



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Gachuhi & Masime JJA)

CRIMINAL APPEAL NO 194 OF 1985

BETWEEN

DAVID MWANGI WANJOHI..... 1ST APPELLANT

PETER MWANGI2ND APPELLANT

NDUIGA MUGO..... 3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a conviction and judgment of the High Court at Nairobi, Cockar & Torgbor JJ dated 19th July 1985

in

Criminal Appeals Nos 1504-6 of 1983)

April 27, 1989, the following Judgment of the Court was delivered.

Three persons David Mwangi Wanjohi, Peter Mwangi and Nduiga Mugo were sentenced to death on a charge of capital robbery contrary to Section 296(2) of the Penal Code. It was held to have been proved by the trial court that at about 10 p.m. on 19th January, 1983 that these three men had seriously assaulted Nelson Muriithi Mugeru at Kiangima village at Mukunduri Trading Centre, in Embu District, and stolen his shoes a *Lenvin* wrist watch, two kilogrammes of meat and Kshs 80/- in cash. The attack on Nelson began with the threat of being shot with something looking like a pistol. He was hit hard on the head and rendered unconscious until the next morning. Whether or not the wound on the back of Nelson's head was caused by the use of a heavy blunt weapon suggested by medical evidence, it was the wound which complied with the charge. Hence if the appellant David and Peter were proved to have been in possession of the stolen articles belonging to Nelson, shortly after the theft, and the appellant Nduiga Mugo was recognised by Nelson, it would follow that they had been proved to have committed the charge, in the circumstances of this case.

On first appeal, the High Court confirmed their convictions and they have now appealed to this court.

In the case of the appellant Nduiga Mugo (called the Accused 3 at the trial) we are convinced that the evidence of recognition was not correctly appreciated as a matter of law.

The evidence of Nelson was to the effect that while Nelson was walking alone the headlights of a vehicle behind him showed him three people ahead of him. When they got closer, he saw one had the uniform of an Administration Policeman, that is that he had a maroon pullover and a military cap. When very near, one man (not the appellant) pointed at him something that looked like a pistol, and told him not to move forwards or backwards. This was the man with the uniform, and this man caught hold of Nelson's neck with one hand. Nelson struggled to get away. Nelson was hit on the head a number of times and he fell down unconscious. In the course of this attack, Nelson thought that he recognized Mwenga Kamuruana. This is said to have been Nduiga Mugo's other name. On recognizing Mwenga, Nelson knew that the other men attacking him were not policemen. Mwanga was close to Nelson. "The light from the stars was enough and I knew him well." remarked Nelson.

Yet at the same time, Nelson was unable to describe the part played by the appellant, or the clothes that he wore. Nothing is recorded as to any distinguishing feature, such as he appellant's voice or physical appearance.

Nelson's first report is not recorded.

In these circumstances, where the attack was swift rendering Nelson unconscious, the possibility of correct recognition is remote. It may well be that Nelson appeared to be an honest and witness, and that his failure to identify the appellants David and Peter indicated that he was not prone to exaggeration. But that was the situation in *Roria v Rep* [1967] E.A. 583 where at page 584 the Court of Appeal remarked:-

"In the present case the learned trial Judge thought Samaji an honest witness. We do not quarrel with his assessment of her honesty, but a witness may be honest yet mistaken, and in excluding the possibility of a mistake on her part, the learned Judge, with respect, erred in our view."

It will be said that recognition is stronger than identification. That may be so; but an honest recognition, but yet be mistaken. The trial court did not observe this distinction. The Court was impressed by the demeanour of Nelson, and although the "identification" was made at night, the Court had no hesitation in accepting that evidence.

The trial court approached the problem from the wrong angle. The High Court set out all the principles laid down in *Abdullah Bin Wendo v R* (1953) 20 E.A.C.A 166; *Roria v Rep*. (supra) and *Turnbull v Reg C.A.R.* (1976) Vol. 63, P. 1132 at P. 1137 and thus realized that the vital question upon which there is special need for caution is the correctness of the identification, i.e excluding any mistake. Unfortunately the High Court devalued this principle in the following passage:

"The trial magistrate was impressed by the quality of this evidence and therefore omitted any reference to the possibility of the appellants' identification as mistaken, though such a reference might have been desirable. We do not think that the omission or error resulted in any failure of justice."

That is, with respect, wrong. It is not that a reference to mistaken identification is desirable. It is the vital question. It is the vital question which has to be answered beyond reasonable doubt. Was the appellant recognized beyond reasonable doubt? Whether the error caused a failure of justice is the next step.

The quality of the evidence has to be considered. Does starlight afford a means of illumination for observing the shape or features of a person to such a degree that proof can be had beyond reasonable doubt, or is it a state of darkness richer in imagination than fact? There is no doubt that starlight *per se* affords no scientific means of illumination at all. It may purport that there was a clear sky, against which

there might be seen the semblance of a human being. But it is not an assured basis, such as moonlight, for observing the details of the features of a person. Indeed Nelson could not tell what clothes the appellant was wearing, however close the latter was to Nelson. It is plain that Nelson could not see details, and the appellant did not speak, nor move in any special way, or indicate any special feature. We are bound to say that the quality of the evidence was precarious at best, and that it was a misdirection for the High Court to conclude that the conditions for "identification were not unsatisfactory." However long Nelson had known the appellant, if there was no light by which to see the appellant, nor other means of recognition, Nelson could only have guessed at the identity of the man near him, and in that event the failure to put the cardinal question, could Nelson have been mistaken, was a grave error. It is also surprising to find that the High Court felt that mistaken identify was not raised by the defence. The appellant had said that he had not been present. Is that not raising the issue of mistaken identity? It is said that he did not cross-examine Nelson on mistaken identity. Was that not suggested by the question to which the answer was "no, I could not recognize the clothes you were wearing when I was attacked." But in any case, upon whom was the burden of proof? Was it not upon the prosecution who were relying on improbable evidence?

The Republic submitted that starlight might not be sufficient means for identification of strangers, at some distance, but it may be a sufficient illumination for persons well known who are close. We agree with Mrs Kamande that the illumination by starlight is not a scientifically assured basis of perceiving the features of a person and unless the witness relies on some sound means of distinguishing the person, perhaps by voice or conduct, touch or otherwise, mere starlight is not sufficient as a means of proof beyond reasonable doubt.

That being so, other evidence was relied upon. The Republic suggested that the appellant had been seen in the light of a car. Had that been the case, there would have been some evidence upon which to base the identification. But that is not what Nelson relied upon, and it cannot be said that that must have been the case.

It was also suggested that the defence of the appellant showed that as the appellants David and Peter had stayed with the appellant on the night of the attack on Nelson that they must all have associated together in the attack. There was a toy gun in this appellant's house. That was put down to the appellant having possession of it, and also that it must have been the gun used by the man wearing the Police uniform. That was possible, but not inevitable. As Mrs Kamande pointed out, this circumstantial evidence must not allow for other reasonable hypotheses of innocence apart from that of guilt. Moreover, it was no part of the case against this appellant that the appellants David and Peter led the police to this appellant's house. That appears to have been relied on by the High Court to strengthen the case. If so, that was also a misdirection as it was largely hearsay; an indeed the toy pistol could easily have been left in the house by David and Peter, since they had other property stolen from Nelson. This part of the case could not support the conviction alone.

The result then would seem to be that the evidence of recognition was not sound, and the circumstantial evidence was not sufficient in itself to prove the case. Consequently this appellant's appeal is allowed, his conviction quashed and sentence set aside. He is ordered to be set at liberty forthwith.

On the other hand the appeals of the appellants David and Peter are dismissed. Each one was found in very recent possession of stolen property belonging to the victim Nelson. There were some discrepancies in the evidence as pointed out by the learned counsel for each appellant. But the lower courts were entitled to find that David had Nelson's *Lenvin* watch and Peter the shoes of Nelson. David also had an administrative Policeman's uniform.

The proper inference of theft was drawn, which led to the finding that these two men were guilty of robbery as charged. Accordingly their appeals are dismissed.

Dated and delivered at Nairobi this 27th day of April , 1989

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR