



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (P.C.A.), J. MOHAMMED & KANTAI, JJ.A.)**

**CRIMINAL APPEAL NO. 90 OF 2010**

**PAUL THUO MBURU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng, JJ.), dated 15<sup>th</sup> March, 2005*

*in*

*H.C.CR. A. No. 577 of 2002)*

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**JUDGMENT OF THE COURT**

On the 18<sup>th</sup> day of June, 2001, Dr. Godfrey Baltaza (PW 1) (Baltaza), left his place of work at Kenyatta National Hospital, Nairobi, at 5 pm and headed home in Ngong. He arrived home at about 5.30 pm but decided not to enter the home but to drive to his farm which was near his home. Unfortunately his motor vehicle stalled a few metres from his home and this being a recurring problem, he telephoned his son Billy Baltaza, (PW 2) (Billy) and asked him for help. He alighted from the motor vehicle leaving the ignition key in place. As he waited for his son Billy, he saw two young men approach. He did not know them before. They crossed the road and accosted him producing guns which they pointed at him. They ordered him to get back into the motor vehicle where he sat at the back seat.

According to him, the appellant sat at the driver's seat and attempted to start the vehicle which of course could not start. They threatened to kill him. The appellant ordered him to remove his Rado golden watch which he took; he also took Baltaza's national identification card, his wife's identification card, 2 ATM cards, a credit card and cash of about Ksh. 1800/=. As this was going on, Billy arrived. One of the attackers got out of the vehicle and ordered Billy to get into the vehicle. Billy who had come knowing that the problem with the motor vehicle was an overflow of fuel and was carrying a soda bottle as part of the equipment to rectify the problem, resisted. He aimed the bottle at the attacker but unfortunately missed his target. The attacker panicked and shot Billy twice in the chest. Billy fell down. This created a commotion and the attackers fled the scene.

Baltaza being a medical doctor administered first aid to his son and a friend happened by and they rushed Billy to a nearby health facility. Billy was later transferred to Nairobi Hospital where he was admitted and

a difficult operation to remove bullets lodged in his chest was done. He stayed in ICU for about 2 weeks.

Happily, he survived. Baltaza reported the incident at Ngong Police Station where he recorded a statement. About two months later, he visited the said police station to try and identify some people who had been arrested. Meanwhile, after Billy had recovered, he had also visited the said police station and recorded a statement.

More than two months after this incident, Billy was reading the Daily Nation when he saw photographs of suspects published by police as wanted persons. He thought he recognized the appellants' photograph and he went to Ngong Police Station. The appellant and another had been arrested by police from Kiambu Police Station. Billy went to Ngong Police Station where an identification parade was to be mounted but the appellant and his accomplice refused to participate and so no parade was mounted.

These are the events that led to the laying of a charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** against the appellant and another who was acquitted at the trial. Particulars of the charge were that the appellant and the other on the said day in Ngong, while armed with dangerous weapons namely pistols, robbed Baltaza of his wrist watch make Rado, 3 ATM Cards, one credit card and two 2 national identification cards and cash Kshs. 2800/= all valued at Kshs.12,000/= and that at or immediately before or immediately after the time of such robbery they threatened to use actual violence against the said Baltaza.

The second count was grievous bodily harm contrary to Section 234 of the Penal Code, particulars being that the appellant and his partner on the same date and at the same place willfully and unlawfully did bodily harm to Billy.

The two were charged before the Chief Magistrate, Kibera, and were tried by Ms Siganga, Senior Resident Magistrate, who in a judgment delivered on 15<sup>th</sup> May, 2002, convicted the appellant and sentenced him to death on the first count and to two years suspended sentence on the second count. The other accused person was acquitted of the charges the court finding no evidence to link him to the charges.

A first appeal to the High Court of Kenya at Nairobi, (**Lesiit & Ochieng, JJ.**) failed, and that provoked this appeal. Being a second appeal Section 361 (1) (a) of the Criminal Procedure Code mandates us to deal only with issues of law but not matters of fact which have been tried by the trial court and retried by the first appellate court unless, on the whole, we found that the courts below reached conclusions unsupported by the evidence or which a reasonable tribunal properly applying the law would not reach on the mandate of the court on a 2<sup>nd</sup> appeal.

On the duty of the Court on a 2<sup>nd</sup> appeal like this one, see the case of **Njoroge v Republic [1982] KLR 388**. The following statement appears in **Karingo v Republic [1982] KLR 213** at 219:

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja v R. (1956) 7 EACA 146).”***

Apart from Baltaza and his son Billy the prosecution called IP John Otieno attached to CID office, Ngong Police Station. The totality of his evidence was that he had been requested by an investigations officer (who was not called as a witness by the prosecution) to conduct an identification parade but that the appellant and the other suspect had refused to participate in the same on account of their photographs having been published in a newspaper which photographs had been seen by Baltaza and Billy.

Dr. Zephania Kamau testified on the serious injuries suffered by Billy and produced a P3 Form as exhibit in the case.

No.74636 PC Alex Mureithi was the arresting officer. He was on patrol on Thika Flyover with his

colleagues on 17<sup>th</sup> July, 2001 when they stopped a motor vehicle which had been circulated by police as having been stolen in Ngong the day before. There were 3 occupants in that motor vehicle who included the appellant and a person who was eventually charged with him in Court. One of the occupants of the motor vehicle shot at police but missed. Police shot back and killed him instantly. The witness testified further that the appellant who was also armed and the other suspect fled the scene to a nearby bush but were arrested with assistance of members of the public and pistols found on them. They were escorted to offices of CID where it was discovered that there were many other cases involving the appellant and his accomplice. They were thus charged with the offences that have led to this appeal.

Put on his defence the appellant in a sworn statement testified that he was a businessman who sold vegetables in various places and that he was arrested on charges that he knew nothing about. It was his case that the charge laid against him were a result of photographs that had appeared in a newspaper and he denied that he was in the stolen motor vehicle at all but that he was buying vegetables near the scene of arrest.

This was the case that led to the appellant being convicted as we have stated. When the appeal came up for hearing before us the appellant was represented by learned counsel Mr. P. M. Nyaga while the respondent was represented by the learned Senior Assistant Deputy Public Prosecutor Mr. Peter Mailanyi. Learned counsel for the appellant relied on a Supplementary Memorandum of Appeal drawn by him on behalf of the appellant where 4 grounds of appeal are set out. These grounds range from an attack of the first appellate court which is said to have erred in finding that the identification of the appellant was positive without the possibility of error. That court is also said to have erred in failing to make an adverse inference on the prosecution's case on account of the complainant's failure to give a description of the assailants to the police. Also that the first appellate court should have made an adverse inference on the prosecution's case on account of the complainant's failure to record an initial report. Finally, that the first appellate court failed in its duty of re-evaluating the evidence to reach its own independent findings on the evidence.

In submissions before us Mr. Nyaga submitted that the circumstances existing when Baltaza and Billy were attacked were not favourable to allow for positive identification free from possible error. Learned counsel wondered why neither Baltaza nor Billy had given a description of the attackers to police and yet Billy said he could identify the appellant in a photograph that appeared in a newspaper months after the attack. According to learned counsel, had the High Court properly carried out its mandate of re-evaluating the evidence it would have noted material contradictions in the prosecution case such as how long the attack took – according to Baltaza this was 5-8 minutes while Billy testified that the attack took 20 minutes. Also, that Baltaza testified that he had not known the attackers before while in cross-examination he stated that he had seen the attackers before within Ngong area. Learned counsel faulted the prosecution case where it was stated that Billy had been shot at the scene of robbery yet the prosecution had not produced spent cartridges which would have tied the appellant to the incident. Learned counsel completed his submissions by attacking the prosecution case where PC Alex Mureithi testified that a gun was recovered from the appellant upon arrest but that gun was not produced in court. Learned counsel thought that all these issues were missed by the High Court which in the event had failed to carry out its mandate of re-evaluating the evidence and reach its own independent conclusions as required in law.

In opposing the appeal Mr. Mailanyi for the respondent submitted that the incident took place in broad daylight at an open place and that Baltaza sat in the car with the appellant and had a good opportunity to observe him. According to learned counsel, Billy identified the appellant in a photograph that was published by police of wanted persons and immediately visited Ngong Police Station where he stated that he could identify the appellant.

Mr. Nyaga, in a brief reply, submitted that where identification was made in error it became a matter of law clothing us with jurisdiction to consider on a 2<sup>nd</sup> appeal like this one.

We have considered the record of appeal, the submissions made before us and the law and have taken the following view of this appeal.

Learned counsel for the appellant submits that the trial court and the first appellate court erred in holding that there was positive identification of the appellant by Baltaza and Billy.

The record shows that Baltaza gave detailed evidence on how his car stalled and how he was accosted by people who he called youths who attacked and robbed him. He said that he did not know them previously. He did not give any description of the attackers to the police. He said:

***"...I did not describe to the police the mode of dressing of the robbers. I did not also describe the robbers to the police..."***

And

***"...I had seen your face previously in the Ngong area and I knew I could recognize you anywhere I see you..."***

Billy testified that after being discharged from hospital police visited him at home and he recorded a statement. He did not give any description of the attackers to the police but that one day he was reading a newspaper when he saw a photograph and recognized it as that of the appellant and that he told the police as much.

In the analysis of evidence on identification the learned trial magistrate held that:

***"...it is clear that PW1 and PW2 gave similar descriptions of accused's 2 mode of dressing and role during the incident. This cannot be a coincidence and this is a (sic) clear evidence of accused's 2 involvement in the robbery of PW1 and wounding of PW2. The testimonies of PW1 and PW2 controvert accused's defence that he knows nothing of the incident..."***

The High Court on first appeal agreed with this analysis.

We have perused the record and cannot find the evidence in which the trial court reached the conclusion that it did. Baltaza gave detailed testimony but did not give any description of the attackers to the police. His son Billy who was seriously injured in the incident did not also give any description of the attackers to police at all and he did not explain how he was able, in November, 2001, about 5 months after the incident, to positively identify the appellant through a photograph of the appellant published in the newspaper by police as a wanted person. In criminal jurisprudence a trial court must exercise extra care when considering evidence on visual identification in all circumstances. In the case before the trial court Baltaza thought that the whole incident, where he had been threatened with guns took 5-8 minutes while his son Billy who joined him at the scene long after the robbery had started testified that the incident took 20 minutes.

In ***Roria v Republic [1967] EA 583 Sir Clement De Lestang, V.P.***, sitting in the predecessor of this Court had this to say on identification at p.584:

***"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardener, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts:***

***'There may be a case in which identity is in question and if any innocent people are convicted today, I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity'".***

And in Kenya, the sentiments of Lord Gardener were in the comments made by the predecessor to this Court in the case of ***Kamau v Republic (1975) EA 139*** where it was stated: ***"The most honest***

***of witnesses can be mistaken when it comes to identification".***

As a result of the concerns shown by the courts as indicated above on the need to ensure that no person is convicted of an offence on the basis of the untested evidence of visual identification by a witness, this Court has set out certain guidelines that would help the trial courts and the first appellate courts to ensure that a person is convicted only when it is beyond *per adventure* that he was properly identified. In the case of ***Cleophas Otieno Wamunga v Republic (1989) KLR 424***, this Court set out the guidelines as follows:

***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well known case of R. vs Turnbull (1976) 3 ALL ER 549 at page 552 where he said:***

***'Recognition may be more reliable than identification of a stranger; 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'".***

The circumstances in the case before the trial court where Baltaza was accosted by 2 young men and threatened with guns and where his son Billy, in joining them, was not only threatened but was shot and seriously injured and where neither of them gave a description of the attackers to the police on first report or at all cannot be said to have been favourable for a positive identification. If, indeed, Baltaza had seen the attackers before in the Ngong area why did he not state so on first report or in his statement to the police? Why did he not unhesitatingly tell the police that he had previously seen the attackers in the Ngong area? Baltaza gave a very detailed account of how the attack took place but he did not state at all that he had seen the attackers before or that he had recognized them. The conclusions reached by the trial court as confirmed by the High Court on first appeal were not supported by the evidence at all. Had the High Court properly evaluated the evidence it would have noted that neither Baltaza nor his son Billy gave any description of the attackers to the police. The circumstances of the attack were also such that Baltaza was accosted by the attackers and forced into the car and he did not say that he had a good opportunity to see the appellant properly for a positive identification about 5 months after the attack. According to him the whole incident took about 5-8 minutes but according to his son Billy the incident took 20 minutes. The High Court should have noted that there were material contradictions even on how long the attack took according to the evidence of these 2 witnesses.

Having reached the conclusion that the trial court reached its conclusions on either very weak or no evidence and having found that the High Court failed in its duty of re-evaluation of the evidence we do not have to examine the other grounds of appeal raised by the appellant which, in any event, all revolve around the issue of identification.

The conviction of the appellant was unsafe and should not be allowed to stand. The appeal has merit. We hereby allow it and quash the conviction of the appellant and set aside the sentence imposed. The appellant shall be set free forthwith unless otherwise lawfully held.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of June, 2017.**

**P. KIHARA KARIUKI, PCA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**