IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, G.B.M. KARIUKI & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 201 OF 2007

BETWEEN

JOHN MURIITHI NYAGAH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nairobi

(Lesiit & Makhandia, JJ.) delivered 25th May, 2006

in

H. C. CR. A. 1087 OF 2003)

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JUDGMENT OF THE COURT

1. The appellant, **John Muriithi Nyaga**, has appealed to this Court against the judgment of the High Court which upheld his conviction for robbery with violence contrary to section 296(2) of the Penal Code and affirmed the death sentence thereof meted out in Criminal Case No.5875 of 2003 at Kibera, Nairobi, by the Senior Principal Magistrate, Ms Mwangi, who heard the case and found him guilty and convicted him in the judgment delivered on 19th November 2003. Death sentence was passed on to him on 3rd December 2003.
2. The particulars of the charge were that -

   "John Mureithi Nyaga, on the 27th day of July 2003 at Ongata Rongai Township in Kajiado District within the Rift Valley Province, jointly with others not before the Court, being armed with a knife and rungus robbed Mathew Kipkemboi Mbungei of one Siemens mobile phone, a pair of shoes, an employment card, an identity card and cash Ksh.4,700/= all valued at Shs.11,400/= and at, immediately after, or immediately after the time of the robbery, wounded the said Mathew Kipkemboi Bungei."

3. The record of appeal shows that the complainant, Mathew Kipkemboi Mbungei (PW1) had travelled from upcountry and was walking to his place of residence at Ongata Rongai at about 10.00 p.m. It was dark. He was accosted by three people as he walked. Before they attacked him,

he said he identified one of them as the appellant. They engaged him in a conversation. As he was about to walk away, he was asked if he could sell a mobile phone for them and he retorted that it could be taken to his office. The person he said was the appellant did not speak to him. He spoke to the leader of the gang who in turn asked the complainant if he knew any of the robbers to which the complainant answered in the negative. It is then that the appellant and one robber stood behind the complainant while the other robber stabbed him with a knife 4 times. The complainant asked the robbers why they were killing him. They took 400/= from his pockets, and 700/= from his shirt pocket, his mobile phone and shoes. This took about ten minutes. They stabbed him until he fell down unconscious. He regained consciousness after a while. Two good Samaritans, a lady and a gentleman, came and took him to his house which was 80 metres away. If this episode is true, the complainant must have bled a lot due to the relentless stabbing. The two good Samaritans were never called to testify. The doctor or paramedic who treated the appellant at **Jamii Clinic** where he said he was taken by the good Samaritans was not called to testify. From there the complainant was referred to Kenyatta National Hospital. No one was called to testify either from Kenyatta National Hospital.

4. The appellant whom the complainant knew worked at Gate Butchery at Ongata Rongai did not go underground after the incident on the 27th of July 2003. On 29.7.2003, two days after the incident, the complainant led Police Constable Joseph Mutha (PW2) of Ongata Police Station to the said butchery where they found the appellant. The complainant alleged that he was one of the three robbers who robbed him on 27.7.2003.
5. Only three prosecution witnesses testified against the appellant. These were the complainant, **Mathew Kipkemboi Mbugei**, Police **Constable No.50986, Joseph Mutha PW2** and the Police Surgeon, one **Dr. Zephania Kamau PW3**.
6. In his appeal to this Court, the appellant relied on his Supplementary Memorandum of Appeal in which he proffered 5 grounds of appeal as follows:

1. ***That the learned Judges of the High Court erred in law by failing to appreciate the law as it pertains to the evidence of identification and recognition***
2. ***That the learned Judges of the High Court erred in law by failing to address themselves to the appellant's contention that identification of the appellant by a single witness occasioned a miscarriage of justice.***
3. ***That the learned Judges of the High Court erred in law by introducing matters which were not in issue before the trial Court.***
4. ***The learned Judges of the High Court erred in law by failing to exhibit an independent mind when considering the appeal.***
5. ***That the learned Judges of the High Court erred in law by failing to reconsider or adequately analyse the appellant's alibi defence.***

7. This is a second appeal. We are enjoined to deal only with issues of law as section 361 of the Criminal Procedure Code, Cap 75, ordains that this Court shall not hear a second appeal on a matter of fact and that severity of sentence is a matter of fact. What are the points of law in this appeal? The 5 grounds of appeal show that the appeal is pegged on two issues of law, namely (1) identification and recognition by a single identifying witness and (2) alibi.
8. When the appeal came up for hearing before us on 21st May 2014, the appellant was represented by learned counsel **Mr. Gilbert C. Mutembei**, while the respondent was represented by the learned Senior Principal Prosecution Counsel, **Mr. I. S. Monda**.
9. **Mr. Mutembei** contended that the High Court erred in upholding the appellant's conviction in the face of insufficient evidence of identification by the only identifying witness, PWI, and erred in not giving the appellant the benefit of doubt. He submitted that the High Court (Lessit, J and Makhandia, J, *as he then was*) contradicted itself in its judgment delivered on 25th May 2006 and failed to evaluate sufficiently or at all the evidence adduced before the trial Court. It was Mr. Mutembei's submission that although the High Court noted that *"security lights were on at the scene of crime,"* there was no evidence as to the exact proximity of the light to the scene, or indeed its intensity. The High Court observed, correctly in our view, (and Mr. Mutembei was in agreement) that *"the offence was committed at night and hence the means by which the complainant was able to identify the appellant becomes critical."*

10. After reiterating the evidence of the complainant, the High Court then went on to state that -

"from the foregoing, what emerges is that the appellant was identified by the assistance of the security lights from three houses adjacent to the scene of crime."

There was no evidence as to how close or far the three houses were from the scene of crime and clearly the evidence does not show the incident took place outside the houses. In addition, there was no evidence as to the type of light or how bright or otherwise it was. But the High Court was alive to the need for this evidence as it stated -

"in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."

11. The High Court then proceeded to criticize the learned trial Magistrate for failing to evaluate the evidence of identification and stated that in the absence of such evaluation -

"we would have been prepared to hold that the evidence of identification by the complainant was not watertight as to comfortably find (sic) a conviction."

12. It was Mr. Mutembei's submission that the High Court misdirected itself on law because after finding that the evidence on identification was not watertight as the circumstances of lighting could not be depended on to establish identification with certainty, and that the trial Court had failed to analyse the evidence, it then went on to contradict itself when it stated -

"the presence of the light and what transpired before and after the robbery convincingly proves that the appellant was positively identified by the complainant."

13. The High Court took into account that the robbery took 10 minutes, and that the robbers engaged the complainant in a discussion, and that the latter knew the appellant. Tthe conditions of lighting did not change due to the conversation nor was there evidence as regards the distance the robbers kept as they engaged the complainant in conversation. There is no evidence that they shook hands or were next to each other (although there was evidence that one of the other robbers slapped the complainant).
14. In spite of this, the High Court in its judgment concluded that the complainant recognized one of the robbers as Mureithi, the appellant. The Court stated -

"The complainant says he recognized one of the robbers as Mr. Mureithi, the appellant herein. The appellant did not dispute the fact that his name is Mureithi either in cross-examination of the witnesses or in his defence."

The High Court then went on to postulate as follows -

"the complainant also stated that he had known the appellant for over one year as he worked in a butchery where the complainant frequented as a customer. The appellant in his statement of defence confirmed that indeed he worked in a butchery and knew the complainant as a customer. The offence was committed by three people according to the complainant. It was at 9.40 p.m. In his defence the appellant states that he used to sleep at his place of work with two others – Joseph and Waweru. Is it a coincident (sic) in the circumstances that the complainant states that he was attacked by a gang of three people one of whom was the appellant and yet the appellant used to sleep with two others at his place of work! His place of work was the butchery next to where the complainant worked ..."

15. It was on the basis of this postulation that the High Court came to the conclusion that the appellant was identified as one of the three robbers. This was notwithstanding the insufficiency of the evidence on identification, a fact the High Court acknowledged in its judgment.

16. It was Mr. Mutembei's further contention that the High Court misdirected itself by holding that notwithstanding the absence of inquiries by the trial court "as to the light (sic) condition at the scene of crime" conditions were positive and sufficient to show that the complainant was in a position to positively identify the appellant. It was Mr. Mutembei's submission that the High Court made a conclusion and then set out to justify its decision so as to uphold the conviction and sentence. It also introduced extraneous matters that were not borne out by the evidence which they labelled as circumstantial evidence.
17. **Mr. Monda** opposed the appeal. He submitted that the High Court properly evaluated the evidence and came to the right conclusion. The complainant, he said, positively identified the appellant as one of the three robbers as the two had a conversation before the robbery which took ten minutes. He pointed out that the complainant led the police to the appellant's place of work and contended that there was no mistaken identity. He contended that this being a second appeal, this Court is bound by the concurrent findings of fact by the two courts below.
18. We have perused the record of appeal and the authorities cited by counsel and duly considered their submissions.
19. The evidence in the trial Court was by a single identifying witness. Evidence of a single identifying witness must be examined with considerable circumspection to ensure that it cannot but be true before a conviction is founded on it. It was in **Kiilu & Another V. Republic** [2005] 1 KLR 174 that this Court, differently constituted, held -

*"**Subject to certain well known exceptions, it is trite law that a fact may be proved by 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 that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."***

20. The only evidence implicating the appellant was by PWI. Was it water-tight and such as could not but be believed or did it leave room for doubt? Mr. Mutembei submitted that it was not. He contended that the first appellate court put forward a theory not supported by evidence or counsel who appeared so as to justify upholding the conviction. In the judgment, the High Court stated at pg 9 -

"In his defence the appellate states that he used to sleep at his place of work with two others – Joseph and Waweru. Is it a coincident in the circumstances that the complainant states that he was attacked by a gang of three people one of whom was the appellant and yet the appellant used to sleep with two others at his place of work! His place of work was the butchery next to where the complainant worked.

"Finally we note that in the evidence there was no claim by the appellant that the complainant bore any grudge or vendetta against him that would have spurred him to frame the appellant with the offence. The two had not at any time fallen out. All the foregoing taken into totality together with the presence of security lights at the scene of crime leaves us in no doubt at all that the appellant was positively identified at the scene of crime."

The first appellate court, without evidence to buttress the point, concluded that because the appellant lived with two other people, and as the complainant was attacked by three people, it followed that the three people were the appellant, whom he claimed to have recognized, and his two colleagues who shared the living quarters with him. The assumption was bereft of evidence.

21. The first appellate court also introduced the issue of grudge or vendetta which was not in evidence and concluded that as the complainant had no vendetta or grudge, the complainant was not framing the appellant. We agree with the appellant's counsel that the issue of grudge or lack of it was not supported by evidence and that the first Appellate Court introduced and relied on it to justify the conclusion it reached.

22. In **Okethi Okale & Others v. Republic** [1965] EA 555 this Court observed that the learned High Court Judge had in determining a murder case in which the main evidence was by the deceased's wife who claimed to have seen the assailants attack and kill her husband had stated -

"this is a case in which reasoning has to play a greater part than actual evidence"

In its judgment in the case, this Court deprecated that approach thus;

"with all due respect to the learned trial Judge, we think that this is a novel proposition, for in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial Judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches (see R v. Isaac [1965]) Crim. L.R. 174. This theory by the learned Judge was inconsistent with the evidence-of-Joyce that the injury on the head was caused by the second appellant with an axe, neither is it supported by the medical evidence."

23. In this appeal, the High Court took into account the theory it propounded as aforesaid together with the evidence on security lights at the scene of the crime in reaching its decision.

It seems clear that the High Court took into account circumstances that were not supported by evidence and it is doubtful its conclusion would have been the same if it had not done so. In **Maitanyi v. Republic [1986]** KLR 198, this Court in an appeal against conviction and death sentence for robbery with violence under section 296(2) of the Penal Code in which the conviction was founded on the evidence of a single identifying witness held that:

" 1. 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, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made."

In the judgment in **Maitanyi's** case the Court stated; and it is worth repeating:

"That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. 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, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves."

24. The complainant was adamant that he saw and recognized the appellant. He testified that he had a conversation with the robbers for ten minutes. It was about 10.00 p.m. It was dark. He admitted that one of the three robbers asked him whether he could or did identify any of them to which he answered in the negative. This question was posed because it was dark. The robbers took refuge in the cover of darkness. If the light from the security lights was bright enough to expose the identities of the robbers, it is hardly likely that the question would have been posed. The complainant's insistence that there was light from security lights must be viewed in the context of

this. The complainant's testimony that he saw the face of the appellant in darkness is clearly an exaggeration. The complainant's evidence-in-chief shows that the complainant did not speak to the person he thought was the appellant. His evidence was *"the accused (appellant) who I knew by names (sic) as Mureithi spoke to the one speaking to me."* The leader asked me if I knew any of them and I said no because I knew the consequences of saying I knew him. The complainant went on to testify:

"the accused and another stood behind and stabbed me with the knife 4 times. I asked them why they were killing me and why not have the money..."

"they continued stabbing me until I fell down unconscious. After a while I got conscious..."

The only evidence before the Court on the basis of which the trial Court convicted the appellant was by the complainant. Evidence of a single identifying witness especially where the conditions for positive identification are difficult must be tested with the greatest care especially where the life of an accused person is at stake and the predecessor of this Court in the case of **Abdala bin Wendo and Another V.R.** [1953] 20 EACA 166, held that what is needed in such circumstances is *"other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, though based on the testimony of a single witness, can safely be accepted as free from the possibility of error."*

25. In the present appeal, there is no other evidence to support the evidence of PWI. The first appellate court put forward a theory not canvassed in evidence or in counsel's speeches that *"there was no claim by the appellant that the complainant bore any grudge or vendetta against him that would have spurred him to frame the appellant with the offence."* That is the caveat given by this Court in **Okethi Okale and Others V.R.** (supra). The first Appellate Court also assumed that because the appellant lived with two other persons, the three of them must have been the robbers! In **Suleiman Juma alias Tom V.R. Criminal Appeal** No.181 of 2002 (Msa)) this Court warned that *"where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that in less than watertight."*
26. It is acceptable in law that evidence of recognition is stronger than of identification because recognition of someone known to one is more reliable than identification of a stranger. But in **Wanjohi & 2 Others v. Republic** [1989] KLR 415, this Court held that *"recognition is stronger than identification but an honest recognition may yet be mistaken."*
27. In the well-known case of **R V. Turnbull and Others** [1976] 3 All ER. 549 which has been referred to many times with approval and adopted by this Court, the Court of Appeal, Criminal Division, in England, warned of specific weaknesses which had appeared in the evidence of identification. In that case, the appellants were jointly convicted after a retrial, of conspiracy to burgle and were both sentenced to three years imprisonment. They disputed the evidence of identification and appealed against conviction and sentence. In his judgment, Lord Widgery. CJ, pointed out

"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...

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."

28. In the instant appeal, other than the evidence of PWI, there was no other evidence to lend support to PWI's evidence that the person he saw could not but be the appellant. The evidence of the complainant was to the effect that after he was stabbed 4 times, the robbers *"continued stabbing him until he fell down unconscious."* It does not require a rocket scientist to see that if true, the relentless stabbing must have resulted in PWI losing a lot of blood. Yet he gained consciousness "after a while and was taken home by good Samaritans." The police surgeon (PW3) observed

that the injuries sustained by the complainant were on his head. Yet the complainant testified that *"the accused (the appellant) and another stood behind and stabbed me with the knife (sic) 4 times."* At no time did he allege being hit or cut on the face or head save for the slap he got from one of the robbers. The police surgeon testified -

"I examined one Mathew Kipkemboi Mbugei in a case of assault. His eye was red, haematoma below the right eye lid. His face was swollen. He had a wound on the side of the eye and on the neck. They were stitched. It was 3 days old. The cause of the injury may have been a sharp and blunt. (sic). He had been treated at Elite Medical Services."

29. Clearly, the injuries observed by the police surgeon were inconsistent with the stabbing the complainant alleged. The doctor testified that the injuries sustained by the complainant were as a result of assault. And they were consistent with assault. At no time did PWI tell the Court that he had been treated at Elite Medical Services (for assault) which is what he told the police surgeon. The appellant was at his place of work when he was arrested. His conduct was not consistent with guilt. He never went underground. It would not be normal in a case where a robber is known by his victim for such robber to expose himself to his victim contrary to what PWI alleged the appellant did. It is hardly likely that such robber would even engage in a conversation with the victim before robbing him. It would be foolhardy for such robber to then continue working next door to the victim's place of work without any fear! Yet this is the scenario presented by the evidence adduced by the prosecution. It is simply not credible! This is clearly a case of mistaken identity. The first appellate court should have seen that the evidence was not sufficient to sustain a conviction and should have declined to uphold it.
30. The appellant in his unsworn statement stated in defence that he was not at the scene of crime. He raised an alibi in his defence. He stated -

"On 27th I was on duty up to 10.00 p.m. I sleep where I used to work and we used to sleep 3 of us i.e. Joseph and Waweru. On 28th I went to work and I saw the police come and asked (sic) for my names.(sic) At the police station we were told to have beaten somebody. (sic) The charges were read to me and I was charged. I cannot do something like that to the person because he is a customer."

31. The appellant was under no duty to prove the alibi. The alibi could very well have been true. The first High Court did not see the inconsistencies between the evidence of PW1 relating to his injuries and the evidence of the police surgeon (PW3). The first appellate court cautioned itself of the danger of convicting on the evidence of a single identifying witness. It went on to state that it had considered the evidence was of recognition and that it appreciated the need to examine the evidence with circumspection. It noted that it had taken *"into account all the circumstances of the case, and was convinced that the appellant was positively identified by recognition by the complainant."* Yet there was no circumstantial evidence save for the theories that the Court advanced. In **Kiarie v. Republic, [1984] KLR 739**, this Court held that*:*

"an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

32. In light of the above, it is clear to us that the evidence of recognition by PWI could not be safely relied on and the High Court erred in upholding the conviction of the appellant.
33. Accordingly, we set aside the judgment of the High Court and quash the appellant's conviction and sentence and unless otherwise lawfully held, we order that the appellant shall be released and set free forthwith.

Dated and delivered at Nairobi this *27th day of June 2014*.

M. A. WARSAME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR