IN THE COURT OF APPEAL AT NAIROBI

CORAM: NAMBUYE, MARAGA & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 44 OF 2010

BETWEEN

PETER NGURE MWANGI ……..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at

Nairobi (Ojwang & Warsame, JJ) dated 1st October, 2009

in

HCCR.A NO. 470 OF 2005)

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JUDGMENT OF THE COURT

This is a second appeal by *PETER NGURE MWANGI* ("the appellant") against the dismissal of an appeal by the appellant arising from the conviction and sentence for robbery with violence contrary to *Section 296 (2) of the Penal Code* by the High Court *(Ojwang and Warsame, JJ {as they then were})* sitting as the first appellate court. The High Court appeal originated from an original trial, conviction and sentence in Thika CMCR. NO. 1688 of 2005 where the appellant was charged with the offence of robbery with violence contrary to *Section 296 (2) of the Penal Code*. He was tried, found guilty, convicted and sentenced to death.

The particulars of the charge were that on 22nd March, 2005 at Githurai

Kimbo Village in Thika District of Central Province, while armed with a pistol, the

appellant robbed *Pastor Geoffrey Mongare,* (PW1) of cash, in the sum of KShs.600/=, and immediately before the time of the robbery used actual violence to the said Pastor Geoffrey Mongare.

The appellant denied the offence and at the trial court the prosecution called a total of four (4) witnesses. The complainant, PW1 testified that on the

22nd March, 2005 at around 2pm, he was driving his Motor Vehicle Toyota Sprinter Reg. No. KAC 777 to his home in Githurai Kimbo. When he stopped at his gate, he felt a pistol being pressed on his neck by the appellant who ordered him to hand over money and his cell phone. When his wife,

Mary Muthoni Margaret (PW2), opened the gate, she found him under attack by the appellant. PW2 thereafter called PW1's brother, *Kagicho,* to come out and help. The appellant shot at Kagicho who ran away and locked the gate. In the meantime, the appellant frisked PW1's clothing and took KShs.600/= from his wallet.

Kagicho called neighbours for help at which point the appellant ran away. PW1 then reported the matter to the police and informed them that he identified the assailant, as the appellant, by recognition. It was PW1's further testimony that the appellant was a person well known to him, as the appellant had worked for PW1 previously at a construction site. PW1 knew the appellant by the name *Tyson*. According to PW1 the attack took place at about 7.30 pm; the appellant was close to him and there was enough lighting for purposes of identification.

PW2 testified that at the material time she had gone to open the gate for her husband when she heard him plead with the assailant *"please don't kill me"*. When she opened the gate, she saw the appellant who pointed a gun at her. She

ran back to the house and informed a pastor and her brother in law, Kagicho, that her husband was being robbed. The Pastor and Kagicho jumped over the fence to the neighbours' house to seek help. PW1 thereafter gained his freedom and entered the gate to the house. PW2 testified that she knew the appellant very well. He was their neighbour and had previously worked at PW1's construction site. She testified that she could see the appellant very well as he did not cover his face at the time of the robbery. It was her testimony that the attack took place at around 7.30 pm, there was moon light and sufficient light to enable her identify the assailant.

Isaac Nyongesa Makoha (PW3), who was PW1's and PW2's neighbour, testified that at around 7.30 pm, his children ran to his house and informed him that PW1 and PW2 were being robbed. PW3 responded to the distress call. Upon arrival, PW1 described to PW3 who the assailant was. From the description given, PW3 could tell that the assailant was the appellant.

P.C. Humphrey Nyagah (PW4), was at the material time stationed at Githurai Kimbo police station in the Crime Section. He testified that on the material day at round 7.30pm, PW1 reported to him the incident of the armed robbery. PW1 informed PW4 that he was confronted by the appellant while armed with a pistol. PW1 informed him that he knew the assailant very well. There was enough light at the scene of the attack to enable PW1 to identify the appellant as the assailant.

On 23rd March 2005, at about 5.30pm, PW1 led police officers to the appellant's house where PW1 positively identified the appellant to the police officers as the assailant. The police arrested the appellant and later charged him with the offence of robbery with violence.

The appellant was placed on his defence on the basis of the foregoing evidence. In his defence, the appellant gave unsworn testimony. He denied the offence. He stated that on 23rd March, 2005, while at his home, he heard a knock at the door. He opened the door. Police officers came in. They carried out a search in his house but recovered nothing. He was thereafter arrested and taken to the police station. He did not know why he had been arrested. It was not until PW4 later on informed him of the charge against him. The appellant claimed that although PW1 and PW2 claimed to have known him for a long time, they did not give his name to the police when they reported the crime on 22nd March, 2005.

The trial court considered the evidence and reached a conclusion that the witness' testimonies were consistent and that the appellant was properly identified by recognition as a person well known to the complainant and other witnesses. The trial court found that the prosecution had proved its case beyond reasonable doubt, found appellant guilty and convicted him of the offence charged and sentenced him to death.

Aggrieved by the decision of the trial court, the appellant filed an appeal in the High Court which was principally based on the grounds of contradictions in the evidence and on the issue of lack of proper identification by recognition. The High Court considered the evidence tendered before the trial court

and concluded that the prosecution proved its case beyond reasonable doubt and that the learned trial magistrate was correct in holding that the appellant was properly identified by recognition.The learned Judges found no merit in the appeal and dismissed it accordingly.

Aggrieved by the decision of the High Court, the appellant filed a second appeal to this court. The appellant in his Supplementary Grounds of Appeal dated 19th September, 2012, raised the following seven grounds, which can be summarized as follows:

1. *The charge sheet was fatally defective.*

2. *The conviction based on identification by recognition was erroneous.*

3. *The learned judges failed to exhaustively re-analyse and re-evaluate the evidence.*

4. *The evidence relied on was contradictory and inconsistent.*

5. *Vital witnesses were not called to testify.*

6. *The prosecution did not prove its case beyond reasonable doubt.*

7. *Due consideration was not given to the defence.*

At the hearing of the appeal, the appellant was represented by Mr Mogikoyo while Mrs T. Ouya, Senior Assistant Director of Public Prosecutions represented the respondent. Counsel for the appellant adopted the Supplementary Memorandum of Appeal filed by the appellant and based his arguments principally on two issues; (1) defective charge sheet and (2) identification by recognition.

With regard to allegations of defective charge sheet, Counsel for the appellant argued that the charge sheet was defective as the person who was named as the complainant was not the person who testified. To Mr. Mogikoyo, uncertainty as to who the complainant was, is fatally defective to the charge

thereby making the proceedings a nullity.

He further argued that the identification of the assailant was not free from error and that even if it was identification by recognition, it could still be

mistaken. In support of this proposition, counsel relied on the case of ***KIARIE V***

R, [1984] KLR 739, which held *inter alia* that a witness could be honest but

mistaken. Counsel maintained that this was a case of mistaken identity in that, despite PW1 and PW2 testifying that the appellant's name was *Tyson*, they did not give this name to the police when reporting the robbery. The charge sheet did not also include the appellant's name as *alias* Tyson. Counsel further argued that there were contradictions in the evidence of PW1 as to the time of the robbery as PW1 testified at one point that the robbery occurred at 2pm and later testified that the robbery occurred at 7.30pm, begging the question whether the robbery took place at 2pm or 7.30pm?

On identification of the assailant at the scene, Counsel argued that there was not enough light to enable PW1 and PW2 to see and recognize the appellant as the assailant. That although PW2 testified that there were security lights at the scene of the robbery, he did not explain how far the security lights were from their house or how bright the lights were. In counsel's view, in the absence of such explanation, it was doubtful whether PW1 and PW2 were able to identify the appellant as the assailant. In support of this proposition, reliance was placed on

CHARLES O. MAITANYI V R, CR.A NO. 6 OF 1986.

Further, it was counsel's argument that the appellant's conduct dispelled the notion of his being the assailant as he was found by the police in his house

the following day after allegedly attacking his neighbour. In counsel's view, this was not the expected behaviour of a person who had committed an offence. Counsel further argued that a key witness, Kagicho, PW1's brother, who allegedly was at the scene of the attack was not called to testify; that the contradictions between the testimonies of PW1 and PW2 on what they actually saw during the robbery created doubt, which doubt should be resolved in favour of the appellant and lastly that the identification by recognition was not water tight. On the basis of the above arguments, counsel urged the court to allow the appeal.

Learned counsel for the State opposed the appeal and supported the conviction. Counsel submitted that the issue of the defect on the charge sheet based on the names on the charge sheet was an error on the face of the record which was curable under *Section 382 of the Criminal Procedure Code* and that no prejudice was occasioned by the error.

On identification, counsel submitted that identification by recognition of the appellant as the assailant was free from any error as the appellant was a person known to PW1 and PW2; that it was possible to know someone physically but not know their names; that the witnesses did not have to describe the appellant to the police and what was important was for PW1 and PW2 to recognize the appellant as the assailant; that there was enough lighting from the security lights; that PW1 was close to the attacker, making identification by recognition possible. Lastly, counsel submitted that failure to call Kagicho did not occasion any injustice or prejudice to the appellant; that the contradictions in witness' testimony were immaterial. On that account, counsel urged the court to dismiss the appeal.

The appellant's counsel, in reply, submitted that the charge sheet indicated that the complainant was Pastor Geoffrey *Mongare* yet the person who testified [PW1] is indicated as Pastor Geoffrey *Mungai*. In his view, this defect rendered the proceedings, conviction and sentence a nullity.

This being a second appeal, our mandate is as set out in *Section 361 (1) of the Criminal Procedure Code* namely to deal with issues of law. We have carefully considered the record of appeal, the rival submissions by counsel for either side, principles of case law relied upon by either side and the law and we proceed to make our determination as hereunder.

On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not. This Court considered the ingredients

necessary in a charge sheet and stated as follows in the case of *ISAAC OMAMBIA*

V REPUBLIC, *[1995] eKLR*:

> *"In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."*

A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence

and Practice (40th Edn), page 52 paragraph 53, this Court stated in *YONGO V R*,

(1983) eKLR that:

> *"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:*
>
> > *(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,*
> >
> > *(ii) when for such reason it does not accord*
> >
> > *with the evidence given at the trial."*

Further guidance is found in the case of ***PETER SABEM LEITU V R**, CR.A NO.*

482 OF 2007 (UR) where this Court held thus:

> *"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."*

Turning to the second limb as to whether the defect in the charge sheet is curable under *Section 382 of the Criminal Procedure Code* or not, we have had occasion to revisit and construe this section on our own.

Section 382 of the Criminal Procedure Code provides:

> *"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*

In the case of ***NJUGUNA V R**, [2002] LLR NO. 3735 (CAK)* this Court in

considering whether a defect in a charge sheet is fatal stated:

> *"We think, like the Learned Judges of the High Court did, that stating in a Charge Sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the Charge Sheet and it did not render the Charge Defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him."* [Emphasis added]

In the instant appeal, we find that the defect in the charge sheet of stating the complainant's name to read "*Mongare"* instead of "*Mungai"* did not prejudice the appellant in any way. Our reason for saying so is that the person who was robbed was "*Mungai"*. He is the one who led police to the arrest of the appellant. He is the one who knew the appellant as a neighbour. By indicating his name to read

"*Mongare*" instead of "*Mungai"* was merely a typographical error. The type of

errors normally curable under *Section 382 of the Civil Procedure Code*. We are satisfied that the first two Courts were justified in finding it inconsequential to the success of the prosecution of the appellant in connection with the offence he had allegedly committed. *Section 382 of the Civil Procedure Code* as the appellant did not point out any prejudice which the irregularity could or did occasion him.

Turning to the issue of identification, we are satisfied that the determination of this appeal turns mainly on the question of identification. The learned judges of the High Court conducted a thorough and exhaustive re-appraisal and assessment of the evidence as a whole consistent with their duty as laid down in

OKENO V R, [1972] EA 32. On the identification of the appellant, the learned

Judges stated:

> *"After carefully considering the evidence, we find that conditions for mistaken identity did not exist. There was enough lighting; the complainant was seeing a suspect who was quite familiar to him; the complainant's wife, who was also familiar with the appellant came along and bore witness to the robbery incident; there was abundant evidence placing the appellant at the scene of crime at the material time."*

The factors for consideration by the Court were discussed by the English

Court on the question of identification of Appeal in the case of *R V TURNBULL &*

OTHERS, [1976] 3 ALL ER 549. These factors include the distance between the

witness and the suspect when he had him under observation, the length of time the witness saw the suspect, and the lapse of time between the date of the offence and the time the witness identified the suspect to the police.

In the case of *WAMUNGA V R, [1989] KLR 424*, this Court held *inter alia*

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."*

In the case of *REPUBLIC V ERIA SEBWATO, CR.A. NO. 37 OF 1960*, (UR)

the court held that where the evidence alleged to implicate an appellant is entirely of identification, that evidence must be absolutely water tight to justify a

conviction. This Court in the case of *SHALEN SHAKIMBA OLE BETUI &*

SHADRACK KOITIMET OLE BETUI V R, CR.A NO. 284 OF 2005 stated as

follows:

> *"The present was a case of recognition rather than identification and on our part we have considered this issue and are satisfied that in view of the concurrent findings of the two courts below the appellants were positively identified, nay recognized by PW1 and PW2. There could be no possibility of a mistaken identify. We are satisfied that the*

appellants were convicted on very sound evidence of recognition in circumstances which were conducive to proper identification/recognition, Anjononi and Another v. R, [1980] KLR 54 at p. 60."

In the instant appeal, applying the above principles to the rival arguments on this issue, it is our finding that PW1 and PW2 identified the appellant by recognition as he had worked for them on their construction site. He was also a local resident. PW1 and PW2 had been seen with him from time to time in circumstances while not under an apprehension, with his face bare. On the day of the incident the appellant had not covered his face. The circumstances of identification were favourable and free from the possibility of error. In the circumstances of this appeal, we find therefore and hold that the learned Judges of the High Court cannot be faulted for finding as they did, that the appellant was positively identified by recognition by PW1 and PW2.

With regard to the issue that an essential witness, one Kagicho, was not called to testify, counsel for the appellant argued that this weakened the prosecution's case. Counsel for the respondent, on the other hand, however, argued that the failure to call Kagicho as a witness did not occasion any injustice or prejudice to the appellant. In resolving this, the Court is guided by the case of

DANIEL MUHIA GICHERU V R, CR.A NO. 90 OF 2007 (UR), where this Court

addressed itself on the number of witnesses the prosecution is obliged to call as follows:

"The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:

> *"…. There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent …. While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to*
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> *draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."*

In our view, the adverse inference can only be made where the evidence tendered by the prosecution is *"barely adequate"*. In the instant appeal, we find from the record that the evidence adduced against the appellant was quite overwhelming. Accordingly, the prosecution has the discretion to determine which witnesses are material. We note from the instant appeal that the possible materiality of Kagicho's evidence has not been shown. Since it is not disputed that Kagicho was called to the scene by PW2, he would have simply stated that he was called to the scene, witnessed the robbery and then jumped over the wall into the compound of PW3 to alert them. He would simply have corroborated PW3s evidence that he is the one who alerted PW3 about the robbery that was taking place at PW1s gate. This had nothing to do with the chain of events forming the robbery incident. We are satisfied that exclusion of this evidence does not break the chain of events forming the commission of the robbery. Indeed no explanation was given by the prosecution as to why Kagicho was not called but we find nothing on the record to suggest that his exclusion from giving testimony was on account of the likelihood of his testimony being adverse to the prosecution's interest.

On the alleged inconsistences especially those touching on the time of the commission of the offence as being indicated as 2.00 pm on the one hand and

7.30 p.m on the other; we find 2.00pm to have been an error. The consistent time

as per the testimonies of PW1, PW2 and PW3 was 7.30 pm. The stating of 2.00pm was therefore a curable minor error. 7.30pm is consistent with the bulk of the testimony that the robbery took place at night.

Side by side with the above, there is also the issue of the distance from the scene to the security light and the intensity of the light. Although we accept, these were not stated by PW1 and PW2, there is nothing to suggest that the light then prevailing was not sufficient enough to enable them recognize a familiar face in the manner they did. We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case.

The upshot of our assessment above is that the appeal is devoid of merit and is hereby dismissed.

Dated and delivered at Nairobi this 31st day of July, 2014.

R. N. NAMBUYE

JUDGE OF APPEAL

D. K. MARAGA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR