



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & MURGOR J.J.A)

CRIMINAL APPEAL NO. 188 OF 2013

BETWEEN

ROBERT KAMAU WAMBUI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, & Ochieng, JJ)  
dated 17<sup>th</sup> July 2013*

*in*

*HCCRA No. 243 of 2008)*

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**JUDGMENT OF THE COURT**

In this second appeal, **Robert Kamau Wambui, the appellant**, was charged before the Chief Magistrate at Makadara, with two counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the offence are that on 14<sup>th</sup> July 2006 at Maringo Estate jointly with others not before the court, the appellant while armed with dangerous weapons namely a toy pistol robbed the complainants, **Francis Munyao Mutua, PW1 (Francis)** of Kshs. 5,600/- and **Joshua Mutisya Paul, PW2 (Joseph)** of Kshs. 7,000/- and immediately before or immediately after threatened to use actual violence on each of the complainants' respectively.

The appellant pleaded not guilty to the charges.

Briefly, the facts are that at about 7.30 p.m. on 14<sup>th</sup> July 2007, Francis and Joshua had gone to visit Joshua's cousin in Maringo Estate, but his cousin was not at home. As they returned home, eight assailants attacked them, ordered them to lie down at gun point, and demanded Francis' mobile phone. Francis, on realizing that one of the assailants, the appellant herein, had a toy pistol, caught hold of two of them, and a struggle ensued. Suddenly, there were gun shots and, as the police arrived at the scene, the appellant slipped out of Francis' grip. Together with the police, Francis and Joshua chased the robbers. The appellant tried to enter the compound of Dr. Farsha Primary School, but was caught by the fence. **PC Geoffrey Jefwa, PW 3**, of Maringo Police Post who was on patrol that evening, arrested the appellant and

also recovered a toy pistol at the scene.

In his defence, the appellant testified that he resided in Maringo Estate and was a mechanical student in Kariobangi, and that while on his way home, he heard gunshots. As he was running away, he was stopped by police at Maringo Girls, and taken to the police station. He stated that the toy pistol was planted on him and that no stolen property was recovered from him.

After hearing the case, the trial magistrate found that the charge was proved, convicted and sentenced the appellant to death as by law prescribed. Dissatisfied with that decision, he appealed to the High Court that upheld the trial court's decision.

The appellant has now preferred an appeal to this Court. Relying on the Memorandum of Appeal of 25<sup>th</sup> July 2013 and the supplementary grounds of appeal filed on 2<sup>nd</sup> March 2016, he complained that the High Court failed to appreciate that he was not properly identified; failed to evaluate the evidence, and instead relied on evidence that was contradictory; and finally that the prosecution failed to call a vital witness, that being the investigating officer.

On behalf of the appellant, learned counsel **Mr. Nyachoti**, submitted that the identification of the appellant, was not free from error as the circumstances were unfavourable. It was dark, and the witnesses did not indicate the intensity of the light, so as to enable them to see and identify the appellant.

Counsel further submitted that there were two scenes for consideration, the scene of attack and the scene of arrest. From the scene of attack, there was no indication of how long the chase took, or who arrested the appellant. As none of the witnesses saw the appellant, it could not be conclusively stated that he was in fact one of the assailants. Counsel surmised that the appellant could have been taking cover in view of the gunshots that had been fired; that the prosecution's case was based on circumstantial evidence, which was insufficient to arrive at a conviction.

Counsel further argued that the evidence of Francis and Joshua was contradictory, in that, on the one hand, Francis stated that he struggled with the robbers, while Joshua stated that they were ordered to lie on their stomachs which they did. It was further argued that in view of the chaotic scene, there was no possibility for either Francis or Joshua to have identified the appellant.

Counsel concluded by submitting that only the testimony of the arresting officer was received, but had the case been investigated by an investigating officer, an identification parade should have been conducted and the appellant properly identified.

In response, **Ms. Maina**, learned senior public prosecuting counsel opposed the appeal and submitted that there was sufficient evidence to secure a conviction. Counsel further submitted that Francis and Joseph identified the appellant as the lighting from the electric lights in the area was adequate, and that during the ensuing struggle with the appellant, Francis saw his face. As he tried to escape, they gave chase and arrested him where he had been trapped by a steel fence. Francis identified the appellant as he was wearing a spotted shirt. Counsel argued that an identification parade was not necessary as the appellant was arrested immediately after the robbery occurred.

The jurisdiction of this Court - it is clearly defined as determining only questions of law on second appeals. See ***Joseph Njoroge vs Republic [1982] KLR 388***.

Having regard to the extent of our jurisdiction, we will begin by determining whether Francis and Joshua's evidence was contradictory in accordance with the evaluation done by the High Court. When we compare Francis' evidence with Joshua's, what becomes apparent is that each of the two witnesses recounted their own version of the attack. It was Joshua's evidence that they were ordered to lie down, and that guns were pointed at them. According to Francis, when he realized that the weapon the appellant held was a toy gun, he caught hold of the appellant, and struggled with him.

The sequence of events was such that, after the assailants attacked them, Francis and Joshua were ordered

to lie down which they did, hence Joshua's testimony that Francis was down. But upon realizing that the appellant's weapon was a toy pistol, Francis grabbed the appellant and struggled with him, until he slipped out of Francis' grip. We are unable to find any contradictions in the evidence as recounted by Francis and Joshua. The events as they took place during the attack are clear and properly re-evaluated by the High Court, and therefore, this ground is unfounded and is dismissed.

The appellant's other complaint is that a vital witness, namely, the investigating police officer was not called to testify. The evidence shows that PC Geoffrey Jefwa, the officer who arrested the appellant testified before the trial court, and as such, under **Section 143** of the **Evidence Act**, the Prosecution is not obliged to call any given number of witnesses.

With the evidence of the arresting officer, we do not see what further value the evidence of the investigating officer would have added to the prosecution's case, or what prejudice was occasioned by the appellant in view of the fact that he was not called to testify. As such, we find that this ground is without merit.

We will now finally address the issue of whether the appellant was properly identified, which is the issue upon which the prosecution's case turned, and whether in evaluating the evidence the High Court arrived at the correct conclusion that the appellant was one of the robbers that attacked Francis and Joshua on the night in question. On this issue, the High Court had this to say;

***“(37) PW1 said that he saw the appellant’s face clearly. There were lights at the scene.***

***(38) PW1 was very close to the Appellant, as he even held the Appellant with his hands. The two men struggled before the Appellant got out of PW1’s grasp.***

***(39) Given the close proximity between the two men, and the fact that PW1 realized that the weapon which the Appellant was holding was a toy pistol, we find that the witness had a good opportunity to identify the Appellant during the robbery.***

***(40) The Complainants pursued the Appellant and his accomplices. It is true that the Complainants did not expressly state that they never lost sight of the Appellant. But having positively identified the Appellant, and being the same people who apprehended the Appellant, we find that there was no room for mistaken identity.”***

This Court has variously emphasized that evidence of visual identification in criminal cases must be carefully tested to avoid the possibility of a miscarriage of justice. In the case of **Republic vs Turn bull and others [1976] 3 All ER 549 Lord Widgery C.J** , set out precautionary measures to be applied and stated thus;

***“First whenever the case against an accused depends wholly or substantively on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often?. If only occasionally had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancies between the description of the accused given to the police by witness when first seen by them and the actual appearance?***

In the case of **Wangombe v Republic [1980] KLR 149** the issue of identification was addressed thus;

***“...in this case guilt turned upon visual identification by one or more witnesses.. a reference to the circumstances usually requires the judge to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of the light.”***

In adhering to these principles, there is no doubt that the assailants, numbering eight, attacked both Francis and Joshua. Francis stated that he identified the appellant with the assistance of electricity lights; that he was wearing a dotted shirt, and that it was the appellant who attacked him. When Francis realized that the appellant’s gun was a toy, he stated that he got hold of two of the assailants and a struggle ensued. This brought them into close proximity with each other, and provided Francis with a further opportunity to see the appellant.

Though his evidence did not indicate the nature of the lighting during the attack, Joshua’s evidence largely corroborated Francis’ as when cross-examined by the appellant, Joshua stated;

***“You put a gun in my stomach. I looked at you face by face”.***

When the appellant, attempted to escape after the gunshots were heard, Francis and Joseph, together with the police gave chase. They again identified the appellant when his flight was brought to an abrupt end after he was entrapped by the school’s fence, and was immediately arrested by PC Jefwa.

The evidence points to an incident that comprised an attack, a chase, and an arrest. Assailants attacked Francis and Joshua on the night in question, and with the aid of electric lights, they identified one of the assailants as the appellant who was wearing a dotted shirt and was holding a toy gun. On realizing that the gun was a toy, Francis caught hold of the appellant, and as they struggled, the appellant was brought into closer focus, enabling Francis to see and identify him.

After the gunshots, the appellant attempted to escape, and was chased by Francis, Joshua and the police, and was found entrapped by the school’s fence, where he was arrested. The toy gun was also recovered at the scene.

In *Wangombe vs Republic (1980) KLR 149*, this Court stated;

***“the identification of a person who took part in the alleged offence and as chased from the scene of the crime to the place where he was arrested is of course strong evidence of identification and if all the links in the chain are sound it may be relied upon.”***

As observed by the High Court, there was no indication of how long the chase took, or whether Francis and Joshua lost sight of the appellant in the course of the chase. But this notwithstanding, Francis and Joshua chased him upto the school’s fence which had entrapped him. He was again identified by Francis and Joshua, upon which PC Jefwa immediately arrested him.

In addition to his identification, the existence of the toy gun is further evidence of the appellant’s involvement in the robbery. Though he claimed that it was planted on him, Francis’ evidence was that during the attack, the appellant realized the gun pointed at him was a toy. That toy gun was recovered at the scene of the appellant’s arrest, which evidence, when considered in conjunction with his identification by the complainants, leaves no doubt that the appellant was one of the assailants that robbed them on the night in question.

We have considered the evidence in its totality, and are satisfied that the High Court properly evaluated the evidence, particularly on the question of the appellant’s identity, and in so doing, the court rightly concluded that this was not a case of mistaken identity but that, the appellant was indeed one of the robbers who attacked and robbed Joshua and Francis on the night in question.

Accordingly, there is no reason to interfere with the concurrent findings of the two courts below. We find that the appellant’s appeal is without merit, and we order that the same be and is hereby dismissed.

*It is so ordered.*

**DATED and delivered at Nairobi this 29<sup>th</sup> day of September, 2017.**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**