



**IN THE COURT OF APPEAL FOR EAST AFRICA**

**AT NAIROBI**

**( Coram: Madan, Law JJA & Miller Ag JA )**

**CRIMINAL APPEAL NO. 27 OF 1977**

**BETWEEN**

**NJERI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was convicted of doing grievous harm to the complainant Teresiah, contrary to Section 234 of the Penal Code, by the Resident magistrate at Kiambu. She appealed to the High Court, but her appeal was dismissed.

The case against the appellant was that as the complainant was passing the house of the appellant at Gathanga Village on March 29, 1976, she saw a group of persons standing by the side of the road. It was 10 pm and presumably dark. The complainant deposed that she heard the appellant say “there she is passing, break her legs.” The complainant was then violently assaulted and lost consciousness. The next thing she knew was that she was at Kiambu Hospital, where she remained as an in-patient for over six weeks, suffering from a compound fracture of the skull and of the left tibia and fibula. When seen by a policeman a few days after being admitted to hospital, she named the appellant as the assailant.

The case against the appellant was not a strong one. The learned trial magistrate carefully directed herself as to the danger inherent upon convicting on the evidence of a single witness at night. It was common ground that the complainant and the appellant were neighbours, and that they had known each other since 1960. The learned magistrate was satisfied that there was no possibility of error in the identification. The learned High Court judges on first appeal came to the same conclusion.

On a second appeal this court is concerned only with points of law. Once it is established that there was some evidence to support a conviction, this court will not on a second appeal examine the sufficiency of that evidence. There was some evidence implicating the appellant in this case, although it may not have been strong evidence. The sufficiency or otherwise of that evidence does not constitute a question of law. As the learned High Court judges observed, a conviction can in law be based on the evidence of a single identifying witness. It is only if a conviction is based on no evidence or if the courts below have misapprehended evidence or misdirected themselves in relation thereto, that a question of law arises on a second appeal.

Mr Otieno has submitted that identification by voice is less satisfactory than visual identification. In our view it can be equally safe and free from error, more so if the identification takes place at night. We agree with the two lower courts that in the particular circumstances of this case, the appellant and the complainant being familiar with each other for many years, the possibility of error was excluded.

We see no merit in this appeal, and order that it be dismissed.

**Dated and Delivered at Nairobi this 15th day of May 1979.**

**C.B.MADAN**

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**JUDGE OF APPEAL**

**E.J.E.LAW**

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**JUDGE OF APPEAL**

**C.H.E.MILLER**

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**AG.JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**