**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 107 OF 2013**

**BETWEEN**

**JOHN KIMOTHO TUMBO .....APPELLANT**

**AND REPUBLIC.....RESPONDENT**

***(An appeal from Judgment of the High Court at Nyeri***

***(Kasango & Makhandia, JJ.) delivered on 30th April, 2008***

***in***

***H.C.CR. Appeal No. 117 of 2004)***

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**JUDGMENT OF THE COURT**

1. John Kimotho Tumbo was charged with two counts of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***, ***Cap 63*** of the ***Laws of Kenya***. He was acquitted in Count I and convicted on Count II.

    1. The particulars in Count II were that on 2nd July, 2003, at Murinduko in Kirinyanga district within the then Central Province, jointly with others not before court, while armed with dangerous weapons namely pangas, axes, and torches robbed John Njuguna Wanyoike cash Ksh. 10,000/=, 20 packets of cigarettes, 8 sodas, 6 pairs of everpower batteries all valued at Ksh. 10,675/= and at or immediately before or immediately after the time of such robbery used actual violence to the said John Njuguna Wanyoike.

2. The prosecution evidence relevant to the conviction in Count II was given by PW2 John Njuguna Wanyoike. He testified as follows:

***"I operate a kiosk of shop goods. I can remember 2nd July, 2003 at about 2.30 am. I was asleep; I was with my wife and children. While there, I was woken by my wife. I saw people inside my house. They were six. The men had pangas, sticks and axes. My wife screamed. She was whipped three times. She was told to shut up. I asked the men what is up. They told me to give them money. I said I had no money. They started beating me. They beat me a lot. I stepped on the bed. They started cutting me. I saw one man called Kimotho. I asked him why they wanted to kill me and I had no money. I jumped on***

***the bed. They were flashing torches on me. When I stepped on the bed the torch which had flashed on my eyes moved. The torch which had flashed on me flashed on Kimotho. When I saw him, I asked him why they were cutting me. They asked me if I know him and why I mentioned him. When I was jumping from the floor onto the bed is when I saw Kimotho. I know him before. They started cutting me all over when I said Kimotho. I fell on the bed and became unconscious. Before they left one of them told Kimotho to stand at the door and ensure that my wife did not go out to scream. They then went to my shop and stole Ksh. 10,000/=, eight bottles of soda, torch batteries, cigarettes, horseman and kings ten packets each of the brands. I do not know how they broke into the shop. Where I was sleeping is a room behind the shop. When they left I discovered they broke into the shop. I called neighbours to come and open for me. I was cut on the head twice and on the right side of my face, shoulder and right hand. I was taken to Embu Hospital. Before I went to hospital we reported at Togonye Police Post. Police told me to go to hospital first as I was in bad shape. I was treated and discharged. I came home at 7.00 am. I found a mob which had come to console me. I told them I had identified Kimotho as among the people who robbed me. I told them to go and arrest Kimotho...We took him to Togonye Police Post.... Later I went for a P3 Form. I have known Kimotho for over five years. I cannot mistake him for another. I stayed with the men in the house for over twenty minutes. When I told them I had known Kimotho they cut me mercilessly and threw an axe at me which they left in my house".***

3. The trial magistrate upon hearing the prosecution and defence evidence relating to Count II stated as follows:

***"On the 2nd Count, the issue for determination is whether the accused is the one who jointly with others not before court robbed John Njuguna Wanyoike. Evidence adduced was by the complainant John Njuguna (PW2). He testified that on the night of 2nd July, 2003, at 2.30 am he was asleep in his house when he saw people inside his house who were armed with pangas, sticks and axes....He identified one man called Kimotho and asked him why he wanted to kill him. The men asked him if he knew him and why he mentioned his name. The men started cutting him all over the body. PW2 testified he knew Kimotho before and that is why he recognized him when he was flashed with a torch. The men left and told Kimotho to stand at the door to ensure that his wife does not go and scream..... I find that although it is only PW2 who identified the accused, it is safe to rely on his evidence as he knew the accused before and he revealed that he had identified him so soon after the robbery. PW2 had no reason to frame the accused. I find that the prosecution has adduced sufficient evidence to prove that it is the accused who jointly with others not before court who robbed the complainant..".***

4. The learned Judges of the High Court in dismissing the appellant's appeal expressed themselves as follows on identification:

***"In a case where the only evidence against an appellant is his identification in difficult circumstances, it always causes uneasiness to the court. The court ought to warn itself that even the evidence of recognition can be mistaken. PW2 identified the appellant who he said he knew previously. He identified him by means of a bright torch that was directed at the appellant. On identifying him he addressed him by name. The robbers realizing one of them had been identified severely attacked PW2. We are of the view that severe attack after identification corroborates the complainant's evidence of identification. It is clear that the moment he mentioned the appellant's name, the robbers realized that one of them had been recognized. On that basis, we find that reliance on the evidence of PW2 on identification was safe".***

5. Aggrieved by the dismissal of his appeal by the High Court, the appellant has lodged this second appeal citing two grounds namely:

i. ***that the learned judges erred in law in finding that the circumstances at the time of the robbery were conducive for positive recognition of the appellant by PW2.***

ii. ***that the learned judges erred in law in failing to carefully re-evaluate the evidence on record thus upholding conviction***.

6. At the hearing of this appeal, the appellant was represented by learned counsel Messrs Kimunya while the State was represented by the Senior Prosecution Counsel Messrs J. Isaboke.

7. Counsel for the appellant elaborated the grounds of appeal emphasizing that the gist of the appeal is on identification of the appellant. It was submitted that the alleged offence was committed at 2.30am at night and the circumstances surrounding the commission of the offence were not conducive for a positive identification that was free from error. Counsel challenged the testimony of PW2 as the sole identifying witness. It was submitted that both the trial magistrate and the High Court did not evaluate the intensity of the light from the torch that was allegedly used to illuminate and identify the appellant; that whereas the two court's below treated the case as a matter of recognition, lighting from the torch that led to recognition was not interrogated and tested to determine if there was no mistaken recognition; that PW2 simply talked of men who had torches; there is no reference to bright torches by PW2 in his testimony and the high Court erred in introducing and making reference to bright torches that is not covered by the record. Counsel stated that PW2 testified that he was able to recognize the appellant when one of the torches flashed on the appellant; it was submitted that there was no interrogation by the two courts below as to how long the flash was on the appellant. It was further submitted that PW2 testified he became unconscious after severe beating; if this were so, how then did PW2 hear the robbers tell Kimotho to stand and guard the door? It was submitted that an unconscious person cannot hear any conversation and doubt is cast as to the truthfulness of the testimony of PW2. It was noted that PW2 testified he was being beaten and cut at the same time; it was submitted that a person who is being cut does not have a proper state of mind to recognize anyone and the circumstance of being beaten and severely cut at the same time is not conducive to an identification that is free from mistake or error. Counsel submitted that had the two courts below properly evaluated the evidence, they ought to have found that an unconscious person could not hear proceedings of the night and make a positive identification that was free from error.

8. The State in opposing the appeal emphasized that the complainant spent over twenty minutes with the attackers and when it was clear the appellant had been recognized, the attackers accelerated beating and cutting the complainant; that PW 2 had known the appellant for over five years and he gave the name of the appellant at the earliest opportunity; that the defence gave an unsworn testimony which denied the prosecution the chance to test its veracity.

9. We have considered the rival submissions by counsel. We have examined the record of appeal and the judgement of the High Court. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in ***Chemagong vs. Republic, (1984) KLR 213,*** at page 219 where this Court held:

***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)"***

10. Our evaluation of the evidence on record shows that the only evidence linking the appellant to the crime is the testimony of PW 2 which is testimony of a single identifying witness. It is our duty to determine whether the two courts below properly evaluated the testimony of PW2 in identifying the appellant and linking him to the offence as charged. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances, it is safe to act on such identification. In ***Wamunga vs. Republic, (1989) KLR 424,*** it was stated 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".***

11. In the instant case, PW2 testified that he was able to recognize the appellant through a flash from a torch. From the evidence adduced, we cannot help but note that no information was given as to the intensity and brightness of the light from the torch. This information was necessary to enable the court carefully test the recognition evidence. The evidence of identification/recognition at night must be tested with the greatest care using the guidelines in ***Republic - v- Turnbull, (1976) 3 All ER 549*** and must be absolutely watertight to justify conviction. **(See *Nzaro -v- Republic, 1991 KAR 212 and Kiarie - v- Republic, 1984 KLR 739*)**. In the case *of* ***Maitanyi -v- Republic 1986 KLR 198,*** this Court stated that in determining the quality of identification using light at night, 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.

12. Our analysis of the evidence on record shows that in the present case, no inquiry was made by the learned Judges as to the nature of the alleged torch light or its intensity. No inquiry was made to determine its brightness and position in relation to PW2 and the appellant. No inquiry was made as to the intensity of light from the torch. No inquiry was made as to whether there was any other source of light in the room to enable the complainant state that there were six robbers. No inquiry was made to determine how the complainant being an unconscious person was able to know that the attackers were speaking to Kimotho. In the absence of such inquiry, the evidence of recognition cannot be held to be free from error **(See *Simiyu & Another –v- R, [2005] 1 KLR 192*)**. We are convinced that there was no proper testing of the evidence of identification and recognition by the two lower courts. Had the evidence been thoroughly tested and analysed we doubt whether the lower courts would have come to the same conclusion. The benefit of this doubt is given to the appellant. The learned judges made reference to a bright torch when there is no evidence on record to support the conclusion that the torch was bright. We find that the appellant's conviction for the offence of robbery with violence based on improper identification and recognition cannot be safely supported.

13. On the whole, we find that the case against the appellant was not proved beyond reasonable doubt and we can only agree with the Court of appeal in ***Suleiman Juma alias Tom – v- R, Criminal Appeal No. 181 of 2002 (Msa),*** that where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight. The evidence of PW 2 on recognition which was used to identify and convict the appellant, looked at in the totality of the case is not watertight. We hereby quash the conviction of the appellant in respect of Count II and we set aside the death sentence that was meted out to the appellant. We hereby order and direct that the appellant be set forth at liberty unless otherwise lawfully held.

***Dated and delivered at Nyeri this 15th day of July, 2014.***

***ALNASHIR VISRAM***

**.....**

***JUDGE OF APPEAL***

***MARTHA KOOME***

**.....**

***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

**.....**

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**