IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 69 OF 2013

BETWEEN

MOSES GITONGA KIMANI …… APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

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

(Lesiit & Makau, JJ.) dated 12th June, 2012

in

H.C.CR.A No. 271 of 2009)

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JUDGMENT OF THE COURT

1. This is a second appeal against the judgment of the High Court wherein the appellant's conviction and sentence were upheld. The appellant was jointly charged with his father, Julius Kimani, initially for the offence of grievous harm contrary to ***Section 234*** of the ***Penal Code*** in the Senior Principal Magistrate's Court at Nkubu. However, the charge was later substituted with the offence of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code.***

2. The particulars of the offence were that on 19th August, 2006 at Nkumari Village, Kariene Location in Meru Central District within the then Eastern Province, the appellant and his co-accused while armed with a dangerous weapon namely a panga jointly robbed Lawrence Mungatia Magambo of cash Kshs. 18, 500/= and at or immediately before or immediately after the time of such robbery wounded the said Lawrence Mungatia Magambo.

3. The prosecution called a total of four witnesses. It was the prosecution's case that on 19th August, 2006 at around 11:00 p.m. PW1, Lawrence Mungatia Magambo (Lawrence), had just arrived at his house from work. As he was about to open the door Lawrence heard people behind him and he turned to see who it was. With the aid of light from the torch he had and the moonlight he recognized the appellant and

his co-accused who were well known to him. According to him, the appellant was armed with a panga while his co-accused was armed with an axe and a club. While demanding money from Lawrence the appellant's co-accused hit Lawrence on his left ribs with the club. Sensing that he was in danger Lawrence screamed his assailants' names and stated that they were killing him. The appellant then cut Lawrence on his face near his left eye with the panga he had; Lawrence fell down and lost consciousness.

4. Meanwhile, PW2, Elias Mwenda (Elias), who lived about 20 feet from Lawrence heard his screams and rushed to his aid. He too was able to recognize the appellant and his co-accused with the aid of his torch and moonlight. He testified that he saw the appellant and his co-accused standing over his brother (Lawrence); they were both armed. The assailants ran away when they saw Elias. Elias reported the incident to the police and gave the names of the appellant and his co-accused as the assailants who had attacked Lawrence. At the time Lawrence was still unconscious and he was rushed to the hospital. Upon regaining consciousness the following day, Lawrence identified the appellant and his father as his attackers. He stated that they had stolen Kshs. 18,500/= from him. Thereafter, the appellant and his father were arrested and arraigned in court.

5. In his defence the appellant gave a sworn statement. He denied committing the offence he had been charged with. He testified that on 5th January, 2005 he left home and went to work in a quarry in Mitunguu; he stayed in Mitunguu for a period of two years and only went back home on 15th December, 2007. He was later arrested on 16th December, 2007 and framed with the charge of robbery with violence. The appellant's father also gave a sworn statement denying the charge against him. He maintained that both he and his son had been framed due to a land dispute between his family and the complainant's family.

6. Convinced that the prosecution had proved its case, the trial court convicted the appellant and his co-accused and sentenced them to death. Aggrieved with both the conviction and sentence, the appellant and his father preferred an appeal in the High Court. Unfortunately, before the appeal was concluded the appellant's father died hence his appeal abated. The High Court vide a judgment dated 12th June, 2012 dismissed the appellant's appeal. It is that decision that has instigated this second appeal based on the following summarized grounds:-

- ***The learned Judges erred in law by not finding that the appellant's fundamental rights to fair trial were breached or violated since he was not afforded legal representation in both lower courts.***

- ***The learned Judges erred in law by failing to find that the identification evidence was not sufficient to warrant the appellant's conviction.***

- ***The learned Judges erred in law by failing to consider the appellant's defence.***

7. Miss Kiome, learned counsel for the appellant, submitted that the appellant was not informed of his right to have legal representation at the expense of the State contrary to ***Article 50*** of the ***Constitution*** hence he was prejudiced. She faulted the High Court for not looking into the probability of fabrication of the charge against the appellant due to the grudge between the appellant' and the complainant's families. Miss Kiome argued that the evidence tendered by PW2 contradicted that of PW3; the High Court never took into account the said contradictions. According to her, the dismissal of PW3's evidence by the trial court was without basis. She urged us to allow the appeal.

8. Mr. Onderi, Senior Assistant Deputy Public Prosecutor, in opposing the appeal, submitted that the identification of the appellant was through recognition. The recognition of the appellant was positive and there was no likelihood of a mistaken identity. There was moonlight and both PW1 and PW2 had torches; the distance between PW1 and his assailants was 1.5 meters; the assailants were well known to PW1 and PW2; PW1 shouted the names of his attackers during the incident; the complainant gave the names of his assailants in his initial report. Mr. Onderi argued that the ingredients of the offence of robbery with violence had been proved against the appellant. This is so because the appellant was in the company of another robber; they were armed with dangerous weapons; they injured the complainant. According to

him, the appellant's conduct of going underground after the incident was consistent with the conduct of a guilty man.

9. He argued that the trial court observed the demeanour of the witnesses and found PW1 and PW2 to be truthful. The trial court found that there was no evidence of a grudge or malice between the appellant and the complainant. Mr. Onderi further submitted that the appellant had all the necessary information during his trial since he was provided with witness statements. He argued that the appellant should not have raised the issue of infringement of his rights for the first time in this second appeal but should have done so in the two lower courts.

10. On our part, we have taken into account the submissions made on behalf of the appellant and the State; we have also considered the record of appeal and the judgment by the two lower courts. This being a second appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Karingo – vs – Republic (1982) KLR 214,*** and ***Chemagong –vs- Republic (1984) KLR 213***).

11. On the alleged violation of the appellant's rights, the issue before us is whether the appellant was entitled, as of right, to legal representation at the state's expense. If so, whether the rights of the appellant, who was not represented by counsel at the trial, were violated.

12. The appellant's trial took place in the year 2009 under the former Constitution. ***Section 77*** of the former Constitution provided in part as follows:-

> ***"77. (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law***
>
> ***(2) Every person who is charged with a criminal offence***
>
> ***….....***
>
> ***a. shall be given adequate time and facilities for the preparation of his defence;***
>
> ***…..***
>
> ***(b shall be permitted to defend himself before the court in person or by a legal representative of his own choice;***
>
> ***(c) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;***
>
> ***……***
>
> ***(14) <u>Nothing contained in subsection (2) (d) shall be construed as entitling a person to legal representation at public expense."</u> Emphasis added.***

Based on the foregoing an accused person was not entitled to legal representation at the State's expense under the former Constitution. In ***Charo Karisa Thoya –vs- Republic- Criminal Appeal No. 274 of 2002,*** it was held:-

> ***"As we have indicated before, in so far as the appellant before this Court is concerned, his trial took place under the old Constitution and he would not be entitled to free legal representation***

during the trial."

13. However, the right to legal representation at the State's expense is provided under ***Article 50*** of the current ***Constitution*** which provides in part:-

> ***"Article 50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right—***
>
> a. **…**
>
> ***(d) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
>
> ***(e) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;…." Emphasis added.***

14. This Court while considering the importance of legal representation in the ***David Njoroge Macharia –vs- Republic - -Criminal Appeal No. 497 of 2007*** expressed itself as herein under :-

> ***"The counsel's role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact, sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel's participation was succinctly articulated by Lord Denning in his decision in Pett –vs- Greyhound Racing Association (1968) 2 All E.R 545, at 549. He had this to say:***
>
> ***"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"***

The right to legal representation is integral to the realization of a fair trial more so in capital offences.

15. In ***David Njoroge Macharia –vs- Republic (supra)*** this Court held, ***"Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

Under the current ***Constitution*** an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise arise in the absence of such legal representation. As noted in the ***David Njoroge Macharia case*** the ***Constitution*** does not set out what constitutes substantial injustice. Chapter 18 ***(transitional & consequential provisions)*** of the current ***Constitution*** places an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under ***Article 50*** of the ***Constitution*** within four years of the promulgation of the ***Constitution.*** It is the envisaged legislation that would set out the circumstances and parameters under which an accused person

is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation.

16. PW2 (Elias) testified that when he heard his brother screaming he rushed to his aid; he was the first to arrive at the scene; by the time neighbours had arrived at the scene the appellant had already fled. On the other hand, PW3, Elijah Magambo (Elijah), testified that on the material day he had screams and rushed to the scene; he was the first to arrive at the scene and he recognized the assailants as the appellant and his father. He maintained that he was the one who called Elias to come to the scene. Based on the foregoing there are inconsistencies as to whom between Elias and Elijah arrived at the scene first and whether they saw the assailants.

17. In respect of the above inconsistencies, the trial court expressed itself as follows:-

> ***"I have considered the evidence of PW3. He is the father to PW1 and PW2. I observed him and heard as he gave evidence in court. He is an old man who appeared confused, and uncertain of what he was saying. His evidence to some extent contradicted that of PW2, when he said he got to the scene before PW2, and is the one who called PW2. It is doubtful how he was able to see and recognize the accused persons at night at the scene while he was not able to in court, during the day and were just 3 or so meters from the witness box. He had referred to the 1st and 2nd accused as his sons, who are PW1 and PW2 in this case, till the court urged him to move to the dock and see them properly. His evidence cannot therefore be relied on to establish the truth or otherwise of the prosecution case. I have therefore disregarded it."***

The High Court concurred with the above findings of the trial court and observed:-

> ***"On the other hand, we find the evidence of PW3, doubtful because the court which had the opportunity of hearing him and seeing him found that he could not even in court at close range see and recognize the appellant and his co-accused who were only 3 meters from him. The trial court correctly disregarded his evidence and found him unreliable and we agree that the trial court acted correctly."***

In ***Nelson Julius Irungu –vs- Republic- Criminal Appeal No. 24 of 2008***, this Court held,

> ***"As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses."***

Guided by the aforementioned case we see no reason to interfere with the trial court's finding on the credibility of the evidence tendered by PW3.

18. Both lower courts made concurrent findings that the appellant was positively recognized as one of the assailants. 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."

19. PW1 (Lawrence) and PW2 (Elias) testified that they were able to recognize the appellant with the aid of light from torches and moonlight. 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."

Both Lawrence and Elias testified that light from their torches and the moonlight was bright to enable positive recognition of the appellant. We also note that Lawrence testified that at the material time the distance between him and his assailants was 1.5 meters hence he was able to get a good impression of the assailants. The trial court found both of these witnesses to be truthful and we see no reason to hold otherwise.

20. In his testimony Elias stated that he mentioned the appellant as one of the assailants in his initial report. We also take note that Lawrence gave evidence that when he regained consciousness he told his brother, Elias, that it was the appellant and his father who had attacked him; He also gave the appellant's name to the police. 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……"

21. It is not in dispute that the appellant was well known to both Lawrence and Elias prior to the incident hence it was a case of recognition. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566***, this Court held at page 1568,

"This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."

Based on the foregoing, we find that the recognition evidence was safe to warrant the appellant's conviction. We further find that the recognition evidence was overwhelming and displaced the appellant's defence.

22. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed. Given that this Judgment raises a constitutional issue in respect of realization of the right of an accused person to legal representation, we direct the Deputy Registrar of this Court to formally serve a copy of this Judgment to the Hon. the Attorney General, the Constitutional Implementation Committee and the Law Reform Commission for their records and necessary action, as may be appropriate.

Dated and delivered at Meru this 26th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR