



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**CRIMINAL APPEAL NO. 60 OF 2016**

MAIKO EKUAM EKIRU ..... APPELLANT

*versus*

REPUBLIC..... RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. H. N. NDUNGU – SENIOR PRINCIPAL MAGISTRATE dated 19th July, 2010 in Nanyuki Chief Magistrate’s Court Criminal Case No. 1803 of 2009)*

**JUDGMENT**

1. MAIKO EKUAM EKIRU, the Appellant was charged with **two counts of robbery with violence contrary to section 296(2) of the Penal Code** and **one count of theft of motor vehicle parts contrary to section 279 of the Penal Code**. After trial the appellant was convicted in all counts and was sentenced to death in respect of the first count whilst the other counts were held in abeyance. Being dissatisfied with his conviction and sentence by the trial court he has presented this appeal against both.

2. This is the first appellate court. The Court of Appeal in the case **DAVID NJUGUNA WAIRIMU vs REPUBLIC 2010 eKLR** in discussing that duty stated:-

*“[The duty of the first appellate court] is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstance of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”*

3. **JOSEPH AMANA PW 1** was an employee of Olpajeta. On 15<sup>th</sup> May 2009 at 2 a.m. he in the company of others, were transporting their colleague Robert to Nanyuki hospital. Robert was unwell. They hired a Nissan vehicle to transport him to the hospital. When they were at Doldol on Nanyuki road the car got a puncture. When they got out of the vehicle they realised they were two punctures. As they began to ponder what to do stones were thrown at them. All of them except their sick colleague ran away fearing that the stones were thrown by thieves. PW 1 saw someone following him about 5 metres away holding a torch. That person ordered PW 1 to stop or else he threatened to kill him. On PW 1 stopping the person demanded from him his telephone. He gave it to him. That person also demanded money.

PW 1 said that he had no money. He narrated what happened thereafter in the following terms:-

***“..... He took the torch he had between his thighs while searching me. In that torchlight I saw and recognised him but I feared to call him by his name rest (sic) he killed me. I saw the man the accused before court. I knew him by his nickname ‘Langipicha’ meaning camera man. He is a photographer. We call him ‘Langipicha’ in Turkana language but his real name is Michael Ikuam. I knew him for a long time about 3 years and he would come to the church with the local pastor Gitonga all the time. Also I know his mother. She reside at Tanginyeusi. He checked my trouser for money.....”***

4. That person took from PW 1's pocket Kshs. 600. The person also stabbed PW 1 near his ribs on the left side.

5. On being cross examined by the appellant this is what PW 1 said in response:-

***“I knew you a long time. I recognized him during the robbery. Initially I did not tell police your name until you were arrested. That was because you had gone underground and I knew you would resurface because your family is there. You placed a torch between your thighs and I saw you. I recognized you with the help of that light. You were holding torch between your knees so you could search inside my trousers.”***

6. **PW 2 FRANCIS MWANGI NDIRANGU** was the driver of the ill-fated vehicle. He too stated that at Doldol the vehicle had two punctures. When they got out of the vehicle stones were thrown at them and they all ran in different directions. On their return to the vehicle after the incident they found the sick person that they were ferrying to the hospital had died and that all his clothes had been stolen. He also noted that PW 1 had been stabbed. The robbers had stolen ten litres of the vehicle fuel, the vehicle jack, wheels spanner and a radio.

7. The **Clinical Officer PW 3** confirmed that he treated PW 1 who suffered an assault from a person that he knew. He stated that PW 1 sustained chest walls stab wounds which necessitated him to be taken to theatre for stitching.

8. The Investigating Officer confirmed that PW 1 was assaulted and that the sick person who had been in the vehicle at the time of the robbery had died. The Investigating Officer also stated that one of the victims of that robbery, without naming him, informed him that he had recognised one of the robbers at the scene.

9. The appellant elected to give unsworn statement in his defence. In that statement he said that he was at a bar in Ngarengiro at night when PW 1 requested him to buy him beer. He declined. He later was arrested and charged with the offences before court.

10. The appellant relied on amended grounds of appeal. Those grounds which were prepared by the appellant in person are as follows:-

***1. That the magistrate equally fell into error in affirming***

***conviction and sentence by failing to observe that I***

***was not at the scene of the attack and further key***

***witnesses were never summoned to testify.***

***2. That the magistrate equally fell into error when he***

***convicted the appellant in failing to find that there is***

*no prompt first report made to police.*

*3. That the learned magistrate erred in law by failing to find that there is discrepancy between the injuries sustained by PW 1 and the medical evidence.*

*4. That the magistrate erred in law in affirming conviction and sentence not considering that I was detained in police custody for long period thus violation of my constitutional rights.*

*5. That the magistrate fell into error in failing to give my statement of defence due consideration.”*

11. In regard to ground 1 the appellant submitted that PW 1's evidence of identification was wild allegations not backed by any facts. He also criticise the prosecution for failing to adduce evidence in regard to the brightness or dimness of the torch that enabled PW 1 to identify the appellant.

12. Senior Principal Prosecuting Counsel Mr. Tanui in opposing the appellant's appeal submitted that there was sufficient evidence of identification of the appellant.

13. Having re-evaluated the trial court's evidence this court is satisfied that there was no error in the identification of the appellant. This court is guided by the decision of the Court of Appeal in this regard in the case **DUNCAN MWEMA V REPUBLIC (2016) eKLR** where the Court of Appeal in considering identification under difficult circumstances stated:-

***“Before accepting visual identification as a basis for a conviction, the court had the duty to warn itself of the inherent danger of such evidence. A careful direction regarding condition prevailing at the time of identification and the length of time the witness had the accused under observation together with the need to exclude the possibility of error was essential.’***

**Nevertheless, it is apt to point out too that in matters of identification, recognition of the accused person by the witness is deemed to be more assuring and reliable than the visual identification of the accused by a total stranger because it is based on the witness's familiarity and person knowledge of the accused. (see Anjononi & Others v. Republic [1976-80] 1 KLR 1566).”**

In this court's view the appellant was known to PW 1 for at least 3 years. He knew him by his nickname in the Turkana language 'Langipicha'. On the night in question there is no doubt that the two were in very close proximity with each other. They were so close that the appellant was able to stab PW 1 with a knife on his chest. The appellant held his torch by his knees while searching the pockets of PW 1 and that enabled PW 1 to identify the appellant. The identification discussed in the case of DUNCAN MWEMA (supra) shows that the identification of the appellant by PW 1 was of higher value because it was one of recognition. It was recognition of a person known to PW 1 for a long period. It was therefore more reliable. In this court's view that recognition was not reduced by the fact the prosecution failed to adduce evidence on the brightness or otherwise of the torch. Contrary to the submissions of the appellant the evidence of PW 1 place the appellant at the centre of the robbery on the night of 15<sup>th</sup> May 2009. It is important to note that appellant's recognition was also not affected by the fact that PW 1 did not

immediately inform the police that he recognised the appellant.

14. The appellant submitted that the prosecution's case must fail for having failed to call the pastor in whose company PW 1 said the appellant was always in. In this court's view and bearing in mind the provisions of **section 143** of the Evidence Act, the fact that that pastor was not called did not affect either the prosecution's case or the appellant's defence. The calling of the pastor as a witness was not essential because he was not a necessary witness in the case. Section 143 provides as follows:

***“No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.”***

15. That section has received judicial pronouncement in two cases. The first case in **BUKENYA VS UGANDA [1971] E.A. 549** where it was stated:

***“The prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent with its case.”***

The second case is **MWANGI VS REPUBLIC [1984] KLR 595** where it was stated:

***“Whether a witness should be called by the prosecutor is a matter within the discretion of the prosecutor and the court will not interfere with that discretion unless it may be show that the prosecutor was influenced by some oblique motive.”***

This court therefore rejects the submissions by the appellant that the prosecution failed to call key witnesses to testify.

16. On the second ground raised by the appellant the court is of the view that PW 1's failure if any to state that he identified the appellant at the scene promptly did not affect that identification or rather that recognition of the appellant.

17. The appellant stated that there discrepancies between the injuries described by PW 1 and those described by the clinical officer. In this court's view there are no such discrepancies. PW 1 stated that he was stabbed near the rib near the stomach. The clinical officer stated that PW 1 had a stab wound on the chest wall on the left side. There is therefore no discrepancy.

18. The appellant submitted at length that the police violated his constitutional rights by holding him in custody for 8 days contrary to article 49 of the new constitution of Kenya. That submissions is in error because the appellant was arrested in July 2009 prior to the promulgation of the new constitution. The new constitution under which the provisions of Article 49 falls was promulgated in August 2010. It follows that any violations that would be alleged by the appellant could only be considered under the old constitution of Kenya. Under the old constitution **section 72(3)** the police could hold a suspect who was arrested for a capital offence, such as the one the appellant faced, for 14 days. The appellant according to the charge sheet was arrested on 20<sup>th</sup> July 2009 and arraigned in court on 28<sup>th</sup> July 2009. Appellant was therefore in police custody for 8 days. The appellant suffered no violation. Even if there was a delay in producing the appellant before court, I would go by the holding of **Justice John M. Mativo** in the case **FRANCIS MUTHEE MWANGI V REPUBLIC [2016] eKLR** when considered the consequences of a three days delay in presenting an accused before court stated:-

***“It is worth noting however that an accused person is not automatically entitled to an acquittal where the prosecution had not been given a chance to offer an explanation for failing to bring him to court on time.”***

19. In the final ground of appeal the appellant alleged that the trial court failed to consider his defence. As stated before the appellant did not adduce evidence of his whereabouts on the day of robbery. His defence suggested that his arrest was due to PW 1 wanting to frame him because he refused to buy PW 1 beer. Contrary to what the appellant submitted the trial court considered that defence and rejected it.

20. In the end this court wholly upholds the conclusion of the trial court where the trial magistrate in her considered judgment stated as follows:-

*“The evidence of identification is in my view clear and without error or fault. The accused was well known particularly to PW 1 for a long time and I am of the view that there cannot be a case of mistaken identity here. I have also considered the defence by the accused person to the effect that the complainant has frame (sic) him up that because he had declined to buy him a beer. It will be noted that PW 2 also said he did see the accused person during the robbery and later when PW 1 pointed in that he confirmed that indeed the accused was the person who attacked them.”*

21. The appellants appeal for the reasons stated above is dismissed. The trial court’s **conviction is hereby confirmed and sentence is hereby upheld.**

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF FEBRUARY 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Maiko Ekuam Ekiru .....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**