



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MARAGA, MWILU & J. MOHAMMED JJA.)**

**CRIMINAL APPEAL NO. 179 OF 2007 (R)**

**BETWEEN**

**ROBERT NJEHIA .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at Nairobi by**

**Lesiit & Makhandia JJ, dated 14<sup>th</sup> December, 2005**

**in**

**H.C.CR.C. NO. 720 OF 2003)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. **MOSES APUNGO LATUNGU** (PW1) was, on the 7<sup>th</sup> June 2001 at about 7.00 pm, walking along Huruma road. There were people walking ahead of him and others behind him. Suddenly he was grabbed around his neck by one of the people behind him. Another, from those in front, trained a knife at his face as the two ransacked his pockets and took a yellow plate holder and some kes.4,500/=. PW1 was harshly, warned by his attackers that he would be killed if he made any noise. He therefore did not raise an alarm. His two attackers, mission completed, resumed walking along from behind him.

2. On the same evening of the 7<sup>th</sup> June 2001 at about the same time of 7.00 pm, **G W** (PW2) was similarly walking along a road within Huruma when she met three men who confronted her. Two of the men had knives while the third had a gun. PW2's evidence at the trial was that it was not completely dark. The two pushed PW2 to a corner against a wall. She was shown a gun and ordered to stop screaming or she would be killed. This witness said that she was able to see her assailants well enough to realize that the man who pulled out a gun on her was of Somali descent.

The other two men had medium sized knives and they spoke Kikuyu. The two robbed her of kes. 28,400 and would have raped her had a policeman (PW3) not appeared on the scene, making her assailants to flee.

3. Subsequently **ROBERT NJEHIA** (the appellant) was arrested and charged with one count of robbery with violence contrary to section 296(2) of the Penal Code, another count of attempted robbery with violence contrary to the provisions of section 297(2) of the Penal Code and the third count was one of attempted rape contrary to the provisions of section 141 of the Penal Code (now repealed). The appellant was convicted on the first two counts by the Chief Magistrate Nairobi and sentenced to suffer death. He was acquitted of the offence of attempted rape. His appeal to the High Court was dismissed for lacking in merit giving rise to this, his second appeal.

4. The appellant made his homegrown Memorandum of Appeal raising six (6) grounds and filed the same herein on 28/12/2005. Those grounds are:-

***“1. THAT the learned High Court judges erred in law by dismissing my appeal while relying upon evidence of PW4 without taking the same evidence with great caution because it required corroboration since it was the word of PW4 against the word of I the appellant and the alleged knife was not positively identified.***

***2. THAT the learned High Court judges erred in law by holding in their Judgment that I was not shot by a stray bullet without considering the following:-***

***(a) PW3 had shot three gun shots but he only accounted for only bullet which he alleged it got his target. The remaining two bullets were astray bullets.***

***(b) PW3 alleged that the thugs had shot one gunshot which missed its target thus anastray bullet.***

***(c) evidence of PW3 reveals that at Muthaiga Police Station he confirmed that I had two gunshot wounds on the chest. However he had alleged to had(sic)only shot me on the leg but not chest.***

***(d) Is it a coincidence that 3 bullets went astray and on the other hand I sustained three bullet wounds or I was hit by the three astray (sic)bullets innocently.***

***(e) The shootout was occasioned in darkness (7.00 p.m) at a densely populated area with a lot of commotion as confirmed by PW1, PW2 and PW3 thus I was mistaken identity(sic)ie an innocent being hit by anastray bullet existed.***

***3. THAT the learned High Court judges erred in law by holding that I had not raised my defence during cross-examination of prosecution witnesses thus rejecting it as an afterthought but the record reveals that I had raised the same in cross-examination as law (sic)required.***

***4. THAT the learned High Court judges erred in law by using logics not canvassed during trial as basis of disregarding evidence of DW2 instead of considering it as law (sic)required.***

***5. THAT the learned High Court judges erred in law by using weak evidence of PW1 and 2 to corroborate another weak evidence of PW3 and 4 contrary to requirement of law that a(sic) weak evidence cannot corroborate another weak evidence to form bases (sic)of a conviction.***

***6. THAT my defence case was not sufficiently considered as I cannot recall all of what was canvassed during appeal hearing I beg this honourable court to furnish me with a certified copy of High Court proceedings and Judgment to enhance me to conduct my appeal more appropriately. Also I wish to present during the hearing of***

***this appeal.”***

On the 9<sup>th</sup> of September 2008 the appellant improved on those grounds of appeal vide his supplementary grounds filed herein on even date. He stated:-

- “1. THAT the first appellate court erred in law in failing to note that I was an innocent passerby who was turned into a suspect by a stray bullet.***
- 2. THAT the first appellate court erred in law in failing to evaluate the evidence of PW4 exhaustively to ascertain with clarity of mind and believe certainty that the recovery of the alleged knife was not sufficiently proved.***
- 3. THAT the 1<sup>st</sup> appellate court erred in law in not noting that the respondent’s allegations were not proved beyond a shred of doubt against the appellant as some of the most crucial witnesses were not availed contrary to sec. 144 of the CPC.***
- 4. THAT the 1<sup>st</sup> appellate court erred in law in failing to note that I actually was supposed to be compensated for incurring or sustaining bullet injuries as a result of police shoot out with thugs instead of being subjected to shoulder other people’s onus as I had nothing to do with the offence.***
- 5. THAT the Hon. 1<sup>st</sup> appellate court erred in declining to evaluate my defence statement alongside the respondent’s before arriving at any due conclusion contrary to sec.169(1) of the Criminal Procedure Code”.***

5. His advocate, learned counsel Mr. Obok, submitting before us said that this was not a safe conviction for the reasons that identification was not properly done; the case was not proved to the required standard and that the defence evidence was not considered yet it was consistent and more believable than the prosecution evidence.

6. The state through Mr. Ondari opposed the appeal arguing that conviction was based on sound identification and other evidence.

7. On a second appeal such as this one this, court is enjoined to consider matters of law only as per the dictates of the provisions of section **361(1)** of the Criminal Procedure Code. That is the position followed in cases on second appeals – see **DAVID NJOROGÉ MACHARIA V R [2011]eKLR.**

8. The appellant was identified by PW1 and PW2 as one of their attackers. PW1’s version was that it was the appellant who attacked him from behind and that while they struggled he had a glimpse of him and saw that he wore a big jacket. He saw his face. He said in court:-

***“I know he is the man I saw that night while struggling for the plate holder because of the way his jaws are moulded. He threatened to kill me and I released the plate holder.”***

Further down in his evidence PW1 added:-

***“When the Somali young man took the money, accused released my coat at the back and came in front of me. He dipped his hand in (sic)jacket pocket and removed the plate holder. I struggled for its possession while accused was in front of me and that is when I properly saw his face. The struggle took about 2 minutes.”***

9. On her part PW2 said that she was attacked by three men, one of Somali descent who was

armed with a gun and two others who spoke Kikuyu. One of them attacked her from the front and this is what she said of him:-

*“I saw him clearly as he was very close to me. He was in front of me. He strangled me with one hand and with the other he held this knife which he placed on my ribs. His friends were at that time pushing me towards the wall and kicking me. That man is in court now. He is the accused at the dock. I am certain I saw him with this knife (knife marked MFI/1). The whole incident took about 5 minutes. Darkness was falling at the time but it was not completely dark. It was possible to see any person or object at a close distance.”*

The evidence on record reveals that the two incidents occurred in the same vicinity and not far apart.

10. Then comes the evidence of PW3 as regards the self same issue of identification. Wilson Kibet, a police officer then stationed at Kasarani Police Station and being in charge of Divisional Split was on patrol duties along Huruma Road at about 7.00 p.m. on 7<sup>th</sup> June 2001. It was then that; in his words,

*“I spotted three men who were mugging a woman. They were pulling her to a dark corner beside the road. I instructed P.c. driver Salim who was driving to stop our motor vehicle so that we could rescue the lady. I went out of the car immediately, drew out my pistol, cocked it and ordered the three men to surrender. One of the thugs was holding a knife high up threatening to cut the lady and I could see one of them struggling to remove her clothes. When they noted my presence one of them fired one gunshot at me and they scattered in different directions. I fired at them three shots and one bullet caught one of them who fell down crying in pain. As I approached he woke up and ran away to a dark corner –”*

11. The trial magistrate was satisfied that the appellant was sufficiently identified as one of the robbers and in addition to other evidence, convicted him and sentenced him to death.

12. The High Court on its part was not satisfied that identification was conducted in the manner required but were satisfied that on the other evidence the appellant was rightly convicted.

13. On our part we are alive to the requirements of the law on a satisfactory identification of a person as the perpetrator of a crime. The evidence of visual identification must be carefully tested so as to avoid a miscarriage of justice – see – **KELVIN KIMATHI NYAGA & OTHERS V R Nyeri Criminal Appeal nos. 109 and 116 of 2012**. Evidence on identification must be water tight to result in a conviction – see **RORIA V R (1967)EA 583**.

In this case PW1 told the police that he had been attacked and robbed by some three men. PW2 told the police that she had been attacked, robbed and nearly raped by three men. The scene was, according to PW3, the same vicinity. The time was the same. The description of the mode of attack and the arms the attackers had in their possession were the same.

The appellant was arrested a few meters from the scene, hidden in a locked toilet, which he would not open despite various knocks by PW4, he was bleeding from bullet wounds which PW3 admitted having inflicted on the appellant; next to the appellant in the toilet basin was the knife that both PW1 and PW2 identified as the one they were threatened with. These incidents are too close to be coincidental. To our minds the inescapable inference to be drawn from those circumstances is that the appellant was one of the robbers of PW1.

14. We found no contradictions that would disable the solid evidence adduced in court. There was all the needed corroborative evidence between that of PW1, PW2, PW3 and PW4 to elicit

doubt on any piece of that evidence.

We are satisfied that in addition to the all compelling circumstances that it was the appellant, who with two others not before court, attacked and robbed their victims, we have no doubt that the direct evidence connecting the appellant to the commission of this offence was unassailable and sufficient. We find, with respect, that the High Court justices misdirected themselves on the issue of identification. The identification of the appellant was safe. He himself admittedly placed himself at the scene of crime. The totality of the evidence and circumstances surrounding the commission of the offences the appellant faced bring to operation the provisions of section 119 of the Evidence Act cap. 80 Laws of Kenya, which states:-

*“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”*

15. In the end we find no merit in this appeal and hereby dismiss it in its entirety.

It is so ordered.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of May, 2014.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**J. MOHAMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**