error because of the prevailing conditions at time of alleged commission.
- (b) That the prosecution did not prove its case against the appellant beyond any reasonable doubt.
- (c) That the prosecution's evidence was full of contradictions and
- (d) That the learned trial magistrate failed to consider the appellant's defence.

The facts of this case emerge from the evidence of the three witnesses called by the prosecution. PW1, Bernard Gituma (Gituma) who is the complainant testified that on 16.1.2001 at about midnight he was asleep in his kiosk at Kianjai Market. That the appellant was one of Gituma's well-known customers. At that time, Gituma was woken up by people who were calling him to open the kiosk. Instead of opening, Gituma started screaming. As he screamed, two shots were fired and then other people also started screaming. A third shot was fired. Gituma's door was then broken down. At that point, Gituma's brother, Nathan Gitonga, (PW3 herein, and referred to as Gitonga), came out of his own nearby kiosk and ran towards Gituma's kiosk, but the robbers threatened to shoot him so Gitonga had to run away. Gituma shone a torch at the robbers and that is when he recognized the appellant as one of the robbers. Gituma

testified that he was able to recognize the appellant because of the light from the torch which he shone at the robbers. Then a shot was fired and Gituma made his escape through another door and into the main plantation.

Later while Gituma and Gitonga were on the road where they met, Gitonga again shone his torch at the robbers. The robbers fired at Gitonga and hit him on the leg. Gitonga showed the trial court the scar from the gunshot wound. Though the record does not show on which leg Gitonga was shot, the scar was said to be behind the knee. PW3 testified that it was the appellant's accomplice known as Kinoti who had the gun. A report was later made to Mikunduri P/Station the same night. That night too, Gitonga was taken to Meru General Hospital for treatment.

When Gituma was cross-examined by the appellant, he testified that he informed the police that he could identify two of the ten robbers but that though Gituma knew the appellant's name, he did not give the name to the police. Gituma testified further that when he went to Tigania Police Station, he recognized the appellant as the latter was being given food.

When Gitonga was cross-examined by the appellant, he testified that he had known the appellant since 1983 but that Gitonga did not give the appellant's name to the police, though he maintained that on the material night he saw the appellant from a distance of about 20 to 25 metres. He further testified that the appellant had a gun and rungun. PW2, Inspector of Police one Kenneth Kabiro testified that on 17.1.2001 at about 12.15am, while he was in his house at Tigania Police Station, he was informed by his report office personnel of some shooting in the neighbourhood. He went to the police station and then proceeded to the scene where he found that Gituma's kiosk had actually been broken into and shop goods and some Kshs. 17,000/= in cash also stolen. PW2 commenced investigations into the robbery on 19.1.2001. Acting on a tip off, PW2 went to the appellant's home and after a search, recovered 2 packets of wheat flour, 3 packets of salt, 2 torch batteries, 8 match boxes and 11 pieces of soap. PW2 then arrested the appellant. From the evidence PW2 told the court that Gituma did not see the appellant on the night of the robbery.

PW2 was cross-examined briefly by the appellant. On cross-examination, PW2 testified that according to the investigations, Gituma had no torch on the material night, and that it was other people who had torches and who saw the appellant. PW2 also testified that the appellant claimed the goods that were recovered from his house were his.

The court also cross-examined PW2 at length. From this cross-examination by the court, PW2 stated that Gituma had told him that he had a torch on the material night. That Gituma told PW2 that he did not identify any of the robbers. That when Gitonga was visited in the hospital he (Gitonga) gave the appellant's name as one of the robbers and it was on that information that PW2 arrested the appellant. PW2 admitted that though he was the investigating officer, he did not peruse Gituma's statement which was taken by one Corporal Mungai. Corporal Mungai was not called as one of the witnesses. PW2 was made to read Gituma's statement to the court and from that statement, it was established that Gituma had a torch and that Gituma had informed the police that he could identify two of the robbers. PW2 agreed with the contents of that statement made by Gituma.

When the appeal came before us for hearing the appellant relied on his written submissions and contended therein that the conditions for his purported recognition on the night of the robbery were far from satisfactory. The appellant urged the court to find that the conclusion reached by the learned trial magistrate that he had been properly identified was erroneous and to find that on this ground, the appellant's appeal had merit. The appellant relied on the case of *R. V. Turnbull* (1976) 3 All ER 549 in which it was held that a trial court ought to caution itself of the possibility that a mistaken witness can nevertheless be a convincing one and that in certain cases, a number of such witnesses could all be mistaken. In the cited authority Lord Widgery CJ said the following:- "Recognition may be more reliable than identification of strangers but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

More on this issue later.

The appellant also contended that the prosecution failed to prove its case against him beyond any reasonable doubt, and thirdly that the trial magistrate totally failed to consider the appellant's defence.

Mr. Muteti appearing for the Republic did not oppose the appeal. In his submissions, the learned state counsel contended that since the prosecution's case in the lower court rested almost entirely on the evidence of identification and the circumstances surrounding such identification, the prosecution had not adduced sufficient evidence to allay the appellant's fears that the identification was not error free. Further that there is contradiction in Gituma's evidence, as to whether he identified the appellant during the robbery or at Tigania Police Station when the appellant was being given food. The learned state counsel also pointed out inconsistencies in the evidence of PW2 and PW3 as to whether PW3 had given the appellants name to the police that led to the appellants arrest or whether as PW3 said PW3 did not furnish the appellants name to the police. Mr. Muteti in addressing this issue wondered why PW3, Gitonga who alleged to have known the appellant since 1983 did not give the appellants name to the police and why he did not even take the police to the appellants home.

At this stage, we can perhaps dispose of the learned state counsel's concern on pw3's (Gitonga's) inability to take the police to the appellant's home. There is evidence from both Gitonga and Gituma that during the robbery Gitonga was shot in the leg and he had to be admitted to Meru General Hospital on that same night of the robbery. Our finding therefore is that Gitonga could not possibly have led the police to the appellant's home when he was in the hospital nursing a gunshot wound. PW2 also stated as much that when Gitonga was visited at the hospital by Corporal Mungai, that is when Gitonga gave the appellant's name to Corporal Mungai. There is no other evidence that we can see from the record that Gitonga had an earlier opportunity to speak with the police. Having thus identified the issues for our determination, it is our duty as the first appellate court to reconsider and re-evaluate the evidence before us with a view to arriving at own conclusions as to whether the conclusions reached by the learned trial magistrate were sound or whether as contended by the appellant and supported by learned state counsel the said conclusions were not made on a sound legal and factual footing. See *Pandya V. R.* (1957) EA 336 and also *Okeno V. R* (1972) E.A. 32. Decisions abound on the issue of identification in cases of this nature. The case of *R. V. Turnbull* (above) is relevant to the circumstances of the present case. Both Gituma and Gitonga alleged that they saw the appellant at the scene on the night the crime was committed against Gituma. In his evidence in chief Gituma stated that with the help of torchlight he was able to recognize the appellant through the door. It is not clear though whether this was before or after the door was broken down but this is what Gituma said in part of that evidence:-

"They broke the door. My brother came from his kiosk. He met one and he was threatened with being fired he ran away. I shone a torch to them and I identified accused person through the door from close range. They shot again and I ran away through another door to the main plantation." Later when they were on the road, Gitonga is said to have shone a torch at the robbers who immediately fired. Gitonga said the following:-

"I torched them and I saw the accused person and another not in court called Kinoti. They shot me at my leg ..... It is Kinoti who had the gun. They said they had shot me."

After carefully considering and re-evaluating the evidence as given by both Gituma and Gitonga, it appears to us that neither of them had the real opportunity to recognize the appellant as one of the robbers who had broken into Gituma's kiosk and who were firing at them. Though Gitonga testified that the whole incident took about one hour, it is to be noted that there were great interruptions during the robbery. There were four gunshots one of which is said to have hit Gitonga in the leg. There is evidence to show that both Gituma and Gitonga had to run for their lives, with little possibility of looking back to see who the robbers were.

Gitonga stated that there was enough light from his torch because the batteries were new but as we have stated earlier, there was not the time for either Gituma or Gitonga to positively say that the appellant was one of the two robbers. The torches were shone only once by each and immediately thereupon there was gun fire. It would therefore be unsafe to say that the identification of the appellant through recognition was free from error. In our view, there was not enough time for both Gituma and Gitonga to have the

appellant under long and uninterrupted observation for positive identification of the appellant as one of the two robbers.

A further scrutiny of the record shows that neither Gituma nor Gitonga gave the name of the appellant to the police at first instance. Yet it was PW2's evidence that the arrest of the appellant was as a result of Gitonga having given the appellant's name to the police. On the other hand, Gitonga said that it was Gituma who caused the appellant to be arrested. In his evidence, Gituma testified that though he knew the appellant, he did not give the appellants name to the police. This is what Gituma said in answer to some questions put to him in cross-examination.

"I told the police I was able to identify two people and I knew your name. So, I never told the police your name."

The question that goes begging is why both Gitonga and Gituma did not give the appellant's name to the police if they knew him so well? We have come to the conclusion that the conditions prevailing at the time of the alleged identification were not conducive to positive identification of the appellant. In addition, the failure by both Gitonga and Gituma to give the appellant's name to the police has also caused some doubt in our minds as to whether indeed the appellant was identified by both of these witnesses. As was held in *Peter Ochieng V. R. Criminal Appeal No. 185 of 1997*, the failure by these two crucial witnesses to give the appellant's name to the police in the first instance has caused enough uneasiness in our minds as to whether it would be safe to believe their evidence.

It would therefore appear, as submitted by learned state counsel that the only evidence that was available to connect the appellant to the offence were the goods recovered by PW2 from the house of the appellant. The appellant alleged that the goods were his. Gituma admitted that the shop goods stolen from his kiosk were ordinary shop goods which had no identifying marks on them and as such he could not say for sure that the goods that were produced in court as exhibits were indeed the goods that were stolen from his kiosk. In the circumstances, we are unable to find that such evidence was helpful to the prosecution's case.

Before we conclude this judgment, there are two points on which we must comment. One is on the number of witnesses called by the prosecution. The learned state counsel contended that the prosecution called only three witnesses two of whom were brothers. What we understood Mr. Muteti to mean was that the witnesses were too few. Section 143 of the Evidence Act, Cap 80 provides that no particular number of witnesses shall be required to prove any fact so that if the evidence of these three witnesses was such as to prove the charge against the appellant, we would have had no problem whatsoever in finding that the same was sufficient to sustain a conviction against the appellant. Secondly, the learned state counsel submitted that the additional evidence extracted from PW2 by the court was not subjected to cross-examination by the appellant to test its veracity. We are in agreement with learned state counsel that if the trial magistrate intended to make such clarification he should have done so before giving the appellant the opportunity to cross-examine PW2. As it turned out the appellant's case was decided partially on the strength of evidence which he had had no opportunity whatsoever to test. It is our considered view that this approach by the learned trial magistrate was prejudicial to the appellant as it denied the appellant his constitutional right to test all the evidence given against him. Section 77(1) (e) of the Constitution provides that an accused person shall be afforded facilities to examine in person or by his legal representative the witness called by the prosecution before the court. By choosing to cross-examine PW2 after the appellant had already cross-examined the witness, the court obviously erred on a matter of law.

The final comment is on the drafting of the charge sheet. It is alleged in the charge sheet that the appellant was "armed with dangerous and offensive weapons namely....." Section 296(2) provides very clearly that the offender commits the offence of robbery with violence if he is armed with dangerous OR (not AND) offensive weapons. We have taken the trouble to point out this particular anomaly with a view to bringing it to the attention of both the police and the prosecutors to take care with the drafting which can sometimes lead to technical knockouts of otherwise strong cases. The prosecution ought to be vigilant about it and so should trial magistrates.

In the result, we do allow the appeal. We quash the conviction and set aside the sentence of death imposed upon the appellant on 22.3.2002. We order the immediate release of the appellant from prison unless he is otherwise lawfully held.

Orders accordingly.

**Dated and delivered at Meru this 30th day of June 2005.**

**D.A. ONYANCHA**

**JUDGE**

**30.6.2005**

**RUTH N. SITATI**

**JUDGE**

**30.6.2005**