



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 11 OF 2013

BETWEEN

PATRICK MURIUKI KINYUA 1ST APPELLANT

DAVID MWANGI GATHOGO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Sergon & Wakiaga, JJ.) dated 1st November, 2012

in

H.C.C.R.A No. 138 of 2010 consolidated with H.C.C.R.A No. 139 of 2010)

JUDGMENT OF THE COURT

This is a second appeal from the judgment of the High Court wherein the appellants’ conviction and sentences were upheld. The appellants were jointly charged with one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and one count of causing grievous harm contrary to **Section 234** of the **Penal Code** in the Chief Magistrate’s Court at Nyeri.

The particulars of the offence of robbery with violence were that on the night of 23rd January, 2008 at Thegu in Nyeri North District within the then Central Province, the appellants jointly while armed with a dangerous weapon namely an axe robbed Isaac Ngatia Kinyua of a mobile phone make Sendo S/No. 3510002545243 valued at Kshs. 4,000/= and at or immediately before or immediately after the time of such robbery killed Isaac Ngatia Kinyua. On the second count, the particulars were that on the aforementioned date and place, the appellants jointly and unlawfully did grievous harm to Mary Muthoni.

The appellants pleaded not guilty to both counts, the prosecution called a total of eight witnesses. The facts leading to the appellant’s conviction briefly stated are as follows; On 23rd January, 2008 at around 9:00 p.m. while PW4, Mary Muthoni (Mary), her husband, Isaac Ngatia Kinyua (deceased), and their son, PW3, Kevin Kinyua Ngatia (Kevin) were in their house when four men claiming to be policemen

came and ordered the deceased to open the door. Upon opening the door, the deceased was ordered to sit down. Both Kevin and Mary testified that the assailants were armed with an axe, crow bar and a gun. According to Kevin, three of the men started assaulting the deceased and one of them shot the deceased at the back of his head. Thereafter, one of the assailants who was armed with an axe tried to cut Mary but she held the axe with her left hand and screamed for help. The axe cut Mary on her left palm. The assailants ran away after taking the deceased's mobile phone.

PW2, Francis Mwai Maina (Francis), who lived a kilometer away heard the screams and went to the scene, he found a crowd had gathered. He saw the deceased lying on the ground with blood oozing from his head. Francis looked for a vehicle to take the deceased to hospital but unfortunately the deceased died. PW5, Dr. Anthony Njuguna (Dr. Anthony), testified that the cause of the deceased's death was cerebral hemorrhage due to a deep wound on the back of his head.

Mary testified that she was able to recognize three of the assailants with the aid of the light from the lamp that was inside the house as well as from the moonlight. She said she recognized three of the assailants as David Muriuki, David Gathogo and one Evantus Ngatia who had since died. According to her, the assailants had not covered their faces; it was the 1st appellant who had shot the deceased while the 2nd appellant was the one who was armed with a crow bar. She was able to recognize the assailants because she had a case against the 2nd appellant while the 1st appellant was from Chaka. Kevin on the other hand was only able to recognize Evantus Ngatia. Mary reported the incident to the police and gave the names of the assailants whom she had recognized. Later on, police arrested some suspects and Mary picked out the appellants from two identification parades as some of the assailants. The appellants were arraigned in court and charged.

After taking into consideration the aforementioned evidence, the trial court found the appellants had a case to answer and put them on their defence. The 1st appellant gave unsworn statement and testified that on the day of his arrest as he was coming from Doldol where he had purchased sand; he met police officers who informed him that the OCS of Kiganjo Police Station was looking for him. He followed the police officers to the police station, and that is how he was arrested. According to the 1st appellant the OCS framed him with the aforementioned charges because he had failed to get any evidence against him in another case of robbery with violence. The 1st appellant denied committing the offences he was charged with. According to him, when Mary gave the names of her attackers, she did not mention him. The 2nd appellant gave a sworn statement and denied the charges against him. He testified that the complainant (Mary) had previously accused him of robbery with violence in another case which was dismissed. According to him, Mary had framed him up.

At the conclusion of the trial, the learned magistrate convicted both appellants on both counts and sentenced them to death for the offence of robbery with violence and directed the sentence of seven years imprisonment for the offence of grievous harm to be held in abeyance. Aggrieved with both the conviction and sentence, the appellants appealed to the High Court. The said appeal was dismissed by the High Court vide a judgment dated 1st November, 2012. It is that decision that has provoked this appeal on the following grounds:-

- ***The learned Judges erred in law and facts in finding that there was proper identification which was based on the identification parade.***
- ***The learned Judges erred in law and facts in finding that the alleged recognition evidence by PW4 was free from error and failed to reconsider the evidence.***

Mr. Kimunya, learned counsel for the appellants, submitted that the trial magistrate relied heavily on the evidence of recognition which was given by PW4 (Mary), the deceased's wife. He argued that Mary testified that when she reported the incident to the police, she gave the names of the assailants she had recognized yet no names were recorded in the investigation diary that was produced before the trial court. Mr. Kimunya submitted that the two lower courts failed to interrogate the intensity of the light from the lamp which allegedly assisted Mary in recognizing the assailants. According to him, since the incident

occurred inside the house and the fact that there was moonlight was of no consequence to the recognition evidence. He maintained that in order for a court to base the conviction of an accused person purely on recognition evidence the same ought to be safe and free from error.

Mr. Kimunya faulted the identification parade. Placing reliance on the case of Githinji & Another –vs- R, (1970) E.A 231, he argued that as the appellants were well known to the complainant thus an identification parade was not necessary. He urged us to allow the appeal.

Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal submitted that the prosecution’s case was proved to the required standard. He argued that it was a case of recognition and the complainant gave the names of the robbers who were well known to her. Mr. Kaigai did concede that the two lower courts did not interrogate the intensity of the light from the lamp. However, he maintained that the light emitted from the lamp was adequate for positive identification by a person who was not a stranger. He further submitted that the two lower courts had made concurrent findings which were supported by evidence on record. He urged the Court to dismiss the appeal.

This is a second appeal and by dint of **Section 361** of the **Criminal Procedure Code**, this Court is restricted to delve on matters of law only. In Karingo –vs- Republic, (1982) KLR 213, this Court at page 219 stated:-

“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 C/O Karanja –vs- R (1956) 17 EACA 146)”.

From the record it is clear that the only evidence against the appellants is that of recognition tendered by PW4 (Mary). Mary testified that she knew the appellants prior to the incident and was able to recognize them on the material day. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In the case of R –vs- Turnbull and Others (1976) 3 All ER 549, Lord Widgery C.J. had this to say:-

“First, wherever 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 to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a 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 discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”

.....

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”.

In Abdallah Bin Wendo -vs- R, 20 E.A.C.A 166 at page 168 the Court said:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the 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 correct identification were difficult...”

In this case the complainant testified that she was able to recognize the appellants with the aid of the lamp which was in the house. In *Maitanyi -vs- Republic*, (1986) KLR 198, this Court at page 201 held,

“The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care? It is not a careful test if none of these matters are unknown because they were not inquired into.... See Wanjohi & Others -vs- Republic (1989) KLR 415”

No evidence was led as to the intensity of the light from the lamp or its position in respect of the complainant and the assailants.

The complainant also testified that she had known the appellants for a long time prior to the incident. She gave the names of the assailants who had attacked her as David Muriuki, David Gathongo and Evantus Ngatia. From the record, PW6, Cpl. Charles Gitende (Cpl. Charles), testified that the people whose names the complainant gave were arrested with the help of the administration police. This piece of evidence is marred with inconsistencies. Firstly, the complainant named her attackers as David Muriuki, David Gathogo and Evantus Ngatia. She never mentioned the 1st appellant’s name. Secondly, neither the said names nor the fact that the complainant had recognized some of the assailants was indicated in the investigation diary. Further, there was no evidence that Mary had told the members of public who first arrived at the scene that she had recognized some of the assailants. In *Maitanyi -vs- Republic*, (*supra*) this Court while testing identification evidence expressed itself as follows: -

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant’s aid or to the police.....”

Both Cpl. Charles and PW7, C.I.P Stephen Ringera (C.I.P Stephen) testified that the two separate identification parades were conducted in respect of the 1st and 2nd appellants; the complainant picked both appellants from the parades. The purpose of an identification parade is to test the accuracy of identification of a stranger by a witness. In James *Tinaga Omwenga -vs- R*, *Criminal Appeal No. 143 of 2011*, this Court expressed itself as follows:-

“The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect...”

In this case, it is not in dispute that the appellants’ were well known to the complainant hence this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value. See this Court’s decision in *Juma & Another -vs- R*, (2003) KLR 386. We also note contrary to the evidence of Cpl. Charles and C.I.P Stephen the complainant testified that she only picked the 2nd appellant from an identification parade; she never participated in another identification parade in respect of the 1st appellant.

On cross examination by the 2nd appellant the complainant at page 29-30 testified as follows:-

“I saw you properly that night of attack (sic). I know because I have a case against you in court. You are known as Kamwamba back home. I told police that one of my attackers was Kamwamba. In my report to the police I did not use the name Kamwamba for you since I learnt

that was a nick-name so I used the name Gathogo. My statement to the police reads the names James Kagotho (noted by the court that it reads Kamotho and that the witness looks and sounds evasive)...”.

Despite noting that the complainant was evasive the trial magistrate failed to take caution and erroneously relied totally on her evidence to convict the appellants. From the foregoing, the recognition evidence was not safe to warrant the appellants’ conviction.

Commenting on the ground of appeal that the High Court failed to re evaluate the evidence, In ***Simiyu & Another –vs- R, (2005) 1 KLR 192***, this Court held:

“It is trite that it is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice.it is not enough for the first appellate court to merely scrutinize the evidence to see if there is some evidence to support the trial court’s findings and conclusions”.

It is discernible from the record, the High Court failed to properly re-evaluate the evidence and draw their own conclusions in deciding whether the judgment of the trial court should be upheld or not as required. The High Court merely summarized the facts of the case and findings of the trial court and concurred with the said findings without subjecting the evidence to fresh scrutiny. The result is that the gaps found in the evidence of identification through recognition and the purported identification parade was not resolved and that failure may have occasioned the appellant prejudice. See this Court’s decision in ***Mbui John Mwavita –vs- R, Criminal Appeal No. 338 of 2008***.

In the result the conviction against the appellants cannot safely be supported, and the appeal is allowed. The conviction of the appellants is quashed, sentence set aside, and the appellants are ordered to be set at liberty forthwith, unless held for any other lawful cause.

Dated and delivered at Nyeri this 21st day of January, 2015.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO- ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR