IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 70 OF 2014

BETWEEN

JAMES MWENDA MEME ………………………………………APPELLANT

AND

REPUBLIC ………………………………………………….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Emukule& Ouko, JJ-as he then was) dated 4th December, 2008

in

H. C. CR. A No 72 of 2006

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JUDGMENT OF THE COURT

1. The appellant was tried and convicted by Maua Principal Magistrate for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. It was alleged before that court that on 18th September, 2005 at Maua Location, in Meru North District within the then Eastern Province, jointly with others not before court, while armed with offensive weapons namely, knives, he robbed **Purity Muthoni Ikiao (Purity)** of one mobile phone, one bag, one trouser suit, one dress, one pair of shoes, four hard cover exercise books and cash (Kshs 3,000/=) all amounting to Kshs 10,400/= and at or immediately before or after the time of such robbery used personal violence against the complainant.

2. After hearing four prosecution witnesses and the appellant in his defence, the trial court found the charge proved beyond reasonable doubt, convicted him, and sentenced him to death as by law provided. He challenged the conviction and sentence before the High Court (**Emukule J. & Ouko, J-** as he then was) but the appeal was dismissed, thus provoking this second and final appeal before us.

3. The concurrent findings of fact made by the two courts below were short and straightforward. On 18th September, 2005 Purity, who was a student at Kabete Technical Training Institute in Nairobi and a resident of Maua Town, was making her way back to Nairobi at 5.30 a.m. Her mobile phone was on her waist and she carried the bag containing the items listed in the charge sheet. As she headed to the bus stop

near Mobil Petrol Station in Maua Town within the precincts of Banda Hotel, she was held from behind by a person who then moved to the front, whereupon she recognized him as Mwenda, the appellant. She was able to recognize him with the aid of fluorescent security lights which were on at the Banda Hotel. Purity also knew the appellant before the material date and asked him what the problem was. She held onto her mobile phone. In response to Purity's question the appellant asked: *"You think it is (sic) how many phones that have passed through my hands?"* Purity replied that there was no problem with the phone, and that she could give it to him together with the money in her possession. Moments later the appellant grabbed the collar of her polo neck sweater and started pulling her towards Banda Hotel and onwards past the hotel for about 100 meters. At some point Purity managed to break free from her assailant and ran away screaming.

4. The appellant ran after her. In the ensuing commotion Purity's bag fell down enabling the appellant to catch up with her and seize her. He hit her with an object above the left eye and she fell down. He took her mobile phone. Someone then asked the appellant: **"Mwenda what are you doing?"**

5. The person who called out the appellant's name was **Peter Mugambi Kailenya (**Peter) (PW2). He was in his house at Kwa Makumbi preparing to go out on duty when he heard screams. He rushed out only to find the appellant beating up a woman he did not know. He recognized him at once as he was his next door neighbour in the plot at Kwa Makumbi and the security (fluorescent) lights from Banda Hotel nearby were on. That is when he called him out and asked him what he was doing. The appellant told Peter: *"leave that matter"* and ran away from the scene carrying with him Purity's bag and mobile phone.

6. Peter assisted Purity, who was bleeding from the face, to report the matter at Maua Police station. They arrived there at 6.30 am and found **PC Charles Kaesa** (PW3) and Purity gave the name of the appellant as the person who assaulted her and stole her property which she enumerated. She was referred to Nyambene District Hospital for treatment and the clinical officer there, **Catherine Mankura** (PW4) confirmed that Purity had a cut wound on the left preorbital region (above the eye). She determined that it was caused by a sharp object and classified the injury as *'harm'*. A P3 form was completed to that effect.

7. The arrest of the appellant was made by **PC Kaesa** together with two other officers who knew the appellant. They traced him at Kaciongo area and placed him in the cells where Purity was summoned and confirmed he was the person she had reported at the station.

8. In his defence, the appellant testified that he was arrested for other offences during a night raid by the police, and that he had been framed by the investigating officer who charged him with a non-bailable offence. He conceded that he knew Purity as a person from Maua who used to sell coffee and he had drunk coffee at her place. They had subsequently quarreled when he stopped drinking her coffee. He nevertheless did not cross examine Purity on that story. The appellant also denied knowing Peter or being his neighbour at Kwa Makumbi.

9. During the course of the trial, the court visited the scene of the crime, where Purity was recalled to show the situation of the electricity lighting she referred to and the distances she had estimated in her evidence. Peter was also recalled at the scene to identify the room which the appellant occupied next to his. They did so.

10. The appellant sought to challenge his conviction on five grounds of appeal but at the hearing, learned counsel for him, **Mr. E. Kimathi** abandoned all the grounds except one which challenged the identification of the appellant by recognition. On that issue, Mr. Kimathi observed that the time of the robbery was 5.30 am which must have been dark. It must have been so because the two witnesses on recognition testified that they were aided by lights to make the identification. In his submission, there was no evidence on the intensity of those lights, and their positioning was suspect. He referred to Purity's evidence that at one point she was taken behind Lenana Hotel where there was no light. He also faulted Peter for purporting to have seen the appellant in darkness. Referring to the court's visit at the scene, Mr. Kimathi observed that the visit was made during the day and it was therefore not possible to get a simulation of the intensity of the lighting. In sum, counsel submitted, there was no proper analysis of the evidence relating to identification which remained in doubt.

11. On the other hand, learned Senior Prosecution Counsel **Mr. Moses Mungai** vehemently opposed the appeal submitting that the recognition of the appellant by Purity and Peter was beyond doubt. They both knew him before as Peter was a next door neighbor who called the appellant out by name when he saw him from a distance of 20 meters, while the appellant himself confirmed that he was known to Purity. As for the lighting, counsel observed that the offence took place almost at daybreak and the electricity lighting at the scene was added advantage. The court visited the scene and confirmed for itself the existence of the lighting and the distances referred to in the evidence. Citing the case of **Anjononi v Republic [1976-1980] KLR 1566,** he submitted that recognition was more reassuring than visual identification of a stranger.

12. We have carefully considered those submissions on the sole issue of law raised. Courts have always been sensitive to the issue of identification for obvious reasons. As this court observed and held in ***Wamunga v Republic [1989] KLR 424*** :-

"Evidence of visual identification in criminal cases can bring about 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 more identifications of the accused which he alleges 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".

13. Some measures for minimizing this danger have been suggested in various authorities and we take it from the case of ***R. V. Turnbull [1977] QB 224***:-

"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution [.....] When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

14. Applying those principles, the identification of the appellant in this case remains one of the quality of the identification evidence. The robbery took place at 5.30am – 6.00 am, which the High Court characterized as day break. As correctly observed by the appellant's counsel, however, that was not necessarily daylight and the witnesses themselves confirmed it when they said they also relied on electricity lighting at the scene. There was a concurrent finding of fact by the two courts that indeed there were fluorescent tube lights at the scene and we have no reason to disturb that finding. In ***Daniel Kabiru Thiong'o vs Republic –Nyeri Criminal Appeal No 131 of 2002 (unreported)*** this Court stated that:-

"An invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so".

15. The appellant was not identified through a fleeting glance but there was time enough for the two witnesses to have a good look at him. More importantly, the appellant was not a stranger to the two witnesses. They spoke to him and called out his name. He answered back. At the first opportunity when the report was made to the police within the hour, the name of the appellant was given out and this led to his arrest. As correctly observed by the state counsel, citing the **Anjononi case** (supra) such identification is more reassuring as it is one of recognition. Accordingly, it is manifestly clear that the appellant was positively identified and the question as to identification becomes settled beyond reasonable doubt. See ***Wanjohi & 2 others v Republic [1989] KLR 415***.

16. For those reasons we find no compelling reason to disturb the findings made on the identification of the appellant and we order that this appeal be and is hereby dismissed.

Dated and delivered at Meru this 9th day of July 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR