IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 637 OF 2010

BETWEEN

SAMUEL GITHINJI KIMARU.....1ST APPELLANT

PETER MWANGI WANJIRU.....2ND APPELLANT (DECEASED)

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court at Nakuru

(Maraga & Emukule, JJ.) dated 26th April, 2010

in

H.C.C. CR A. No. 56 & 57 of 2009)

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JUDGMENT OF THE COURT

1. The appellant Samuel Githinji Kimaru was jointly charged with Peter Mwangi Wanjiru (deceased) and another with the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***. The person who was charged as 3rd accused was acquitted by the trial court while the 2nd appellant herein died before the appeal was heard. The particulars of the offence are that on 27th July, 2008 at Nakuru Township in Nakuru District of the Rift Valley Province, jointly with others not before court being armed with dangerous weapons namely pistols, robbed Maurice Mwita Nyabagosi of a motor vehicle registration number KAV 781C Toyota Corrola saloon station wagon white in colour valued at Ksh. 550,000/= a mobile phone make Samsung A800 valued at Ksh. 13,000/= cash money Ksh. 100/-, ATM card all valued at Kshs. 563,100/= and immediately before or immediately after such robbery, used actual violence to the said Maurice Mwita Nyabagosi. In Count II, the appellant was charged with being in possession of ammunition without a firearm certificate contrary to ***Section 4 (1)*** as read with ***Section 4 (3)*** of the ***Firearms Act, Cap 114 Laws of Kenya***.

2. Upon hearing the evidence and submissions by counsel, the 1st and 2nd appellants were convicted and sentenced to death by the trial court. Their first appeal to the High Court was dismissed and this is a second appeal.

3. At the hearing of this appeal, learned counsel Mr. D. Mongeri appeared for the appellant while the State was represented by the Senior Public Prosecution Counsel Mr. T.K. Mutai.

4. Counsel for the appellant adopted the home-made grounds of appeal as filed by the appellant. The appellant cited four main grounds as follows:

> ***i. That the learned Judges of the High Court erred in law and fact in failing to reconsider that the purported identification parade relied upon by the subordinate court was improper and contrary to Chapter 46 of the Police Force Standing Order.***
>
> ***ii. That the learned Judges erred in failing to find that there was mistaken identity in the conviction of the appellant.***
>
> ***iii. That there was no voice expert called to testify in relation to the alleged communication between the complainant and the 2nd appellant.***
>
> ***iv. That the learned Judges erred in law and fact in upholding conviction based on evidence given by a single witness.***

5. Counsel for the appellant reiterated the grounds of appeal and referred this Court to the pertinent facts of the case as given by the complainant. The material facts as testified by the complainant PW1 Maurice Mwaita Nyabangeci is as follows:

> ***"I am a taxi driver and I used to drive a taxi until I was robbed. I do recall on 27th July, 2008, on the day I was near Akamba Office with my taxi waiting for customers. While there, Peter, my well known customer, (accused 1) called me. He told me that he had a visitor at Akamba Office. He wanted me to pick the visitor at Akamba Office. I have a motor vehicle Reg. No. KAV 781C Toyota Corrolla. While waiting at the Akamba office, accused 2 (appellant in this case), came to my car. I asked him if he was a customer. He said he wanted the owner of the motor vehicle. I said I knew the owner. I told him I do not know where the owner was. I suspected him. Later accused 1 called me after five minutes. He asked if I had seen his visitor. He told me the visitor was the one who had approached me. The same man came again. He searched the motor vehicle. He sat at the rear right behind me. We were at Kenol Petrol Station. The lights were bright. I fuelled there. I asked him to give me Kshs. 100/- and he said he had no money. We now proceeded to medical staff quarters where accused 1 said he used to stay. On the way, I saw accused 1 standing on the road within the staff quarter compound. I stopped. Accused 1 came . We talked for a short while. He asked me how much I was to pay him. I told him Ks. 300/=. I saw accused 1 enter his hand in the jacket. He picked a pistol. He ordered me to move to the back seat. I could not believe what he said. I got hold of that pistol. Accused 2 held me from behind, I screamed for help. They told me to stop lest they shoot me. I feared and surrendered. I moved to the back seat. I was told to lie flat. Later accused 1 took the co-driver's seat. He asked for the keys. While there, a 3rd person emerged from a farm plantation nearby. That man took the driver's seat. They drove off. It took about five minutes. At the scene there was electricity light from the buildings. They drove to an unknown place."***

6. Counsel for the appellant relying on the facts and evidence as given by the complainant submitted that the appellant in the present case is not the person who was the alleged visitor. The defence given by the appellant is an *alibi* that he was not at the scene of crime. Counsel for the appellant submitted that the main issue in this appeal relates to identification of the appellant as the person who was the visitor; who was picked by the complainant and was among the persons who robbed him his car, mobile phones and other items.

7. Counsel submitted that the evidence used by the trial court and the High Court to convict the appellant is testimony of a single identifying witness who could be honest but mistaken. It was submitted

that the complainant did not give the police the description of the appellant; that the identification parade conducted was improper because the appellant was subjected to the same members of parade who were never changing their positions; that the parade members were not of same physique and complexion as the appellant; that no item was recovered from the appellant and no receipt of the alleged mobile phone that was robbed was produced in evidence. Counsel submitted that the trial court convicted the appellant on Count III which involved theft of Kshs. 19,000/= from PW3, Esther Mwita. Counsel referred this Court to the testimony of PW3 and submitted that in her entire testimony, PW3 did not testify she lost any money and there was no mention of the sum of Ksh. 19,000/= in her evidence. Counsel submitted that the items recovered were from the deceased and not the appellant. Counsel relied on the case of ***Martin Mukaria - v- Republic, Criminal Appeal No. 462 of 2010,*** in urging this Court to allow the appeal. Counsel reiterated that the alleged offence took place at 8.00 pm and the conditions and circumstances of the complainant identifying the appellant was not positive. It was further submitted that both the trial court and the High Court erred in convicting the appellant based on an identification parade that was faulty.

8. The State opposed the appeal urging this Court to uphold the conviction and sentence by the two lower courts. The State submitted that the only issue in this appeal is whether the complainant properly identified the appellant as one of the robbers. It was submitted that the appellant and complainant had a conversation prior to the appellant entering the taxi at Akamba Office. That this conversation was of ample duration and it gave the complainant an opportunity to properly see and visualize the appellant. It was also submitted that at the Kenol Petrol Station where the complainant had stopped to fuel, there was bright light and this also gave the appellant an opportunity to further properly see the appellant. That the complainant also identified the appellant at the identification parade. The State submitted that the identification of the appellant is one of recognition and the two lower courts correctly established that the appellant had positively been identified as one of the robbers.

9. This is a second appeal and as was stated in ***Njoroge - v- Republic, (1982) KLR 388,*** this Court is only concerned with points of law. There are two points of law pertinent in this appeal. The first is whether the identification parade as conducted before trial was proper in law and the second is whether there is sufficient evidence on record to support the conclusion by the High Court that identification of the appellant as one of the robbers was proper.

10. We have considered submissions by both counsel in this matter. We have examined the record of proceedings and the evidence relating the conduct of the identification parade. The record shows that the Inspector of Police Albanius Kimango, PW6, who conducted the parade was at the same time one of the Investigating Officers in the case. In an identification parade, the Investigation Officer should not conduct the parade as was in this case. We are satisfied that the identification parade that was conducted was not proper and in accordance with the laid down procedures. Once the parade as conducted was flawed, the results thereof cannot stand. Due to the flaw in the conduct of the parade, we find that the learned Judges erred in holding that the appellant had properly been identified by the complainant in an identification parade.

11. As regards the evidence of PW1 relating to visual identification of the appellant, we take cognisance of the dicta in ***Anjononi & others -vs- Republic, (1976-80) 1 KLR 1566***, where this Court held at page 1568:

> ***"Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another".***

12. In the instant, case, the complainant PW 1 did not know the appellant and hence there is no question of recognition. What we have is an issue of identification by a stranger and we must consider and determine whether the complainant was able to positively see the appellant as the person who was the visitor and who later turned and robbed him the taxi vehicle. There is no doubt that the testimony of PW1 the complainant in relation to the deceased 2nd appellant is one of recognition both visually and aurally. But as relates to the appellant, the complainant's testimony is one of identification of a stranger. The

alleged offence was committed at 8.00 pm and it was dark.

13. The evidence of identification at night must be tested with the greatest care using the guidelines in ***Republic - v- Turnbull, (1976) 3 All ER 549,*** and must be absolutely watertight to justify conviction. (See ***Nzaro -v- Republic, 1991 KAR 212 and Kiarie - v- Republic 1984 KLR 739***). In the case of ***Maitanyi - v- Republic, 1986 KLR* 198,** this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect. In the present case, the complainant testified that he was able to see and identify the appellant on three different occasions, first during their conversation at Akamba Offices, second at the Petrol Station when he was fuelling and third after the robbery when they drove off and there was electricity lights from nearby buildings. The complainant testified that he had been asked by the 2nd appellant who is deceased to pick his visitor and he stopped the vehicle when he saw the deceased 2nd appellant. It is trite law that a fact may be proved by the testimony of a single witness (See ***Maitanyi - v- Republic, (1986) KLR 200; Abdulla Bin Wendo & Another - v- Reg. (1953) 20 EACA 166).*** Whereas the evidence of PW1 is one of a single identifying witness, we are satisfied from the testimony given that there was adequate time and opportunity for the complainant to properly see and identify the appellant. The complainant in two instances held two discussions with the appellant at the Akamba office when the appellant sought to know who was the owner of the taxi vehicle; at the third instance the complainant while at the petrol station asked the appellant for Kshs. 100/= for fuel. In all these three instances, PW1 was able to see the appellant. Counsel for the appellant submitted that if the visitor had taken a rear seat in the taxi, how could the complainant be able to see and identify that visitor as the appellant?

13. On this submission, the record shows that the complainant did not lose the person he carried as the visitor; this visitor was with the complainant in the taxi vehicle at all material times. The person the complainant carried at the Akamba Office as the visitor is the person who in the company of two others robbed the complainant. We are satisfied that the visual identification of the appellant at the Akamba Office at the time of entering the taxi was free from error and the two courts below did not err in finding that the complainant had positively identified the appellant as one of the robbers.

14. The appellant cited the case of ***Martin Mukaria - v- R., Civil Appeal No. 462 of 201*0** in support of his submissions. We have considered this case and we find it is distinguishable. In the Martin Mukaria case, the complainant was attacked from behind and the offence was committed in less than five minutes for the complainant to be able to positively see and identify the accused. In the present case, there was a series of events and a much longer period of time from when the appellant was at the Akamba Office entering the taxi, to the petrol station and then the onward journey to the Medical staff quarters. This was a much longer period of time and the complainant and appellant were together during the entire period and episode which lasted from 8.00 pm to 1.00 am.

15. The appellant submitted that the learned judges erred in upholding the conviction of the appellant for Count III in relation to theft of Ksh. 19,000/=. We have examined the record of proceedings before the trial court. The appellant was charged with Count 1 of robbery with violence and Count III for theft of Ksh. 19,000/=. The record shows that the trial magistrate acquitted all the accused persons for the offence of theft of Ksh. 19,000/= since no witness testified to prove that the sum was stolen from Esther Mwita.

16. In totality, we find that there was positive identification of the appellant by the complainant and the learned Judges of the High Court did not err in upholding the conviction and sentence of the appellant. We find this appeal lacks merit and is hereby dismissed.

Dated and delivered at Nakuru this 20th 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