



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, OUKO & KANTAI, JJ.A)**

**CRIMINAL APPEAL NO. 73 OF 2014**

**BETWEEN**

**WYCLIFFE SITATI WERE .....1<sup>ST</sup> APPELLANT**

**RODGERS SOITA WERE .....2<sup>ND</sup> APPELLANT**

**JAVAN KHAEMBA NYONGESA .....3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from the Judgment of the High Court of Kenya at Kakamega (Chitembwe and Dulu, JJ.)  
dated 18<sup>th</sup> February, 2014***

***in***

**HCCRA NO. 260 OF 2012)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

It is a common factor that the complainant, a motor cycle taxi rider, was attacked by a group of four men, who inflicted severe injuries on him on the night of 29<sup>th</sup> September, 2011 and in the process, stole his employer's motor cycle.

It is also common ground that the appellants were known to the complainant before the night in question. The complainant was the only witness to the robbery. According to him, save for the 3<sup>rd</sup> appellant, he had seen the 1<sup>st</sup> and 2<sup>nd</sup> appellants earlier in the day. Prior to the attack, he saw them in the company of fourth person by the name Newton at Sienga road. Newton stopped him seeking to be taken to his home in a place called Lisumu. Because it was night time, the complainant was reluctant to go due to security reasons. But upon being persuaded and agreeing on the fare, the complainant was suddenly struck even before Newton mounted the motor cycle. He was not able to say who in particular did so but around him at the time of the attack were the appellants and Newton.

After the attack, the complainant, who had lost consciousness, was assisted by PW4, Moses Otunga

Nasumba to the hospital where he remained for nearly a month. It was at this stage that he realized that he had lost the motor cycle. The owner of the motor cycle made a report of the robbery to the police who commenced investigations by, first visiting the complainant in hospital. PW3 Sgt. Augustine Mwakio testified that when he visited the complainant in hospital, a day after the attack, the latter was not able to speak normally due to the nature of injuries he had suffered. Those injuries, according to the medical report, were on the nasal bridge, lower lip, two teeth were lost and multiple fracture on the jaw.

Despite those injuries, the complainant was able to give the names of the appellant and Newton to the police, (Sgt. Mwakio) and to PW5, Ernest Masuba Wanyonyi.

Based on that information, the appellants were arrested and charged. Newton was however, never arrested as he could not be traced.

All the appellants denied the charge relying on the defence of *alibi*. They maintained that on the night of the complainant's attack, they were with their families, ate dinner and slept. They were therefore surprised when they were arrested two days later. The 2<sup>nd</sup> appellant, however, attributed his arrest and trial to bad blood between him and the complainant arising from his rejection of the complainant's father's proposal to "*inherit*" the former's mother following the death of his father. The complainant's late father and the 2<sup>nd</sup> appellant's father were cousins. Instead the 2<sup>nd</sup> appellant's mother was "*inherited*" by the 1st appellant

Another source of conflict was a land boundary dispute involving the 2<sup>nd</sup> appellant's parents and the complainant's.

From this evidence, the learned trial magistrate found that although the identification of the appellants was by a single witness, that identification was nonetheless accurate in view of the fact that they were known to the appellant; that the complainant supplied the names of the attackers; that they spent sometime together negotiating the fare and that with the aid of the head light from the motor cycle, the complainant was able to clearly identify the appellants.

The learned trial magistrate found that the offence under **section 296 (2)** of the Penal Code was proved beyond any reasonable doubt and that that the *alibi* defences were afterthought. All the three appellants (erroneously referred to as four in the judgment) were convicted and sentenced to suffer death.

Their first appeal to the High Court was dismissed. Chitembwe and Dulu, JJ in their judgment, which is in the first person grammatical category of forms in most parts, (for instance; "*I am satisfied*", "*I have seen*", "*I do hold*", "*I am certain*" and so on) in upholding the decision of the trial court accepted the evidence of identification and dismissed the appellants' respective defences.

The appellants now bring this second appeal on the grounds contained in their consolidated memorandum of appeal whose combined effect can be summarized as follows:

- i) The conviction was against the weight of the evidence.
- ii) The learned Judges failed to consider the appellants' defence.
- iii) The learned Judges failed to find that the trial court did not comply with **section 211 (1)** of the Criminal Procedure Code.
- iv) The learned Judges failed to find that the trial was flawed by the failure of the trial court to accord the 3<sup>rd</sup> appellant fair hearing in that defence hearing proceeded in the absence of the 3<sup>rd</sup> appellant's counsel and for failing to allow the 3<sup>rd</sup> appellant to file submissions.

From the evidence outlined in the preceding paragraphs, the only question that falls for our determination

which was indeed the main question in both courts below is whether the appellants were properly identified as the robbers, who attacked and robbed the complainant on 29<sup>th</sup> September 2011.

In considering this question, we bear in mind our duty as the second appellate court in terms of **section 361 (1) (a)** of the Criminal Procedure Code which limits us to the consideration of only issues of law and not of facts that been determined by the trial court and re-evaluated by the first appellate court. See **John Gitonga alias Kados V. R.** Criminal Appeal No. 149 of 2009.

The question of identification in a criminal trial, it is now settled, raises a matter of law. See **M'Murungi V. R.** Criminal Appeal No. 155 of 1984. The attack occurred at about 7.30pm. The complainant was the only eye witness.

The law on identification is well settled, and this Court has time without number explained that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error, bearing in mind the surrounding circumstances. This requirement does not lessen the need for testing with the greatest care, the evidence of a single witness respecting identification, especially when it is clear that the conditions favouring a correct identification were difficult. See **Kiilu & Another V. R** [2005] 1 KLR 174.

We cannot fault the learned Judges in their finding upholding the trial court that the identification of the appellants was free from any mistake or error. The learned trial magistrate approached the question meticulously and properly warned herself of the need for caution before convicting on the evidence of single witness.

The appellants conceded that they were known to the complainant. The 1<sup>st</sup> appellant described the complainant as his neighbour. The 2<sup>nd</sup> appellant gave a detailed description of the relationship between his family and that of the complainant. Similarly, the 3<sup>rd</sup> appellant knew the complainant fairly well. It was the complainant's case that he had seen the appellants earlier in the day. Prior to the attack, he stopped and talked to the appellants. The motor cycle headlights being on he was able to see the four attackers clearly as they negotiated the fare.

He also gave the names of the appellants and Newton to the police and to PW5, Earnest Masuba Wanyonyi. The only issue taken with regard to this evidence is that the first report in which it is alleged that the complainant named his attackers was inconsistent. It is argued, for instance, that he did not give the name to the very first person who appeared at the scene, PW4, Moses Otunga Nasumba.

We are guided in providing the answer to this question by the decision of this Court, in **Mohammed Elibite Hibuya & Another V. R** Criminal Appeal No. 22 of 1996 as follows:

**"It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case ,proved fatal - this being a proven reliable way of testing the powers of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."**

In the present case, to begin with, the appellants were not strangers to the complainant. He had seen them shortly prior to the robbery. The first witness to arrive at the scene, PW4, Moses Otunga Nasumba confirmed that the complainant was very weak, bleeding heavily and could not see well. At some point, he could not talk. The learned trial magistrate made a finding of fact that due to the trauma of the grievous injuries suffered leading to intermittent loss of consciousness, the complainant could not be consistent in naming the attackers to those he met immediately after the attack. The learned

magistrate, however, was of the firm view that, the first report to the investigating officer in which the complainant named the appellants and Newton was credible.

The High Court, considering this aspect of the evidence made a concurrent finding that indeed the complainant, upon slight recovery from the injuries gave the investigating officer the names and the description of the clothes worn by the attackers; that due to great pain, the complainant could not have given the names of the attackers to PW4 who was the first person to arrive at the scene.

The Court has given the following circumstances in which it will interfere with the finding of fact by the trial and first appellate court.

**"A court on appeal will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."**

See **Chemagong V. R** [1984] 611 KLR.

We are satisfied that in admitting the evidence of first report and in accepting it, both the trial and the first appellate courts did not misdirect themselves. They correctly observed the complainant's state of health and concluded that he was not capable of describing the attackers to PW4 but after recovery he was clear and gave the names and described the dressing of the appellants to the police.

Turning to the ground that the trial court failed to comply with **section 211** of the Criminal Procedure Code, we find that although there was no specific reference to the section, by the trial magistrate, it was nonetheless complied with. The appellants, from the record, opted for sworn evidence and also indicated they would call witnesses. We find no substance in that contention.

Likewise, we find no merit in the argument that the appellants accorded fair hearing when the defence case proceeded in the absence of their advocate and without being accorded the opportunity to file written submissions.

Mr. Kundu advocate who represented the appellants, after the close of the prosecution's case expressly stated that he did not wish to submit. After the ruling on a case to answer, the trial was adjourned for two months to indulge Mr. Kundu.

At the resumed hearing Mr. Wekesa, advocate held Mr. Kundu's brief and led the appellants in their evidence in chief and in their re-examination, at the end of which he was given a date to file final submission and an earlier date for mention to confirm if he had complied. He did not comply and the court set down the case for judgment. The trial court cannot be blamed for the advocate's failure to comply with its order.

In the result, we find no merit in the consolidated appeal and accordingly dismiss it.

**Dated and delivered at Kisumu this 14<sup>th</sup> day of May 2015.**

**D.K.MARAGA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**