**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, NAMBUYE & OUKO, JJ.A)**

**CRIMINAL APPEAL NO. 317 OF 2012 (R)**

**BETWEEN**

**JOSEPH MUTHENGI MULUNGU …….…. APPELLANT**

**AND**

**REPUBLIC ……..……. RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Machakos (Kihara Kariuki & Kimaru, JJ) dated 8th June 2012*

*in*

*HC. CR. A NO. 28 OF 2009)*

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**JUDGMENT OF THE COURT**

The appellant, Joseph Muthengi Mulungu was convicted by the Machakos Principal Magistrate on the evidence of identification by two witnesses PW2, Kombo Kingao (Kombo) and PW3 Kimwele Mwandikwa (Kimwele), who alleged that they witnessed the appellant commit the offence of attempted robbery with violence with which he was charged.

It was the prosecution case that on 22nd February, 2006, at Kivui Village in Mwingi, the two witnesses saw from different positions, the appellant attack Priscilla Mailu, the complainant in an attempt to rob her of her bag and in the process inflicted a severe *panga* cut on her right forearm. After this, the appellant is said to have fled into nearby bushes and thereafter disappeared from his home for nearly two years. Although he was well known to the complainant, the latter categorically told the trial court that she did not identify the attacker. When he did return home in 2008, the appellant was arrested and charged under **section 297 (2)** of the Penal Code with attempted robbery with violence as we have stated earlier.

The appellant denied the charge maintaining that he left the village in 2004 for Mwea where he was employed. On 22nd February, 2006 when the alleged offence is said to have been committed, he was in Mwea. But he recalled that earlier, on 20th March 2005 the complainant's cattle had destroyed crops on his farm, for which the complainant undertook to compensate him but reneged after delivering only 5 kg of maize instead of the agreed 2 sacks. When on 12th December 2006, the appellant went to demand from the complainant the balance of the maize, she arrogantly told him not to expect anything from her.

After this encounter, the appellant travelled to Mwea and did not return until 15th May, 2008.

Once again, the complainant's cattle trespassed on the appellant's farm. He forcibly drove them out to the complainant's home and insisted that he be compensated for this latest damage caused on the farm or he would report the matter to the police. Instead, he said, he was arrested and charged on allegation that he had attacked the complainant.

The learned trial magistrate believed the testimony of the two prosecution eye witnesses, dismissing the appellant's *alibi* defence and the alleged disagreement between the appellellant and the complainant. The learned magistrate concluded on the authority of **Anjononi & others V. R** [1980] KLR 59 that:-

> **"Prosecution witness 2 saw the complainant struggling with the accused. The accused was attempting to rob her at around 7.00am. It was in February and the sun was within the Equator hence there was ample light for a positive identification. The accused person was positively identified and recognized by prosecution witness 2 and prosecution witness 3……..**
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> **In the instant case, the accused person was known to prosecution witness 2 and prosecution witness 3 and the conditions following the identification or recognition of the accused person were conducive."**

The case before the trial court turned on the identification of the appellant as the person who attempted to rob the complainant. The appellant's first appeal was dismissed by P. Kihara Kariuki, J (as he then was) and Kimaru, J in a terse judgment of 5½ pages, in which the learned judges upheld the trial court, stating, for their part that:-

> **"In the present appeal, the offence took place at 7.00am in the morning and conditions of identification were favourable. The circumstances upon which the robbery took place were conducive for positive identification while it is conceded that the evidence of the complainant was that of a single witness, it was apparent that the complainant had positively identified the appellant. The conduct of the appellant of disappearing from his home for sometime before his arrest raised reasonable presumption of guilt on the part of the appellant…… The defence offered by the appellant did not dent the otherwise strong evidence adduced by the prosecution in support of its case on the charge of attempted robbery with violence……"**

Although we shall shortly address it, we think it must be pointed out at this stage that contrary to the above conclusion reached by the learned Judges, the complainant was not an eye witness, could not have been a single eye witness as there was Kombo and Kimwele.

The appellant brings the present appeal on five ground which were condensed and argued by his advocate, Ms. Arati as follows:-

i. There was no evidence or sufficient evidence to warrant the conviction.

ii. The appellant's defence was not considered or considered sufficiently, and

iii. The learned Judges failed to re-evaluate the evidence on record.

Learned counsel relied on the case of **Michael Wanjau Mahinge V. R.** Criminal Appeal No. 3 of 2010.

Mr. Monda, learned counsel for the respondent opposed the appeal on the grounds that the appellant was positively recognized; that the appellant's *alibi* defence was displaced by the overwhelming evidence presented on behalf of the prosecution. We reiterate that the only question in this appeal is that of identification. The jurisdiction of this Court, being the second appellate Court is limited to consideration of matters of law only. In **Karanja & Another, V. R** [2004] 2 KLR 140, the Court emphasized that:-

**"Ours is to see if the evidence was properly analyzed by the first appellate court……Once we are satisfied that the two courts did analyze the same evidence properly then we would find it difficult to interfere with their decision particularly if the same is a concurrent decision."**

Where the High Court fails to carry out its task of weighing conflicting evidence and drawing its own inferences and conclusions, that failure becomes a matter of law on second appeal. Misdirection and non-direction on material points are indeed matters of law. See **Gabriel Kamau Njoroge V. R.** [1982-88] 1 KAR pg 1134. The appellant's contention that the complainant knew him well was common ground confirmed by the complainant herself. She insisted that she compensated the appellant as agreed for the destroyed crops in 2006. She further explained to the trial court that in addition she had, just before the attack, given the appellant some work. Yet, regarding the attack, in no uncertain terms she stated that she never saw the appellant at the scene where she was attacked; that just before the attack she had heard someone calling out that she was *"being called by Maithya"* and immediately someone armed with a *panga* grabbed her bag. She struggled with the man and managed to retain her bag. At such a close proximity, at 7am, how could the complainant fail to recognize the appellant who was well known to her if indeed it was him?

In examination in Chief Kombo said that he saw the attack some 30m from the scene. On being cross-examined, he estimated the distance as 100m. Kimwele on the other hand said Kombo was walking ahead of him and that he was 50m from the scene. According to Kimwele, he only saw the appellant carrying a *panga* dashing into the bush.

The learned Judges of the High Court erroneously based their decision on the complainant's evidence and on the fact that the appellant disappeared from his home for sometime. The complainant, as we have seen, did not see her attacker. The learned Judges yet assumed that she was an eye witness and completely failed to see that there were two other witnesses who alleged to have witnessed the attack and recognized the appellant. Apart from a sweeping statement that the appellant's defence did *"not dent"* the prosecution case, the Judges made no effort in re-evaluating that defence in light of the admission by the complainant of the existence of previous disputes.

We hold, on the issue of identification that there was no evidence meeting the threshold of beyond reasonable doubt. The two alleged eye witnesses, Kombo and Kimwele were either genuinely mistaken or simply suspected the appellant after they failed to trace him from his home. Mistaken identify, as was noted in **Wamunga V. R** [1989] KLR 244 is a common thing.

**"Whenever the case again st a defendant depends wholly or to a great extent on the correctness of one or more identification 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."**

The Court in the above case (**Wamunga)** reiterated Widgery C.J. in the well known case of **R. V. Turnbull** [1976] 3 AII ER 549 that:-

**"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

That is the same position in this matter. Immediately before the attack the complainant heard a voice alerting her that one Maithya was calling her. The investigating officer made no effort to eliminate the participation of a third party and the two courts below failed to evaluate and re-evaluate this evidence.

Turning to the appellant's complaint that his defence was not considered, we find this made out by lack of investigation to the appellant's *alibi* that he was at Mwea where he worked. We find the appellant's *alibi* was never displaced. This, when considered together with the doubt created in the evidence, an identification of the appellant at the scene of the offence creates doubt in the appellant's commission of the offence which doubt we resolve in his favour.

The appeal for these reasons succeeds and is hereby allowed. The conviction is quashed and sentence of death set aside. The appellant shall be set at liberty forthwith unless held for any lawful reason.

**Dated at Nairobi this 4th day of April 2014.**

**E. M. GITHINJI**

**…….**

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

**……**

**JUDGE OF APPEAL**

**W. OUKO**

**…….**

**JUDGE OF APPEAL**

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

**REGISTRAR**