IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO.332 OF 2012

BETWEEN

MORRIS GIKUNDI KAMUNDE ……..APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court at Nyeri at Meru

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

in

H.C.CR. Appeal No. 249 of 2009)

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JUDGMENT OF THE COURT

1. Morris Gikundi Kamunde was charged with the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal code***. The particulars of the offence are that on the 24th day of June, 2009, at Kithare sub-location in Murugi Location of Maara District within Eastern Province jointly with another not before court robbed Emily Njagi of one black handbag, one mobile phone make Nokia 2760, two spotlights and Ksh. 200/= cash money all valued at a total of Ksh. 7,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Emily Njagi.

2. The complainant Emily Njagi PW1 testified that on 24th June, 2009, at about 6.30 to 7.00 pm she was at Katharaka and was heading home with friends Phyllis Mundi and Kathambi Gitonga. That on the way, she saw two boys emerge from the bush on to the road. They were behind at a distance of 50 metres; that at that time she did not identify them; she was in the company of her friends, they stopped as the boys began acting as if they were drunk. That as the boys approached, she looked and recognized the appellant as there was sufficient light; that the boys passed and walked for about 30 metres and they turned back. At that time, PW1 was parting ways with Kathambi and when the appellant met PW1 he cut her on the face demanding money; that the appellant had a panga tucked in his coat and as he cut PW1 twice, she threw her bag at the appellant and he cut her again as she screamed and ran away. That as she screamed

the boys also ran away with her bag containing a mobile phone Nokia 2760, cash Ksh. 200/= and two torches. That Kathambi and Phyllis who were with PW1 were helpless; that people gathered and PW1's husband came and took her to Chogoria hospital where she was admitted for 1 ½ weeks. That a P3 Form was filled. PW1 further testified that on 25th July, 2009, she spotted the appellant and reported the matter to police. In the company of policemen, they went to arrest the appellant who ran away. On 26th July, 2009, the police arrested the appellant. PW1 testified she had seen the appellant for three consecutive months prior to the incident; that this was not the first time such an incident occurred on the road; that her mobile phone and the two torches were recovered.

3. PW2 Phyllis Kanyua Mundi testified that on 24th June, 2009, she was on her way home from work walking alongside PW1 and one Kathambi. That on the road two boys emerged from the bush; that they stopped at Kathambi's gate and the boys came and passed by as they went ahead. That after Kathambi had entered her home, they proceeded with the journey and the two boys started returning and as they were passing, one of the boys shouted *"mama leta pesa"* – lady bring the money. That one of the boys jumped on PW1 and took her bag as they screamed. That PW1 was cut on the forehead and members of the public including Kathambi appeared. PW2 testified she could not tell whether the boys knew PW1. In cross examination, PW2 testified that she recognized the appellant and the clothes he was wearing.

4. Mary Kathambi Riungu PW3 testified that on the material day 24th June, 2009, between 6.30 and 7.00 pm she was walking with PW1 and PW2. That on getting to St. Augustine Catholic Church, she looked behind and saw two boys who were at a distance of about 50 meters; they were walking in a zig zag manner; that the two boys came closer and she was able to recognize the appellant; that they stopped to let the two boys pass as she entered the gate to her compound; that shortly she heard a scream and she also screamed and members of the public came; that PW1 was bleeding; that she flashed PW1's mobile number and it was calling; they searched for it and recovered the handbag, the phone and the two torches; that she called PW1's husband and informed him of the recovery.

5. PW4 Dr. Stephen Ngeera testified that he was a Doctor at Chogoria Hospital and he produced a P3 Form filled by Dr. Irene Biondo in relation to the injuries sustained by PW1. The report showed that PW1 had deep cuts on the face, right hand and the same were less than 24 hours at the time of examination; that the injuries were caused by a sharp object.

6. The appellant when put on his defence stated *"I will keep quiet and wait for the court's decision*."

7. The trial magistrate evaluated the prosecution evidence and convicted the appellant for the offence of robbery with violence and sentenced him to death. In convicting the appellant, the trial court expressed as follows:

> ***"The issue for consideration is that of identification of the attacker. There is evidence on record which is not challenged that the incident occurred at around 6.30 pm. There was sufficient natural light and identification in such circumstances was not difficult. Secondly, there was some walking done by the attacker who came from behind passed the complainant and her friends and at some distance ahead turned and walked back to them. It would appear that even though the complaint (sic) were talking among themselves, they were all monitoring the movement of the two young men who later turned out to be the attackers. The monitoring of the movement of the young men find credence by virtue of the fact that there were a number of attacks of the same nature in this area where a number of public has been mugged (sic). The events preceding the attacks therefore offered ample opportunity to the complainant and her two friends to see the attacker well. Finally, it emerged from the proceedings that the accused was well known to the three before the incident here in that he was a regular at Katharaka area which is a shopping centre which is visited by many people; there is also a bus stop there where the Meru Nairobi road passes through. To me, I find this to be a case of recognition rather than identification and this probably explains the ease with which the police had in apprehending the accused herein. He was with another man committing the offence who could not be named which goes a long way in demonstrating the accuracy in identifying the accused. His name was mentioned to the police and they acted on the information to arrest him.***

8. The High Court in considering the first appeal upheld conviction and sentence meted by the trial court. In upholding the conviction, the learned Judges stated:

> *"**From the evidence on record, it is apparent that the complainant PW1 and PW2 and PW3 … were able to recognize the appellant with the help of natural light as it was not dark yet and also as a person who PW1 used to see at Katharaka bus stage playing pool table games. On 24th June, 2009, PW1 saw and recognized the appellant. PW1 testified that there was sufficient light and that when the appellant and his accomplice returned PW1 was able to see the appellant before he cut her with a panga on her face. …We are also satisfied that PW3 was able to recognize the appellant as the person who she used to see at Katharaka bus stage where he operated as a tout for the last four years. We find that PW3 saw the appellant at close range as he passed them and was able to recognize him".***

9. Aggrieved by the decision of the first appellate court, the appellant has lodged this second appeal raising the following grounds:

a. ***that the learned Judges erred in law by failing to make a finding that the circumstances leading to recognition were not conducive and not free from error;***

b. ***that the trial court as well as the first appellate court erred in law and fact by failing to make a finding that the prosecution case was riddled with loopholes, contradictions and inconsistencies;***

c. ***that the appellant's right to a fair hearing was infringed as he was not accorded adequate time to prepare for his defence;***

d. ***that the trial court erred in law and fact by relying on extraneous matters in arriving at his judgment.***

10. At the hearing of the appeal, learned counsel **Mr. Ken Muriuki** appeared for the appellant while the State was represented by the Senior Prosecution Counsel **Mr. Jackson Makori.**

11. Counsel for the appellant emphasised that the key issue in this appeal relates to identification of the appellant; that both the trial court and the High Court failed to test the evidence of identification and to determine whether the prevailing conditions were conducive to an identification that was free from error. That the appellant was not properly identified. Counsel submitted that PW1 in his statement to the police never indicated that she recognized the appellant; that whereas PW1 and PW3 testified that the appellant was known to them, there is no first report to the police mentioning the appellant.

12. It was submitted that both the trial court and the High Court did not evaluate the intensity of the natural light as the time of offence is given as between 6.30 to 7.00 pm. That the trial court erred in making a finding that there was sufficient natural light; counsel submitted that there is no evidence on record to support the finding and conclusion by the two courts below that there was sufficient natural light. In addition, it was submitted that the learned Judges erred in upholding conviction of the appellant and failed to detect that the trial court used extraneous matters to convict the appellant; that it was extraneous and an error of law for the two courts below to convict the appellant on the basis that similar incidents had occurred in the past along the same road. Further, it was submitted that there is no evidence on record to support the finding and conclusion that the complainant as well as PW2 and PW3 were monitoring the movement of the two boys. It was submitted that there were discrepancies and contradictions in the prosecution case.

13. The State in opposing the appeal submitted that the identification of the appellant was free from error; that identification of the appellant was by way of recognition as PW1 and PW3 both recognized the appellant. It was submitted that the conditions for identification were favourable as there was natural light; the fact that PW1 had two torches in her handbag which were not being used at the time of the attack was proof that it was not yet dark for PW1 to make use of the torches. It was further submitted that

the distance between the complainant, PW2, PW3 and the attackers was 50 metres; that this was close enough distance to enable PW1 and PW3 recognize the appellant; that the conduct of the appellant in running away when he saw PW1 with the police is an indication of a guilty mind; that the evidence against the appellant was consistent and corroborated; that violence was meted upon the complainant and the essential ingredients for the offence of robbery with violence were proved to the required standard. As regards the contention that the appellant was not given a fair trial, the State submitted that the appellant was put in his defence and chose to remain quiet. He was given an opportunity to tender any evidence and he opted to exercise his right to silence.

14. We have considered the submissions by the appellant and the State as we note that this is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In ***David Njoroge Macharia – v-R [2011]e KLR*** it was stated that under **section 361 of the Criminal Procedure Code:**

> ***"Only matters of law fall for consideration and the court 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 also Chemagong vs. Republic, (1984) KLR 213".***

15. The appellant contend that the learned Judges erred in failing to re-evaluate the evidence on record. In ***Salim Juma Dimiro –v – R, Criminal Appeal No.114 of 2004 at Mombasa***, this Court stated that re-evaluation of evidence is a matter of law. In the present case, the appellant is faced with a charge of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***. It is our duty to examine if the two courts below erred in law in dealing with the evidence on identification of the appellant. In ***Abdala Bin Wendo v R, (1953)20 EA CA 166***, it was held that where the conditions for identification are difficult, there is need for other evidence, circumstantial or direct pointing at the guilt of the accused to be produced. In ***R. v Turnbull & Others, (1973)3 ALL ER 549,*** the court considered what factors the court should take into account when the only evidence turns on identification by a single witness. The court said:-

> ***"…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…? 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 the 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 his 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".***

16. In the present case, the testimony of PW1, PW2 and PW 3 is that they were walking and saw two boys walking as if they were drunk; that the boys passed them and then attacked PW1. Both the trial court and the High Court found that the appellant was identified through recognition. On our part, we do not doubt that at the time when the offence was committed, it was not dark. The inference to be drawn from the testimony of all the prosecution witnesses is that it was not dark. It is our considered view that the trial court and the learned Judges did not err in finding that the prevailing conditions for identification were favourable.

17. A critical issue for our consideration is whether PW1 and PW3 recognized the appellant. Is there evidence to prove positive recognition of the appellant by PW1 and PW3? In ***Wamunga vs. Republic, (1989) KLR 424,*** it was stated that where the only evidence against a defendant is evidence of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the

circumstances of the recognition were favourable and free from possibility of error before it can safely make it the basis of a conviction. In ***Simiyu & another – v – R, (2005) 1 KLR 192,*** it was stated there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises. The case of ***R – v- Alexander Mutwiri Rutere alias Sanda & Others, (2006) eKLR,*** states that if a witness is known to an accused but no name is given to the police, then giving the name subsequently is either an afterthought or the evidence given is not reliable. In the instant case, we note that the two courts below did not take into account the dicta in ***Simiyu & another – v – R, (2005) 1 KLR 192*** and ***Lesaran – v- R (1988) KLR 783***.

18. In the instant case, was there a first report made to the police or any other persons where PW1 and PW3 stated that they could recognize the attackers? PW7 PC Paul Mukunzi testified that he was the investigating officer; there is no mention or reference in the Occurrence Book that the complainant or PW3 gave a description or names of the attackers; neither does the Occurrence Book state that the complainant was attacked by persons known to her. In their testimony before the trial court, PW1 and PW3 both claimed to have recognized the appellant but did not in their initial report or statement give his name or description or even say that he was a person who can ordinarily be found at the bus stage where he is a tout. (See ***Charles Gitonga Stephen – v- R, eKLR 2006*****).**

19. In the case of ***George Bundi M'Rimberia – v- R, Criminal Appeal No. 352 of 2006,*** it was stated a more serious aspect arises when a witness fails to mention the name of an assailant at the earliest opportunity as this can weaken the evidence. It is our considered view that failure by PW1 and PW3 to give a description of the appellant or mention his name or to state they were attacked by a person they knew weakens their testimony. Being a person known to them, PW1 and PW3 should have given the name or description of the appellants as was stated in the cases of ***Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987*** and ***Juma Ngondia – v- R, Criminal Appeal No. 13 of 1983*** and ***Peter Njogu Kihika & Another – v- R, Criminal Appeal No. 141 of 1986***. In ***Lesarau – v- R, 1988 KLR 783***, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In ***R – v- Turnbull, (1976) 3 All ER 551,*** Lord Widgery C.J. observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. In ***R – v- Alexander Mutwiri Rutere alias Sanda & 8 Others, (2006) eKLR,*** the High Court observed that *"PW1 and PW2 and several other witnesses claimed they gave the manes of the attackers whom they claimed to know before the incident to the police; the Police Occurrence Book did not have any entry on the names of the attackers, … a reasonable conclusion is that the names of the accused persons were not given because they were not known by the witnesses who therefore lied before the trial court."*

20. In ***Simiyu & Another – v- R, [2005] 1 KLR 192 at 195***, this Court faced with facts similar to the instant case expressed itself as follows:

> ***"If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See R – v- Kabogo s/o Wagunyu, 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe…. Though the prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification…. In the circumstances, we have no doubt that the appellants' convictions are both unsafe and unsatisfactory".***

21. On our part, we are persuaded by the High Court dicta in ***R – v- Alexander Mutwiri Rutere alias Sanda & 8 Others, (2006) eKLR*** and we apply the dicta in ***Simiyu & another – v- R, [2005] 1 KLR 192 at 195*** to the facts of this case. The failure by the High Court to consider quality of the evidence of the alleged recognition of the appellant; failure to weigh that the complainant and PW3 allegedly knew the appellant prior to the alleged incident and noting that no name or description of the appellant was given to the police by PW1 and PW3 leads to our finding that the learned Judges erred in law in re-evaluating the quality of evidence on recognition; the Judges erred in that there was no exhaustive appraisal of the evidence tending to connect the appellant with the commission of the offence to see whether his conviction was safe when weighted against the fact that the complainant and PW3 knew the appellant prior to the incident and they did not disclose this to the police. In totality and guided by the decision in ***Simiyu & another – v- R,*** (*supra*) we hold that the conviction of the appellant is unsafe and unsatisfactory. We hereby set aside the conviction and sentence meted upon the appellant. We order that Morris Gikundi Kamunde be and is hereby set at liberty forthwith unless otherwise lawfully held.

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

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR