



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 49 OF 2013

BETWEEN

STEPHEN MUGAMBI ZAKAYO 1ST APPELLANT

MAURICE KARIITHI MUTURIA 2ND APPELLANT

VERSUS

REPUBLIC... RESPONDENT

(An appeal from the conviction of the High Court of Kenya at Meru (Ouko, J.)

dated 4th December, 2008

in

H.C.CR.A. No. 107 of 2007)

JUDGMENT OF THE COURT

The sole issue for determination in this second and final appeal by Stephen Mugambi Zakayo (Mugambi) and Maurice Kariithi Mutoria (Maurice) is whether the Judges of the High Court (Emukule and Kasango, JJ) erred by failing to test the evidence of the appellants' identification to the requisite standard in dismissing their first appeal to them.

The appellants had been charged, tried and convicted on two counts of robbery with violence. They were sentenced to death on the first count while the sentence for the second count was held in abeyance. The particulars of that first count were that on the 18th day of January 2005 at Kaiboo village, Meru North District of the Eastern Province, jointly with others not before court and while armed with dangerous weapons namely firearms, they robbed Henry Mbaabu of Ksh.15,000, a jacket, a torch and a slasher all valued at Ksh.17,750 and at or immediately before or immediately after the time of the robbery threatened to use actual violence on the said Henry Mbaabu. On the second count, they were similarly alleged to have robbed Francis Ntongai of Ksh.17,000, a pair of shoes and a wrist watch make Seiko-5 all valued at Kshs.21,500, and made similar threats against him.

Mugambi faced two further counts of being in possession of a firearm and of ammunitions respectively without a firearm certificate in that on the 19th day of January 2005 at Mutuati Town in Meru North District he was found in possession of a Sterling Patchet Firearm and of three rounds of ammunition contrary to **Section 4(1)** as read with **3(a)**, and to **Section 4(1)** as read with **Section 4(2) (a)**, respectively, of the **Firearms Act, Cap 114** of the Laws of Kenya.

Before the trial court, the prosecution called eight witnesses. The two complainants testified that on 18th January 2005, they were on their way home from Mutuati Market. The time was 9.30 p.m. on a moonlit night. On the way they were accosted by some five people who proceeded to rob them of the various items listed in the charge sheet. The robbers included two people that the complainants recognized as the appellants herein. Mugambi directed a gun at them while Maurice searched them.

The appellants were also recognized in the course of the robbery by one Josphat Njagi (PW3). He had been with the complainants before the robbery but had gone back to buy torch batteries. As he followed to catch up with the complainants, he came upon the appellants robbing them, and he retreated back to town. When the complainants also went back to town, he told them he recognized the people who robbed them as Mugambi and Maurice, which the appellants also confirmed. He accompanied the complainants to the Mutuati Police Station where they made a report of the robbery and gave the names of Maurice and Mugambi as some of the robbers.

The day after the robbery, on 19th January 2005 at about 8 p.m., Corporal Ephantus Igane, (PW4) who was attached to the Mutuati District Officer's Office received information that someone had been seen with a gun. He marshalled some two colleagues and together they went to the house of the suspect. It was locked with a padlock but they lay in wait. After an hour or so, a woman came and opened the door. They went inside and found a man. They demanded to be shown where the gun was. The man told them it was in the ceiling of the house. APC Peter Kimanzi (PW6) climbed into the ceiling and found a gun which had three bullets inside. They arrested the man, took him and his gun to their Camp and on to the Maua Police Station the next day. That man was Maurice. The gun and ammunition found were duly examined and a report prepared by a Firearms Examiner called Lawrence Nthiwa and produced in court by his colleague Emmanuel Langat (PW7). This was the basis for the third and fourth counts that Maurice faced.

Mugambi was arrested by PW6 and other Administration Police Officers at Mutuati Market pursuant to a warrant of arrest issued for him in connection with the robbery. The complainants pointed him out. Both he and Maurice were picked by the two complainants and PW3 at identification parades mounted by Inspector Samuel Ngeiwa (PW8) on 31st January 2005. He duly filled in the parade forms which were produced in evidence.

At the hearing of the appeal, Mrs Ntaragwi, learned counsel for the appellants contended that the evidence of identification was not properly tested by the two courts below. She submitted that the circumstances were not conducive to an error-free identification as PW1 claimed he was asked to lie down, it was at night and the witnesses relied only on moonlight. The strength of the moonlight was not mentioned until the court itself, improperly in counsel's view, started asking questions about it in a way that went beyond identification and amounted to making the prosecution's case. Such evidence, Mrs Ntaragwi submitted, was mere

afterthought. She also contested whether the appellants' names were ever given to the police and faulted the prosecution's failure to produce the first report at the trial. She rested her submissions by criticizing the reception of evidence on the identification parade since it was alleged the witnesses were known to the appellants.

Opposing the appeal, Mr. Mungai, the learned Senior Prosecution Counsel submitted that the ingredients of the offence of robbery with violence were satisfactorily proved. The appellants were positively recognized as part of the gang that robbed the complainants by PW1, PW2 and PW3. To counsel, the evidence of the moonlight was properly led and was not an afterthought as contended for the appellant. He submitted that the trial court was entitled to ask witnesses clarification questions. To him, the

appellants came into close proximity and contact with the complainants in order to rob them and this afforded the witnesses an opportunity to properly observe and recognize them. All this, together with the fact that the witnesses mentioned them by name in their report to the police lend great credence to the accuracy of the recognition evidence. He conceded that the identification parades were unnecessary, as the witnesses knew the appellants already.

When the case against an accused depends entirely or substantially on the evidence of identification or recognition, the court must approach such evidence with great care and examine it closely to satisfy itself that the evidence is free from the possibility of error. The proper approach is not to determine whether it is possible from the circumstances surrounding the commission of an offence to identify or recognize the killer, assailant, thief or other criminal but rather whether, in those circumstances, a fool-proof identification or recognition can be expected. Prudence commands, nay compels, such circumspection out of recognition that in the ordinary course of things mistakes of identification or recognition even of close family members, are not unheard of.

One of the classic formulations of this conundrum and the judicial cure for it is found in the oft-cited English case of **REPUBLIC –VS- TURNBULL** [1976] 3 All ER 549 quoted by the learned Judges *in extenso* as follows;

“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 witnesses when first seen by them and the actual appearance?”

What the English Court of Appeal stated therein has been restated in many decisions of this Court including **FRANCIS KARIUKI NJIRU & 7 OTHERS –VS- REPUBLIC** [2001] e KLR where it stated;

“The law on identification is well settled, and this Court has from time to time said 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 or free from the possibility of error. The surrounding circumstances must be considered... Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”

We have borne those guiding principles in mind, in considering this appeal. As it is a second appeal, however, our scope for interference with the findings of fact by the two courts below is limited. This was thus stated in **NJOROGE –VS- REPUBLIC** [1982] KLR 388;

“On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal the Court is bound by the concurrent findings of fact made by the lower courts unless those findings were not based on evidence.”

We are not persuaded, as contended by the appellants that the findings by the two courts below that they were recognized as the active two of the five robbers was not based on evidence. To the contrary, the evidence of PW1, PW2 and PW3 is clear and consistent. All of these witnesses knew the appellants well and gave evidence referring to them by name and describing in detail what each did during the robbery.

For instance PW1 stated;

“...on the way we found the two accused standing on the way near the home of Ntongondu. They were 5 people. Some of them were seated and three were standing. They told us to stop. They were as from here to where you [the Court] are when they told us to stop. It is Mugambi who told us to stop. He told us to raise up (sic) our hands. I did so. He told us to lie down. I did so. Maurice the 2nd accused removed money from my front left pocket of my trouser. It was Ksh.15,900. Mugambi had a gun. Maurice also removed my jacket that I was wearing. He took a torch that I was holding. There was moonlight.”

PW2 and PW3 also mentioned Mugambi and Maurice by name. All three witnesses moreover made a report to the police immediately after the robbery in which they gave the names of the appellants. The two complainants had interacted and conversed with the appellants for a considerable period of time during the robbery. It certainly was not fleeting, touch-and-go encounter. Moreover, it can be termed as axiomatic that evidence of recognition, especially by multiple witnesses as herein, is more reliable, more satisfactory and more assuring than the identification of a mere stranger. See, **ANJONONI –VS- REPUBLIC** [1980] KLR 59.

As to the critical aspect of lighting, all three witnesses were emphatic that there was strong moonlight. When questioned by the trial court (it cannot have been a *cross-examination*, as the record indicates), PW1 stated;

“The moon was in the position of the mid-day sun. It was very bright”

We do not find anything objectionable about the trial court asking the witnesses questions after they had been re-examined by the prosecutor. In fact, the record shows that after questioning them, the learned Magistrate afforded the appellants the opportunity to cross-examine them thereby avoiding any prejudice. This was in strict compliance with **Section 150** of the **Criminal Procedure Code**.

PW2 also gave very firm evidence with regard to the strength of the moonlight made even clearer by the questions posed by the appellants themselves. The records reads;

“Cross examination by Court (sic)

The moon was very bright.

Cross examination by Accused 1 about the moonlight: *The moonlight was lighting everywhere. There were no trees there. It is the fence that is high. It was not covering the moonlight.*

[By] Accused 2:

I had started seeing the moon at 7 p.m. The moon was in the position of the midday sun. There were no high trees. I recognized you as you came very close to me when you robbed me. You were not wearing anything on the head”

With respect, the evidence of recognition appears to us to have been iron clad. The circumstances appear to us to have been picture-perfect for positive and safe recognition of the appellant without any possibility of error. Indeed, save for the superfluous identification parade, this was a text book case on recognition evidence.

In the result, this appeal lacks merit. It is dismissed in entirety.

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

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL