



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, WARSAME & G.B.M. KARIUKI)**

**CRIMINAL APPEAL NO 309 OF 2012**

**BETWEEN**

**JOHN MBIVI KIMWELI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(being an appeal from the judgment of the High Court of Kenya at Machakos  
(Makhanda&Dulu, JJ.) dated 15<sup>th</sup> June 2012***

***in***

***H.C.C.R.A 16 OF 2010)***

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

**JUDGMENT OF THE COURT**

***John Mbivi Kimweli*** (hereinafter referred to as the appellant) challenges the conviction and death sentence meted out to him by the Principal Magistrate's Court at Kitui. He was charged, jointly with two others with three counts of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

On the night of 18<sup>th</sup> March 2007, **S M N** (PW1) was at his home together with his wife, **A M** (PW3), and their son **R M M** (PW4). At around midnight, he heard dogs barking so he woke up and peeped through the window. He saw a crowd of people outside. He then heard someone call out his wife's name. One of the people said that they had come for the money from her group, **M M**, where she held the position of treasurer. Another of the robbers also asked her for the money that she was using in her campaign for the position of councillor, **[particulars withheld]** Ward. PW1 passed to the robbers some money through his window. The robbers also asked for PW3's purse and their mobile phones. PW1 pleaded with them not to get into the house, but about four of the robbers got into the bedroom through the window. One of the robbers went and opened the sitting room door, which allowed the rest of the robbers to enter into the house. When inside the house, the attackers beat up PW1 and PW3. During this time they also raped PW3 in turns. PW1 lost consciousness and woke up three days later at Kitui District Hospital, where he was undergoing treatment for his injuries.

PW1 testified that there was enough lighting and so was able to see the robbers. In particular, he stated that he identified the appellant as one of the robbers, and that he recognised him as he had known him for

a period of over 25 years, knew his home, and also that the appellant was his neighbour.

**Lawrence Wambua Francis** (PW2) and **Musyoka Kithunga** (PW5) were, on the night in question, on patrol duty when they encountered a group of people. There was enough light from the torches that they held which enabled PW2 to recognise the appellant. PW2 could see that the appellant and his cohorts were armed with *pangas*, bows and arrows and catapults. Fearing for their lives, PW2 and PW5 ran away, and the appellant and his group followed them, but they were able to elude them; they hid in the bushes near PW1's house and witnessed the entire break in. As they were breaking into the house, the appellants detonated some kind of device, and in the resulting light, PW2 and PW5 were again able to see the appellant clearly.

After the gang of robbers left, PW2 and PW5 went to PW1's house and took them to the hospital. They also called the police who came to the scene. At this time, PW4 was the only one who was conscious, and he told the police the things that had been stolen from them.

The report of the robbery was received by **PC Japhert Mulumo**(PW6). He proceeded to the scene of the robbery and found that the victims had already been taken to the hospital. He went to the hospital and interviewed them, and they narrated their ordeal to him. In the course of the investigation, the members of the vigilante group gave him the names of some of the robbers, and he, with the assistance of other police officers were able to arrest the appellant and one of the co-accused. In the course of the arrest, they recovered a mattress which was positively identified by the complainants as belonging to them.

The victims were treated and examined by **Peter Wambu Muthengi** (PW7) and **Evelyne Makau** (PW8) who are both clinical officers, and at the time were based at Kitui District Hospital. PW7 and PW8 assessed the degree of injury inflicted on PW3 as harm, and that inflicted on PW1 as grievous harm. In his defence, the appellant gave an unsworn statement in which he denied committing the offences. He stated that the charges were as a result of an altercation with a police officer who had ordered meat at the butchery where he worked but later failed to pay for the same.

After evaluating the evidence tendered before it, the trial court was of the opinion that the evidence linking the appellant to the crime was enough: that the appellant had been positively identified by the complainants and the members of the vigilante group as being one of the robbers who had attacked and injured PW1, PW3 and PW4. On this issue, the trial court rendered itself in the following manner:

***“PW1, PW2 and PW5 saw the [appellant] not once, but more than once. I am certain that the [appellant] was positively identified at the scene, the evidence of PW1 is well corroborated by that of PW2 and PW5 (sic).”***

The appellant was therefore convicted on the three charges of robbery with violence, and sentenced to suffer death as required by law in respect of each count. The trial court also ordered that the sentences in respect of the two other counts be held in abeyance pending the execution of the sentence on the first count.

Being aggrieved by his convictions and sentence, the appellant lodged an appeal to the High Court. He faulted the decision of the trial court on the grounds that the alleged recognition was weak; that the prosecution evidence was contradictory; and also alleged that the trial court did not give due consideration to his defence.

The High Court, after re-evaluating the evidence, found that the circumstances at the time of the robbery favoured positive recognition of the appellant, and that he was so positively recognised during the commission of the offences. The first appellate court also evaluated the defence adduced by the appellant and was of the opinion that it did not challenge the cogent evidence relied upon by the trial court in convicting the appellant. Regarding the recognition of the appellant as being one of the robbers who on that fateful night attacked PW1, PW3 and PW4, the High Court rendered itself as follows:

***“... Can we say that the identification, nay, recognition of the appellant was so***

***watertight so as to exclude the possibility of mistake? We think so. The appellant was recognised by 3 different witnesses at different times. It could not have been mere coincidental (sic). There is no evidence that the appellant was disguised as to make his recognition difficult...***"

The result of the first appeal therefore, was that it was dismissed.

Now the appellant brings this second appeal in which he challenges the first appellate court's finding and the resultant upholding of the convictions and sentence by the High Court. The appellant also challenges the identification evidence which he alleged was not sufficient to warrant a conviction, and that his defence was not given due consideration by the first appellate court.

The appellant was represented by Mr. Obok, learned counsel who submitted to us that the evidence relied upon by the trial court was that of self-confessed criminals. He further urged that the circumstances for favourable recognition or identification of the appellant were not favourable. In addition, counsel submitted that the High Court did not take into consideration the defence, and that there was a grudge between the investigating officer and the appellant.

Mr Orinda opposed the appeal on behalf of the State. Learned counsel submitted to us that the appellant has only raised the issue of identification, which was properly dealt with by the two courts below and that these courts properly directed themselves to the identification evidence. Moreover, learned counsel argued, the robbers called out PW3's name, meaning they knew the person that they were robbing. In addition, PW2 and PW5 stated that they had known the appellant for a long period of time, meaning that they were able to recognise him. In addition, there was plenty of light from the torches that enabled the victims as well as the members of the vigilante group see the appellant clearly.

This is a second appeal, and by virtue of section 361 of the Criminal Procedure Code, on a second appeal, this Court will only deal with matters of law. In addition, this Court will generally be hesitant to interfere with the findings of the trial court and the high court unless those findings are perverse. See ***M'Riungu v Republic [1983] KLR 455*** in which the Court clarified the jurisdiction of the Court of Appeal hearing a second appeal:

***"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."***

The main issue of law that presents itself in the present appeal is that of identification. The importance of proper identification in cases such as the present appeal was emphasised by this Court in ***Anjoni And Others v Republic [1981] KLR 594*** where this Court said that:-

***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; 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."***

The principles that a court ought to take into consideration when relying on visual identification to sustain a conviction were also set out in ***Wamunga vs Republic [1989] KLR 424*** where this Court stated at page 426 that:

***"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.”***

We have considered the entire record of appeal, and we find that the High Court exhaustively dealt with the issue of identification by recognition. PW1 had ample time to look at the appellant, as there was light from the torches that the robbers held. PW1 also knew the appellant, as the appellant was a neighbour and someone that he had known for a period of time. The entire incident lasted about two hours, and PW1 therefore had sufficient time within which he was able to look at, and recognise the appellant.

This identification evidence of PW1 was reinforced by PW2 and PW5, the members of the vigilante group who were on patrol. They also had occasion to properly recognise the appellant, first when they came across the gang of robbers, and again when the gang entered into PW1’s compound to break into the house. The lighting was sufficient, as there were the torches that the robbers had, as well as the torches that PW2 and PW5 had. In addition, there was even more light after the explosion which illuminated the area, which enabled PW2 and PW5 see the robbers going into the house. After a thorough scrutiny of this evidence it remained unshaken and the first appellate court rightly believed it. These, in our view, were circumstances that were favourable for the recognition of the appellant.

In ***Thiaka v Republic [2006] 2 EA 326*** this Court when dealing with a second appeal stated that:

***“...[this Court] will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings.”***

We are satisfied that the convictions were based on cogent evidence, and there is no basis to interfere with the concurrent findings of fact. This appeal is devoid of merit, and is hereby dismissed.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of June, 2014**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

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**I certify that this is a**

**True copy of the original.**

**DEPUTY REGISTRAR**

