



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A)**

**CRIMINAL APPEAL NO. 72 OF 2010**

**BETWEEN**

**BENSON KISALI M'MBASU )..... 1ST APPELLANT**

**JEREMIAH EDGWA LIGADIRU )..... 2ND APPELLANT**

**TEDDY KINAMBUKA INYANGALA)..... 3RD APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from a conviction and or Judgement of the High Court of Kenya at Kakamega (Mr/Lady Justice F. M. Muchemi & S. J. Chitembwa) dated 4th May, 2009*

**in HCCRA Nos, 61, 62 & 63 of 2009)**

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**JUDGEMENT OF THE COURT**

1. On 4<sup>th</sup> May 2005, after a trial in the Resident Magistrates' Court at Vihiga, the appellants Benson Kisali M'Mbasu, Teddy Kinambuka Inyangala and Jeremiah Edegwa Lugadiru were convicted by R. O. Oganyo, Senior Resident Magistrate for the offence of robbery with violence contrary to section 296(2) of the Penal Code. They were sentenced to suffer death.
2. The appellants appealed to the High Court where they complained that the trial court was wrong to convict them based on unreliable evidence of identification; that the prosecution evidence was contradictory; that the burden of proof was shifted to them and that their defences were not considered. The High Court rejected their appeals in a judgment delivered on 21<sup>st</sup> May 2009.
3. In this second appeal, the appellants have faulted the lower courts for founding the conviction on what they say is *uncorroborated evidence of a single identifying witness; that had* the first appellate court properly re-evaluated the evidence it would have concluded that the evidence of that sole identifying witness was influenced by pre-set opinions from unrelated incidents; and that the lower courts failed to consider the defences put forth by the appellants.

**Background facts**

4. The complainant Bishop Hesbon Munekane (PW1), a businessman, operated a shop at Magui sub location Central Maragoli location, Vihiga District of the then Western Province of Kenya. He kept a chicken house behind the shop where he reared hens. On 12<sup>th</sup> September 2004 at about 8.00 pm he was at his shop alone. He heard movement as if someone was holding the padlock of the chicken house. He took a torch and shone it in the direction of the chicken house. He saw someone who then hid behind the chicken house. He then heard a knock a second time. He lit his flashlight, opened the door to go out to check and saw a person at the corner of the chicken house holding a stone in his hand. He pointed his flashlight in the direction of that person and recognized him as Teddy Kinambuka Inyangala (Kinambuka). Kinambuka then approached the complainant and hit him on the chest with the stone he was holding and retreated. The complainant pursued him for about five steps, reached him and hit him with a stick.
5. A group of about ten people then emerged from behind the chicken house and from neighboring nappier grass and surrounded the complainant. They were armed with pangas and iron bars. They assaulted him and cut him several times on the head and limbs, as they demanded money. He recognized two of the attackers in that group by their voices and appearance as his neighbours Benson Kisali M' Mbasu, and Jeremiah Edegwa Lugadiru. According to the complainant he "*got to recognize three very well as they come from nearby*". Benson Kisali M' Mbasu had a panga. Jeremiah Edegwa Lugadiru had an iron bar.
6. The group then split up. Some went into the shop. Two were left to guard the complainant. The two then dragged the complainant into the shop where he found M' Mbasu had just taken out money from the safe box. He had earlier informed M' Mbasu that money was in a safe box inside the shop. The other attacker were taking goods. According to the complainant, the house was well lit from a lamp that was on. Light from the torches used by the attackers also further illuminated the shop. As he bled inside the shop, the complainant screamed for help. His son and other neighbours responded. His son started screaming outside and the thugs heard him and got out to pursue him as others struggled with gunny bags carrying goods. He was taken to hospital where he was hospitalized for ten days.
7. At about 10.00 pm on 12<sup>th</sup> September 2004, Wycliffe Nandi (PW2) a resident at Magui sub location, Lugasa Location Vihiga was alerted by his brother Patrick Ashieno that their father, PW1, had been attacked. On receiving that information, he went to Vihiga Police Station and made a report. At the police station he got into a police vehicle accompanied by police officers and were on their way to PW1's residence when they met PW 1 being carried by his wife (PW2's mother) and his brothers "*But my father was just crying and mentioning Endekwa, Mmbasu and Kinabunga*" he said. They placed PW 1 in the vehicle and took him to Mbale Hospital for treatment. PW2 later recorded a statement at the police station in which he stated that his father (PW1) had supplied the names of the appellants, as the attackers.
8. John Mahonga (PW3) is one of the complainant's neighbours who responded to PW1's screams. He found PW1 at his shop having been cut on the head. PW1 could not walk and when asked what happened "*He was crying and saying he saw Mmbasu & Kinambuga and Endekwa who had beaten him.*" He assisted in taking PW1 to hospital.
9. Acting Inspector of Police Kennedy Onsando (PW4) was at Vihiga Police Station on 12<sup>th</sup> September 2004 at about 10.44 pm when PW 2 reported that a group of armed men had attacked his father in the shop and injured him. PW4 booked the report and proceeded, alongside other police officers, towards the scene. On the way they met the complainant being taken to hospital. Some of the officers proceeded to the scene. The others, including PW 4 took the complainant to hospital. PW 4 informed the officers proceeding to the scene about the names of the suspects who had been mentioned by PW 1. Thereafter, after a few failed attempts, the appellants were arrested and charged.
10. Francis Wasike (PW5) a clinical officer at Mbale District Hospital examined the complainant on 12<sup>th</sup> September 2004 at the hospital. On examination he found the complainant had sustained multiple injuries involving cuts on the head, cut on the lower back, cuts on the forehead swelling

and bruises on the chest region. In his opinion those injuries were caused by both sharp and blunt objects. He produced the P3 form that he prepared.

11. The first appellant Benson Kisali M' Mbasu, who was the first accused denied the charge. In his defence he stated that he was arrested on 20<sup>th</sup> September 2004 for allegedly breaking into bar; that a different charge of robbery with violence was read to him; and that at the time of the alleged robbery took place, he was not at home.
12. The second appellant, Teddy Kinambuka Inyangala was the second accused in the trial court. He also denied the charge. He stated in his defence that he is a carpenter; that on 30<sup>th</sup> September 2004 he was going about his business in his farm when police officers enquired from him where changaa was being sold; that the police officers asked him to accompany them to his home where they conducted a search but found nothing; that he accompanied them to the police station where he stayed for a long time before being summoned by Acting Inspector of Police Kennedy Onsando (PW4) who told him *"he'd frame me up because I refused to give him money."* He was then charged with an offence he did not know anything about.
13. The third appellant Jeremiah Edegwa Lugadiru was the third accused in the trial court. In his defence, he stated that he is a tinsmith and a grocer. On 14<sup>th</sup> September 2004 at about midnight, about 8 police officers went to his house. He accompanied them to the police station where he was placed in the cells. He stayed there for two weeks. He was then released without information why he was incarcerated. A week later, two police officers found him at his home and asked him to accompany them to the police station. He was later arraigned in court. Charges he knew nothing about were read to him.
14. Based on that evidence, the learned trial magistrate was satisfied that the appellants were part of the gang that attacked the complainant. The trial court proceeded to convict the appellants and as already indicated, the convictions were confirmed by the High Court on appeal.
15. It is against that background that the appellants have in this second appeal challenged the convictions.

### **Submissions by counsel**

16. At the hearing of the appeal, Mr. P. Ochieng Ochieng learned counsel for the appellants submitted that the test for reliance on the evidence of a single identifying witness was not met; that PW 1, the sole identifying witness could not have been in the correct frame of mind to identify his attackers; that the lower courts did not interrogate the quality of light to determine whether it was sufficient to enable the complainant identify his attackers; that the complainant is an elderly person aged 58 years; that the attack took place late at night; that there were more than 10 attackers; that the complainant was beaten and injured and sustained serious injuries as captured by the clinical officer and required the complainant to be hospitalized for up to a week; that in those circumstances and in his state, it was difficult if not impossible for PW 1 to identify his attackers.
17. Regarding identification of the 1<sup>st</sup> and 2<sup>nd</sup> appellants counsel submitted that the complainant is said to have relied on a lantern for lighting, yet the court did not go into the question of the distance between the lantern and where attack was or the duration the complainant had the attackers in view; and neither did the court interrogate whether light was sufficient.
18. Citing the decision of this Court in **Maitanyi vs.R [1986] KLR 198** counsel submitted that there should have been a careful inquiry by the lower courts regarding the nature of the light available and that the lower courts failed to undertake the necessary analysis in that regard.
19. Counsel urged that the evidence of identification in relation to the third appellant was insufficient

as there was only the evidence of PW 1 who said he spot lit the appellant with a torch from 10 meters away and did not thereafter see him again; that the distance involved, and the fact that PW1 was hit with a stone made it impossible for him to recognize the appellant and there was a risk that the complainant could have been mistaken. In that regard, counsel referred us to the decision of this Court in the case of **John Muriithi Nyagah vs. R Criminal Appeal No. 201 of 2007.**

20. According to Mr. Ochieng, the reliability of PW1's evidence on identification is further undermined by the fact that PW 1 had a preset mind regarding the appellants; that he alluded to the appellant having been released from prison by the President in connection with another case and that PW1 regarded the 3<sup>rd</sup> appellant as a criminal. According to counsel, PW1 was clearly prejudiced against the appellants.
21. Counsel concluded by submitting that the lower courts sought to support the conviction by seeking to find corroboration and alluded to the appellants having gone into hiding after the incident to support the alleged identification. In that regard counsel relied on the case of **Victor Mwendwa Mulinge vs. Republic Cr. Appeal No. 357 of 2012**
22. Opposing the appeal Mr. L. K. Sirtuy, learned Principal Prosecution Counsel, submitted that the circumstances obtaining favored safe identification; that as regards lighting there was a lantern lamp in addition to the spot light that was used by PW1; that the trial court when analyzing the evidence with regard to identification properly cautioned itself of the risk of relying on the evidence of a single identifying witness.
23. Mr Sirtuy went on to say that the evidence of PW1 was supported by that of PW2 who testified that he heard his father, PW1, calling out the names of the appellants as the attackers.
24. Counsel concluded by saying that the High Court duly discharged its duty to re-evaluate the evidence and to draw its own conclusions.

### **Determination**

25. We have considered the appeals and the submissions by counsel. This being a second appeal, we can only consider matters of law. See **M'Riungu v R [1983] KLR 455**. The only question that we have to determine in relation to each appellant is whether in the circumstances of this case, it was safe to convict the appellants on the evidence of a single identifying witness. It is often said that the evidence of a single identifying witness is fraught with danger. In **Cleophas Otieno Wamunga v R Criminal Appeal No. 20 of 1989 at Kisumu** this Court stated that:

***“Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”***

26. In this case, however, we are satisfied that the requisite caution was born in mind as is clear from the concurrent findings of fact by the two courts below on the identity of the complainant's attackers. The trial court on its part had this to say:

***“Having considered the whole evidence on record, I find that the core lies in PW1's testimony as he was the single eye witness of his invaders. PW1 said he used a torch to see accused 2 at first before he was attacked and that in the process of being attacked he heard voices of accused 1 and accused 3 and was able to recognise them more so when in the shop where a lantern lamp was. After warning myself that only PW1 saw the accused persons and after considering the circumstances under which PW1 saw his attackers as well as the fact that after their names had been mentioned to the police by PW1's the***

*three could not be traced at home on several, occasions only to be arrested later over two days to two weeks period variously. I am convinced that the three accused persons were part of the gang that attacked PW1 and immediately after, made away with his listed items in the charge sheet which none was recovered at all.*

27. It is evident from this passage that the trial magistrate was alive to the danger of basing the appellants' convictions on the evidence of a single identifying witness and duly cautioned himself.

28. On its part, the High Court, after re-evaluating the evidence, stated;

*“Although it is only PW1 who identified the appellants, the trial court was satisfied that that identification was proper. We are also satisfied that the identification was proper as there was light from torches and from the lantern lamp and PW1 knew the appellants who are his neighbours. We are satisfied that the circumstances of identification were favourable to enable PW1 identify the appellants.*

29. The approach taken by both lower courts in analysing the evidence of PW1 and the circumstances under which the identification was made accords with the approach proposed by this court **Matanyi Vs R (1986) KLR - 198** and we see no reason to fault it.

30. We can only interfere with the findings of the lower court if they are not based on evidence or if they are based on a misapprehension of the evidence or if the courts below acted on wrong principles in reaching those findings. See **Chemagong vs. Republic [1984] KLR 611**

31. In relation to the first and second appellants, the testimony of the complainant, which the lower courts, accepted was that he recognized the first and second appellants, as part of the group of assailants that attacked him. He described the first and second appellants as “*two of the boys who asked [him] insistently for money as they beat [him]*” and as his neighbours.

32. In relation to the third appellant, the complainant's testimony which was accepted by both lower courts was that when the complainant heard noise emerging from the direction of the chicken house, he lit his torch and saw the third appellant; the third appellant then attacked and hit the complainant with a stone and retreated; the complainant followed him and hit him with a stick.

33. There was also evidence before the trial court that soon after the robbery and as the complainant was being taken to hospital he mentioned the names of all three appellants to his sons PW 2 and PW 3. PW 2 is recorded as having heard his father “crying and ..... (Para. 7). PW 4 also confirmed that the names of the appellant's were furnished to the police when a report of the robbery was first made at Vihiga Police Station.

34. In our view both lower courts carefully examined the evidence of the complainant with respect to identification of the appellants and warned themselves of the danger of relying on the complainant's evidence alone. There is also no evidence to support the complaint by counsel for the appellants that the complainant was influenced by pre-set opinions from unrelated incidents. The reference by the complainant to the first and second appellant having been jailed for other offences or being criminals was made by the complainant in answer to questions put by the appellants to the complainant in the course of cross examination.

35. In the result there is therefore no basis, for this Court to interfere with the convictions. The appeals fail and are accordingly dismissed.

**Dated and delivered at Kisumu this 19<sup>th</sup> day of June, 2015.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true

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**DEPUTY REGISTRAR**