IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 381 OF 2009

BETWEEN

PETER WACHIURI GICHIRA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court at Nyeri (Sergon and Makhandia JJ.)

dated 19th November 2009

in

H.C.CR A. No. 342 of 2007)

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JUDGMENT OF THE COURT

1. The appellant faced the charge of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***. The trial magistrate convicted and sentenced him to death. His appeal to the High Court was dismissed ***(Sergon & Makhandia JJ).*** He has now lodged a second appeal before this Court.

2. The relevant grounds of appeal as stated in the home made memorandum of appeal filed in this matter are as follows:

> i. The learned judges erred in law in finding that the identification of the appellant through recognition by PW 1Joseph Kamau Gituru was not free from error.
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> ii. The learned judges erred in law in not finding that a one Kimani ought to have been called to testify and the failure to call him as a prosecution witness implied that his evidence was adverse to the prosecution.

3. During the hearing of this appeal, learned counsel Lucy Mwai represented the appellant while the State was represented by the Assistant Director of Public Prosecution Mr. Job Kaigai.

4. Counsel for the appellant elaborated that the key issue in this appeal is the evidence on recognition and

identification by a single witness. It was submitted that the appellant was allegedly recognized and identified by the complainant PW1Joseph Kamau Gituru under conditions and circumstances which were not free from error. It was submitted that the offence took place at night and it was alleged that there was moonlight. Counsel submitted that the trial magistrate and the learned judges erred in that no inquiry was made to ascertain the nature of the moonlight and its brightness in relation to the complainant and the appellant. It was submitted that the medical report tendered in evidence did not show that violence was used during the alleged offence; that the complainant suffered no serious injuries and the testimony of PW1 was not sufficient to uphold conviction of the appellant. Counsel cited the case of ***Karanja & another – v- R,*** Nakuru Criminal Appeal (2004) 2KLR 140 in support of the submissions. The case of ***Dzombo Mataza – v- R,*** (2014) eKLR was also cited.

5. The State opposed the appeal and supported the conviction and sentence meted on the appellant. It was submitted that the testimony of PW1 was clear and consistent; that PW1 as the complainant indicated the quality of the moon light at the time of the offence and explained that there was a bright moon. Relating to the submission that there was no violence used during the offence, the State submitted that the report by the Clinical Officer proved that violence was indeed used on the complainant and he suffered injury. On identification of the appellant, it was submitted that PW 3 Police Constable Isaac Njuguna testified that investigation was done and he was given the name of the appellant including his alias name of "Fuaga". That the appellant in his defence admitted his alias name and the defence was displaced by the prosecution case. The State submitted that the complainant had no reason to frame the appellant for the crime.

6. Counsel for the appellant in response to the State's submission reiterated that the recognition of the appellant by PW1 was mistaken and the mistaken identity runs from the time of the alleged recognition to the time of making report to the police. Counsel urged this Court to find that in the instant case, the mistaken identity was consistent and persistent. It was submitted that it is a misdirection to hinge the prosecution case on the defence testimony; that the strength of the prosecution case should not depend on the weakness of the defence case as the appellant could as well have chosen to remain silent.

7. We have considered the submission by the appellant and the State in this matter. The appellant relied on the case of ***Karanja & another – v R (***2004) 2 KLR 140 in support of the proposition that the strength of the moonlight was not tested and that mistakes of recognition of close relatives and friends are sometimes made.

8. The gravamen of the appellant's case is the issue of single recognizing and identifying witness. In ***Abdulla Bin Wendo & Another -vs- Reg (1953) 20 EACA 166,*** it was held that:

> ***"It is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult.*** See also ***Roria -vs- Republic (1967) EA 583*** and ***Ogeto -vs- Republic (2004) 2 KLR 14."***

In ***Wamunga vs. Republic (1989) KLR 424*** this Court held at page 426:

> ***"..Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

9. The evidence on recognition of the appellant was given by PW1 Joseph Kamau Gituru. In his testimony, PW1 stated as follows:

> ***"On 7th December 2006 at about 7.30 pm I was going home with Kimani. On our way home, we could see people seated near some trees. There was a home nearby. The moon was bright. One person identified himself as a policeman. He asked us to stop. When he***

neared me I recognized him. Immediately I asked him since when was he appointed as a policeman? He told me that they were Mungiki and should stop. He was holding a panga with his right hand. I asked him whether it was possible for a police man to carry a panga. He told me not to question him. He then held my shirt on the neck. The other man who was seated came quickly and hit Kimani and Kimani fell down. I was then struggling with the man who held me and I slipped and fell down. He then hit me with the flat side of the panga on my left ribs. The other man was also beating me... They took my watch Seiko 5 worth Ksh. 450/=, my phone make Erickson T10 worth Ksh. 3400/= and they ran away. I was able to recognize Wachiuri.... I told Kimani we proceed to their home and inform the mother. We then went to report to Kiangochi police post. I was given a referral letter and I went to hospital the following day. I took policemen to Wachiuri's home and he was arrested. Nothing was recovered."

10. In cross-examination, PW 1 testified that he knew the appellant as they come from the same village and he was able to recognize him as the moon was bright; that the appellant was the one who came near PW1 and attacked him. That together with Kimani, PW 1 testified that they immediately went to the appellant's home and told his mother what he had done. The appellant's mother told PW1 that the appellant had not arrived home.

11. The honourable judges in evaluating the evidence on recognition expressed themselves as follows:

"The appellant has challenged the evidence of identification ...on the ground that he could not have robbed Gituru someone well known to him and knowing very well that he could be a target of easy recognition....No man knows what goes in the mind of another. It cannot therefore be a correct proposition nowadays that a friend, relative or even a person well known to a victim can never commit a crime on such victim for fear that he could be recognised. It may as in the circumstances of this (sic) case be that the appellant was labouring under a false hope or illusion that he could not be recognized and even if he was, nothing will be done to him... Secondly, there is evidence of PW2, the Clinical Officer confirming that Gituru was injured. The appellant has also complained that the evidence of recognition was not corroborated. That such corroboration would have been provided by one Francis Kimani who was in Gituru's company at the time of the robbery. There is no requirement in law that in every criminal trial, evidence tendered must be corroborated. Yes, there is a class of offences that require corroboration and this is not one of those cases."

12. We have considered the honourable judges re-evaluation of the evidence of recognition as testified by PW1. In the case of ***Charles O. Maitanyi vs. Republic (1986) KLR 198,*** this Court held that:-

"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification."

13. In ***Wamunga vs. Republic (1989) KLR 424*** this Court held at page 426:

"..it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

14. In the instant case, PW1 testified that knew the appellant and that the moon was bright. The appellant agreed that PW1 was a person well known to him. The testimony of PW1 given in cross-examination was consistent and not shaken.PW1 testified that the appellant came close to him and held him by the shirt and a struggle ensued. From this testimony, we are convinced that the circumstances existing at the time of the offence was conducive for a positive identification of the appellant by PW1. We are convinced there is no question of mistaken identification. We find that the honourable judges did not err in their re-

evaluation of the evidence on record and in upholding the conviction and sentence meted upon the appellant.

15. On failure of the prosecution to call a one Francis Kimani to testify, we observe that there is no obligation on the part of the prosecution to call a multitude of witnesses to prove its case. ***Section 143*** of the ***Evidence Act***, (Chapter 80 Laws of Kenya) provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact. In ***Julius Kalewa Mutunga -vs- Republic, Criminal Appeal No. 31 of 2005 (Unreported),*** this Court held that:

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive"***

16. We are of the considered view that failure to call a one Francis Kimani to testify was not fatal to the prosecution case which was proved to the required standard. We find no merit in this appeal and we dismiss the appeal in its entirety.

Dated and delivered at Nyeri this 31st day of March, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR