**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MAKHANDIA & OUKO, JJ.A)**

**CRIMINAL APPEAL NO. 82 OF 2016**

**BETWEEN**

**FRANCIS AMUKUNE OBWINA……...APPELLANT**

**AND**

**REPUBLIC……. RESPONDENT**

*(Being an appeal from the conviction and sentence of the High Court of Kenya at Nairobi (Kamau & Ogola, JJ,) delivered on 14th day of November, 2013*

*in*

*HC. CR. A. NO. 175 of 2011)*

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**JUDGMENT OF THE COURT**

At the heart of this appeal are two related principles of criminal law and procedure.

First, accurate eyewitness identification is key to the apprehension and successful prosecution of criminal suspects. The converse is certainly perilous as inaccurate identification may lead to the prosecution of innocent persons and occasion substantial miscarriage of justice. In light of the inherent danger of miscarriage of justice, it is important that evidence of visual identification be approached with scrupulous care.

In response to widespread concern over the problems posed by cases of mistaken identification, Lord Widgery, CJ of the English Court of Appeal in the famous judgment in **Regina V Turnbull** (1977) QB 224 laid down important guidelines for trial courts in respect of disputed identification evidence. The familiar passage in that judgment reads as follows;

> **"First, whenever the case against an accused depends wholly or substantially 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 on the correctness of the identification or identifications……. 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 relative and friends are sometimes made."**

The caution is required to avoid the risk of injustice because a witness who is honest may be wrong even if he is convinced that he is right; a witness who is convincing may still be wrong; that a witness who recognizes the suspect, even when the witness knows the suspect very well, may be wrong.

The court must of necessity examine the circumstances in which the identification by each witness was made. The **Turnbull** direction, as the strictures enunciated in the **Turnbull** case are called, identified some of these circumstances to include: the length of time the accused was observed by the witness; the distance the witness was from the accused; the state of the light; and the length of time that elapsed between the original observation and the subsequent identification to the police.

Lord Widgery CJ went on to explain the rationale of these safeguards thus;

> **"All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger.**
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> **When it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."**

We must emphasize that a **Turnbull** direction need not be provided unless the prosecution case depends wholly or substantially on visual identification.

The second principle is with regard to evidence of a single identifying witness. In terms of **Section 143** of the Evidence Act, no particular number of witnesses is required to prove a fact. But the testimony of a single witness must be examined with considerable circumspection to ensure that it cannot but be true before a conviction is founded on it. In **Kiilu & Another V. Republic** [2005] 1 KLR 174 this Court emphasised this point saying that -

> **"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for 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. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."** (Our emphasis).
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> See also **Cleophas Otieno Wamunga V R.** Criminal Appeal No. 20 of 1989.

Although the crux of the appellant's trial was his identification by a single witness in an attack that took place at night, both courts below made no specific reference to the foregoing principles or cited any of the well-known authorities in this area of the law.

By the force of **Section 361 (1) (a)** of the Criminal Procedure Code, only matters of law fall for our determination in this appeal. On second appeal matters of fact can only considered if it is demonstrated that the two courts below failed to consider issues they should have considered or, looking at the entire case, the decisions of those two courts on such matters of fact were plainly wrong in which case this Court will consider such omission or action as matters of law. In **Kavingo V R,** (1982) KLR 214 this Court explained that the jurisdiction of this Court on 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.**"

The trial magistrate had found the appellant guilty of robbery with violence contrary to **section 269(2)** of the Penal Code and sentenced him to death being persuaded that the offence was committed and proved beyond doubt; that on 7th August, 2010, after midnight, the appellant and another attacked the complainant, who was walking to his home in High Ridge from Westlands and robbed him of personal belongings whose value was given in the charge sheet as Kshs. 33,000.

Like the trial court, the High Court accepted the evidence of identification presented by a single witness, the complainant. Both courts were equally satisfied that the appellant was known to the complainant prior to the robbery; that the appellant was a trader near the Chief's camp where the complainant had been seeing him; that during the robbery, the complainant saw the appellant from close proximity; that the robbery took some time affording the complainant a chance to see the appellant properly; that immediately after the robbery the complainant gave the local chief the physical description of the appellant and the manner in which he was dressed, on the basis of which the chief was able to trace and arrest the appellant; that following the arrest, the complainant once more identified the appellant; and that the appellant himself led the police to a house where some of the items stolen from the complainant were recovered. The two courts were also in agreement that the complainant positively identified the recovered items as those stolen from him.

Because all these are concurrent findings of fact by both the trial court, where the main witness was heard and seen and first appellate court, where that evidence was re-evaluated and being persuaded ourselves that, though the two courts below made no specific reference to the well-known principles laid down in numerous decisions, they were alive to these strictures enunciated in the **Turnbull** case. The trial court, for instance was satisfied that apart from the fact that the complainant stated that he knew the appellant before the attack, there was some other evidence pointing to guilt of the appellant; that the appellant led the police to a house where items shortly stolen from the complainant and positively identified by him were recovered and retrieved.

In the end, we find no material before us to disturb the concurrent conclusions reached by the two courts below. There was corroborative evidence to support the correctness of the identification of the appellant. Using the description given by the complainant of the appellant, the area chief was able to trace and arrest the appellant. Later on the stolen items were recovered from a house where they had been hidden. We think both courts treated the evidence of identification with the greatest care and found evidence pointing to the appellant's guilt from which they came to the conclusion that the evidence of identification, although based on the testimony of a single witness, could safely be accepted as free from the probability of error

In the result, we find no justification for our interference with the determination of the High Court upholding the appellant's conviction and sentence.

Accordingly, the appeal is dismissed entirely.

**Dated and delivered at Nairobi this 22nd Day of September, 2017.**

**P.N. WAKI**

**…….**

**JUDGE OF APPEAL**

**ASIKE – MAKHANDIA**

**……**

**JUDGE OF APPEAL**

**W. OUKO**

**……**

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

***DEPUTY REGISTRAR***