



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 72 OF 2013**

DIRECTORATE OF PUBLIC PROSECUTION.....APPELLANT

VERSUS

ISIAIAH NDWIGA MUGO.....RESPONDENT

***(An Appeal of the Judgment by the Ag. Senior Resident Magistrate Runyenjes in Criminal Case No. 952 of 2012 on 12/7/2013)***

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

The Director of Public Prosecutions challenges the judgment of Ag. Senior Resident Magistrate Runyenjes in which the respondent was acquitted of the charge of grievous bodily harm contrary to Section 234 of the Penal Code. In the petition of appeal, the following grounds were put forward:-

1. *That the learned magistrate erred in law in holding that identification of the respondent was not sufficient.*
2. *That the learned magistrate ignored the evidence of the complainant concerning identification.*
3. *That the trial magistrate believed the respondent in his alibi defence which had no basis whatsoever.*
4. *That the learned magistrate erred in holding that the conditions for identification at the scene were poor.*
5. *That learned magistrate was biased against the prosecution with the resultant effect that he ignored the evidence on record.*

The appellant filed submissions in which it attacked the judgment of the magistrate. It was argued that the complainant identified the respondent positively. The described the way the respondent was dressed with a white shirt and blue trouser. He also testified that there was moonlight that night which enabled him to identify the respondent. The medical evidence supported the testimony of the complainant to the effect that he sustained injuries during the attack.

The appellant further submitted that it was misdirection on the part of the magistrate to find that the evidence was not corroborated. The trial court ignored the fact that one may be convicted on the evidence of a single identification witness provided that the magistrate warns himself of the danger. It was argued further that there was no contrary evidence to rebut that of the complainant.

The appeal was opposed by the respondent in his written submissions filed in court on 26/3/2015. He pleaded innocence and complained that he was not served with the appeal one year down the line which is against the law.

Briefly stated, the complainant PW1 testified that on the 21/10/2012 at around 8.00 p.m. he was coming

from Kigumo market after buying some sugar and a mobile phone. One Ciachura accompanied him from the shopping centre. The two men met the two accused persons on the way. The respondent descended on the complainant cutting him with a panga from behind. However, the 2nd accused did not assault PW1. With the assistance of the bright moonlight, the complainant said that he was able to identify the appellant. The complainant was taken to hospital by good Samaritans.

On the 23/10/2012 the report of the attack was made at Runyenjes police station. The complainant was issued with a P3 form and was treated for the injuries sustained at the time of the incident. Thereafter, the accused persons were arrested and charged.

PW2 and PW3 were neighbours of the complainant. They did not witness the incident but they assisted to take the complainant to hospital.

PW4 testified that he filled the P3 form in respect of the complainant. On examination, he found that PW1 had a deep cut on the left side of the head extending to the left eye and had a broken scalp. The degree of injury was classified as grievous harm.

PW5 a police officer attached to Runyenjes police station testified that the report was made at the station on 23/10/2012 to the effect that PW1 had been attacked on 21/10/2012 as he was walking home in the company of his employee. The matter was investigated and the two accused persons were later charged with the offence.

The respondent and his co-accused Charles Gitonga Ndwiga denied committing the offence and relied on their alibi defences. The respondent stated that on the date of the alleged incident he was in the home of one Ngari Kamau where he stayed until 6.00 p.m. when the two left and went to a bar. They took their drinks until 10.00 p.m. when they went home in separate ways.

The co-accused told the court that on the material day that he was on duty in the hotel where he worked until 11.00 p.m. when he went home. He called his employer DW3 as a witness. DW3 confirmed that he owns a hotel in Kigumo and that Charles Gitonga Ndwiga is his employee in his business. He further testified that on the material day he was at his place of work with Charles Gitonga until 11.00 p.m. when they went home.

The issues for determination in this appeal are as follows:-

1. *Whether the respondent was positively identified by the complainant.*
2. *Whether the magistrate erred in law and fact in acquitting the respondent of the offence.*
3. *Whether the trial magistrate acted against the weight of the evidence.*

This appeal was filed in November 2013. A notice of appeal dated 11/11/2013 seems to have been sent using the respondents postal address P.O. Box 26 Runyenjes. Thereafter, some hearing notices were sent to the appellant through the office of the respondent. There is no confirmation in the record that the notice of appeal reached the respondent. It is likely that the respondent was served with the notice one year down the line. However, there is no limit for service of an appeal.

The alleged offence took place at night at around 8.00 p.m. The complainant testified that he was attacked by the respondent with a panga from behind. He also told the court that he was able to identify the respondent through the bright moonlight. The prosecution did not explain the intensity of the light and failed to explain the distance from which the complainant saw the respondent. The fact that the complainant was attacked from behind makes identification doubtful. He did not explain whether after being cut with a panga he was able to turn back in order to see his attacker. He told the court that he was accompanied by his employee namely Ciachura who was not called as a witness. The said Ciachura would have shed some light on how the incident occurred and on the issue of identification. The prosecution did not explain why the said witness was not called to testify.

The magistrate relied on the case of **BUKENYA & ANOTHER VS REPUBLIC [1972] EA 549** which

was cited in the case of **GABRIEL KITIKI VS REPUBLIC [2006] KLR** where the court held

*“The prosecution is duly bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in appropriate case lead to an inference that the evidence of uncalled witness would have ended to be adverse to the prosecution....”*

During cross-examination, the complainant said that he was able to identify the clothes the respondent was wearing. This did not come out in his evidence in-chief and no unique features of the said clothings were given to the court to distinguish them from other clothing. The complainant did not give any description of the appearance of the respondent and his co-accused to the police.

The respondent and his co-accused tendered alibi defences which were not dislodged by the prosecution. Once an accused person has given an alibi defence the prosecution bears the burden to dislodge it. The evidence of DW3 confirmed that the co-accused Charles Gitonga was on duty at the material time. This evidence remained unchallenged.

There is no requirement that the evidence of a single identifying witness be corroborated. However, such evidence must be closely scrutinized by the court before convicting an accused. In the case of **WAMUNGA VS REPUBLIC [1989] KLR 424** it was stated that:-

*“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”*

Similarly in the case of **MAITANYI VS REPUBLIC (1986] KLR 198** the Court of Appeal in dealing with identification by a single witness held:-

- 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need or testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.*
- 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.*
- 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made.*
- 4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.*

Having considered the circumstances and conditions of lighting at the scene it leaves a lot of doubts as to whether the respondent was positively identified. The complainant was not able to give any description or identification of his assailants to the police. He only insisted that he knew the respondent very well. It may not be in dispute that the complainant may know his attacker but the pertinent issue is whether he positively identifies or recognizes the person at the scene. Having failed to give any description of his attackers initially, any later identification or recognition must be treated with suspicion unless explained.

I reach a conclusion that the magistrate’s decision was supported by cogent evidence and that he carefully considered all the issues involved. The issue of misdirection on the part of the trial magistrate in this case does not arise. The decision of the trial magistrate is accordingly upheld.

I find no merit in this appeal and it is dismissed accordingly.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 8TH DAY OF JUNE, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Matera for the Respondent**

**Appellant present**