IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 638 OF 2010

BETWEEN

JOHN CHEGE GACHERU …….....…..……. APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru

(Maraga & Emukule, JJ.) dated 12th March, 2010

in

H.C. Cr. A. No. 262 of 2008)

****

JUDGMENT OF THE COURT

1. The appellant faced a charge of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***, ***Cap 63*** of the ***Laws of Kenya***. The particulars are that on the 11th day of November, 2007, at Kiawariga village in Laikipia West District within Rift Valley Province jointly with three others not before court being armed with dangerous offensive weapon namely rungu, robbed Mr. Francis Nderitu cash Ksh. 5,000/= and at or immediately after the time of such robbery used actual violence to the said Francis Nderitu.
2. The appellant was tried, convicted and sentenced to death by the trial magistrate. His first appeal to the High Court was dismissed. This is a second appeal which must be confined to points of law. (See ***Kavingo – v – R, (1982) KLR 214,*** **and** ***Chemagong vs. Republic, (1984) KLR 213***).
3. In supplementary grounds of appeal filed in court on 14th May, 2012, the appellant raised various grounds *to wit:*

(i) ***The High Court erred in law by upholding the lower courts findings while the prosecution's case had suffered procedural irregularities, in that the prosecution side did not avail both the officer who investigated the case and the officer who arrested the appellant. In the absence of the two officers, no cross- examination of these vital witnesses could be done.***

(ii) That the High Court erred in law in finding that there was sufficient evidence of

identification by recognition.

(iii) That the medical report tendered in evidence was not valid as the complainant, PW2, took three days before seeking medical attention.

(iv) That no voice identification was made.

(v) The High Court erred in failing to find that the trial court did not warn itself on the danger of relying on the testimony of a single identifying witness.

4. At the hearing of this appeal, learned counsel Mr. Mongeri appeared for the appellant while the State was represented by the Prosecution Counsel, Ms N. K. Ngovi.
5. Only a single prosecution witness PW2 Francis Nderitu Wanjohi, the complainant, testified in this case. The relevant excerpts of his testimony is as follows:

"On 11th November, 2007, at 8.00 pm I was walking with a person called Mrefu as we were going home. He got to his home first. I proceeded on. I met four (4) people. They flashed their torch at me. I was ordered to lie down. I heard the voice to be Chege's. I asked – Chege – what is it. He said: "lala chini". As he came close I got hold of him. The others set on me. They beat me, took Ksh. 5,000/=. I was beaten with a rungu on both hands and legs. They left me on the ground. I really screamed for help. It was near Chege's home. I tried to run. I fell and lay there for a while. It rained. Then after some time I got up and tried to get home. I saw same 4 people. I ran screaming calling for help. I heard my sister's voice then lost consciousness. I later found myself being taken to hospital. I was admitted. Later, I reported the matter to the police. The person I identified is Chege who is a person well known to me for over 10 years".

6. Counsel for the appellant elaborated on the grounds of appeal. He submitted that this was a unique case because there was only one witness for the prosecution. That the entire case depends on the testimony of the single prosecution witnesses versus the testimony of the appellant. That this is a case of my word against your word. Given this background and record of the case, counsel for the appellant emphasized that the gravamen of the appellant's case is on the faulty evidence of recognition and that both the Investigating and the Arresting Officers were not called to testify. Because the single prosecution witness was the complainant, counsel submitted that the Investigating and Arresting Police Officers were critical witnesses and should have been called to shed light as to why the appellant was arrested and what description was given to enable him to be arrested. Counsel submitted that the appellant could have cross-examined these critical witnesses to determine the cogency and veracity of the charges he faced and the veracity of his *alibi* defence.
7. Counsel submitted that no credible evidence was tendered to prove voice recognition and the circumstances for visual recognition was not conducive for positive identification. It was submitted that the alleged offence took place at 8.00 pm and it was dark. That the complainant testified he was able to identify the appellant using a torch light which was in possession of the attackers. Counsel for the appellant submitted that in his statement to the police, PW2 did not mention that the attackers had a torch and the testimony about the torch only emerged in court during the hearing. Counsel submitted that both the trial court and the High Court erred in that they did not evaluate the nature of the lighting from the torch, the intensity thereof and its relative position to the complainant and the appellant. Counsel submitted that if it were true the attackers had a torch; the torch would be illuminating and shining in the direction and face of the complainant and wondered how one would see the attackers if the light rays were not in the direction of the attacker but the complainant. For the appellant it was submitted that there was no evidence indicating for how long the torch was flashed on the complainant's face. Counsel submitted that the trial court erred in failing to properly evaluate the evidence relating to the torch and the evidence raises doubt whether in fact there was any torch at the time of the alleged offence.
8. Counsel for the appellant further submitted that there was a material contradiction in the evidence of PW3 and PW5. Whereas PW5 testified he was the first to arrive at the scene of the crime; on his part PW3 testified he was the first to arrive at the scene and he never saw PW5. The

importance of this contradiction arises because in the testimony of PW3, he states that upon arrival at the scene, PW2 the complainant stated that he had been attacked by "*Chege*". On the other hand, PW5 states that she was the first at the scene and the complainant could not talk. If according to PW2 the complainant could not talk, is it possible that the complainant could have told PW3 that he had been attacked by "*Chege*"? If PW5 was the first at the scene and she never saw PW3, then at what point did the complainant talk to PW3? Counsel submitted that what is emerging from the evidence on record is that either the testimony of PW3 is correct or that of PW5 is wrong. It was submitted that the two testimonies contradict themselves on the critical issue as to whether the complainant said that he had been attacked by "*Chege*" or whether this was a mere afterthought. Counsel for the appellant submitted that these are the issues that the Investigating Officer would have clarified. It was also submitted that the alleged dangerous and offensive weapons namely the *rungu* and the alleged torch were not produced in evidence. It was submitted that the Investigating Officer would have shed light and clarified the nature of the complaint received; the circumstances under which the offence was committed and investigated the *alibi* of the appellant. Counsel for the appellant cited the cases of ***Anthony Kangethe Mwangi –v –R, Nyeri Criminal Appeal No. 24 of 2010***; ***Charles Bowen Too & another – v- R, Nakuru Criminal Appeal No. 146 of 2011*** and ***Douglas Komu Mwangi – v- R, Nyeri Criminal Appeal No. 653 of 2010,*** in support of his submissions.

9. The State in opposing the appeal submitted that the prosecution had proved its case to the required standard. It was submitted that apart from voice recognition; the appellant was identified visually using light from the torch. That the complainant testified he knew the appellant for over ten (10) years and it did not take more than two (2) weeks before they could meet. It was submitted that the 10 year period within which the complainant has known the appellant make identification through recognition to be positive and free from error or mistake. It was submitted that the fact that the complainant took the police to the house of the appellant meant that the complainant knew the appellant well. It was further submitted that the complainant testified that during the commission of the crime; he got hold of the appellant who was in front of him. In the words of the complainant, he testified that: "*when a torch is flashed in your eyes, you see the torch light; I was able to identify you because we got hold of each other. The torch faced up as we were struggling*." The State submitted that the ingredients for the offence of robbery with violence was proved beyond reasonable doubt; that it is not disputed a robbery occurred and a person was wounded.
10. We have reassessed the evidence on the record, the grounds of appeal presented to us for determination by the appellant as well as the rival arguments presented by both sides. The evidence against the appellant is primarily by PW2 Francis Nderitu Wanjohi. 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."

11. PW2 testified that he recognized the appellant both visually and by voice. We shall analyze each of these two modes of recognition separately. The offence was committed at 8.00 pm and it was dark. PW 2 testified that the source of light for visual identification was a torch which the attackers had. Evidence of visual identification should always be approached with great care and caution **(**See ***Waithaka Chege – v- R, {1979} KLR 271)***. Greater care should be exercised where the conditions for a favourable identification are poor and where identification is by a single witness **(*Gikonyo Karume & Another – v – R, {1900} KLR 23)*.**
12. In the instant case, we note that without proper caution, a possibility of error or mistake could exist as it was night time and the only source of light was a torch allegedly held by the attackers.
13. During the hearing of the case before the trial magistrate, the statement made by the complainant to the police was read in court. The torch is not mentioned in the statement. The complainant when asked why he never mentioned the torch in his statement replied that he did not have to record everything in the statement. He urged the trial court to rely on his testimony as the torch was not an exhibit. The complainant testified that the arresting officer would tell the court what he arrested

the appellant with. We observe that the Arresting Officer never testified. That being the case, it is difficult for us to be convinced beyond reasonable doubt whether there was any light from a torch. The torch was neither mentioned in the statement to the police nor was it produced as an exhibit. Neither the investigating nor nor the arresting officer testified.

14. It is our considered view that it is this kind of scenario that calls for a trial court to be extremely cautious before one can conclude that there was sufficient lighting to recognize and identify an accused person at night and in difficult circumstances. It has been held that before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. **(See *Abdalla Bin Wendo & Another – v- R, {195} 20 EACA 166; Wamunga – v- R, {1989} KLR 42; and Maitanyi – v- R, 1986 KLR 198)*.** It is required that before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently. Failure to undertake such enquiries is an error of law and fatal to the prosecution. We have examined the record and have come to the conclusion that the conditions for correct visual identification were not favourable and positive. There is no cogent evidence to the required standard of proof that a torch indeed existed at the scene of the crime. The fact that the torch was not mentioned in the complainant's statement; failure to produce it as an exhibit as well as failure of the prosecution to call the investigating officer leave a gap in the prosecution case. We find that the learned judges erred in law in failing to re-evaluate the evidence on record to determine if it was proved to the required standard that there was a source light from a torch as alleged. The learned judges erred in failing to determine if there was evidence to support that indeed a torch was used at the time of the offence.

15. The appellant's case is also premised on the fact that both the investigating and arresting police officers were not called to testify. We are aware that under ***Section 143*** of the ***Evidence Act,*** the Prosecution is not obliged to call any given number of witnesses but from the facts of this case, it would have been prudent to call the Investigating and Arresting Police Officers to shed light on the circumstances under which the offence was committed and to test the veracity of the appellant's *alibi*.

16. We note from the record that the complainant testified that he was able to recognize the appellant through his voice. As regards voice identification, in ***Karani vs Republic, (1985) KLR 290,*** this Court held at page 293:

"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases, care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification".

17. PW2 testified that he had known the appellant for ten years and two weeks did not pass before they could meet. In ***Anjononi & Others vs. Republic, (1976-80) 1 KLR 1566*** at page 1568 this Court held,

"…recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other".

18. We have examined the record of proceedings before the trial court. The words that were uttered by the attackers which made the complainant to allegedly recognize the voice as belonging to the appellant are the two words "*lala chini*" repeated twice. We pose the question, is there cogent and convincing evidence that the words "*lala chini*" are sufficient for voice recognition; could the complainant have been mistaken? The complainant testified that he was attacked by four people. To whom did the voice belong? Is there evidence on record that can corroborate the identification of the voice of the appellant? We have examined the record and find that there is no evidence capable of corroborating identification of the voice as that of the appellant. We do not say that corroboration is required for voice identification rather we state that from the specific facts of this case, corroboration of the voice identification would remove any doubt as to the identity of the

attackers. The Investigating Officer not having been called to testify, we find that there is a glaring gap in the prosecution case both as regards the visual and voice identification of the appellant. It is our considered view that the evidence of voice recognition given by PW2 is weak and insufficient to identify the appellant. We are convinced that there was no proper testing of the evidence of visual and aural recognition by the two lower courts. Had the evidence been tested and analyzed, we cannot be sure that the two courts below would still have come to the same conclusion. The benefit of doubt is in favour of the appellant.

19. The appellant further contends that the contradictions in the testimony of PW3 and PW5 is material and the learned Judges erred in law in failing to find that due to the contradictory evidence, conviction was unsafe. The relevant testimony of PW3, Stephen Ndegwa Kariuki is as follows:

"On 11th November, 2007, at 1.00 am I was at home. I heard screams from near my home. A person was screaming. I went out. I found Nderitu. He was injured. He was lying on the ground. His clothes were dirty. He was bleeding. He told me he was beaten and robbed by Chege. He was not talking much. People came. They decided that he sleep in my place and be taken to hospital the following day. He slept he was taken to hospital. I was not at the place the offence was committed. I only gave the complainant a place to sleep. I heard him outside my compound. I found him alone".

20. The relevant testimony of PW 5 Milka Muthoni Githinji is as follows:

"On 11th November, 2007, at 1.00 am I was at home. I heard screams on the road. I stayed. The screams got closer to our home. I went out to check. I saw my brother Francis Nderitu. He was screaming – calling out that Chege had beaten him and robbed him of Ksh. 10,000/=. I called my neighbour Stephen Ndegwa. I went to the wife of Francis Nderitu and came with her. She is Loice Njeri. We came and found him unconscious and sleeping. His wife searched him and found Ksh. 450/-. We decided that he sleeps in Ndegwa's home".

21. We have considered the evidence on record and the testimony of PW3 and PW5. There are no material contradictions. Both witnesses agree that they heard screams at about 1.00 am. Both agree that the complainant spent the night in PW3's house. Both agree that the complainant stated he had been beaten and robbed by Chege. We observe that in his submissions, counsel for the appellant misapprehended the testimony by these two witnesses. PW3 was clear that he was not at the scene of crime. PW5 is also clear that she was not at the scene of crime. The alleged offence took place at 8.00 pm; the screams that both PW3 and PW5 heard were at about 1.00 am which is a different time from the time of robbery. The difference in time is explained in the testimony of the complainant when he stated that after the attack he fell down and remained at the scene and later he got up and tried to go home. That on his way home he met the 4 people again and he started screaming. The evidence shows that the appellant screamed twice first at 8.00 pm and later at 1.00 am.
22. The issue in this case is not whether the complainant uttered the words that he had been beaten by Chege; the issue is whether the complainant positively identified Chege, the appellant, as one of the attackers. The answer to this issue squarely depends on whether the complainant properly and positively identified and recognized the appellant visually and through voice recognition. We have expressed our view that the visual and voice recognition in the testimony of the complainant is weak and unsafe for conviction. We see no need to comment on the defence of *alibi* raised except to state that when an *alibi* is raised, the burden to disprove the *alibi* rests with the prosecution and in the present case, no evidence was led to challenge the *alibi*. If the investigating officer had been called to testify, the veracity of the *alibi* would have been tested.
23. The totality of our evaluation of the evidence on record and the applicable law is that we are inclined to allow this appeal, as we hereby do and quash the appellant's conviction. We set aside the death sentence meted out and accordingly, we direct that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 20th day of March, 2014.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR