



**IN THE COURT OF APPEAL AT NAIROBI**

**(CORAM: WAKI, MWERA & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO.93 OF 2014**

**BETWEEN**

**NABOCHI ATEKU.....APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya t Nairobi**

**(Mbogholi & Achode, JJ.) dated 8th March, 2012**

**in**

**HC.CR.A.440 OF 2007)**

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

**JUDGMENT OF THE COURT**

The appellant, **Nabochi Ateku**, was charged in the Chief Magistrate's Court at Kibera with the offence of robbery with violence contrary to Section 296(2) of the Penal Code in that on 16th February, 2006, at Kangemi Nairobi, jointly with others not before court, while armed with dangerous weapons, namely pangas, he robbed **Mula Musinde Mulange** of a TV set L.G by make, a mobile phone (Nokia) all worth Sh.14,200/=. During the incident the robbers used violence on the said **Mula Mulange**. After trial, the learned magistrate found the appellant guilty and sentenced him to suffer death as by law mandated.

In finding the appellant guilty the learned trial magistrate noted that he had been identified at the time of the robbery, which took place at night, by the complainant (PW1) and his wife, **Rose Umochi Mulange** (PW2). They had been woken up by the robbers; they put on electric light in their one-roomed house. Thus they saw and identified, nay, recognized the appellant there. Then as the robbers armed with pangas left with the stolen property, the two were again able to see and recognize the appellant through the security light outside. Their neighbor, **Norman Lunalo** (PW3), through his window, also recognized the appellant through the security light. Both PW1 and 2 had testified that on several occasions earlier, they had seen the appellant visiting a neighbor called **Mwangi**. The witnesses had added that the appellant bore a scar on his forehead. Thus the learned trial magistrate was satisfied beyond any reasonable doubt that the appellant, who was represented at the trial, had been positively identified at the scene by recognition so his alibi defence had no

merit.

Being dissatisfied with the trial court's decision the appellant moved to the High Court (**Ochieng, Achode, JJ.**) on appeal. The learned judges re-evaluated the whole evidence and dismissed the four grounds put forth. The grounds were that identification was not free of error; evidence was contradictory; proof was not up to the required standard and the defence tendered had not been well appreciated.

Again, the appellant was aggrieved by that decision. He thus lodged this appeal before us by presenting six grounds in the memorandum of appeal. Mr. **Elvis Obok**, learned counsel for the appellant adopted the grounds. He abandoned grounds 1 and 6 and argued the rest on three broad bases namely, recognition, contradictory evidence and failure to present vital witnesses to testify contrary to Section 150 of the Criminal Procedure Code. The appeal was opposed by **Mr. Njagi Nderitu**, Senior Assistant Director of Public Prosecutions.

**Mr. Obok** told us that the robbery took place at night in the room of the complainant and his wife (PW1 and PW2). It lasted less than 10 minutes. He observed that the two witnesses told the learned trial magistrate that they saw the appellant in the electric light and recognized him by the scar on his forehead and that they had seen and known him in the past when he came visiting one **Mwangi**, their neighbour. Counsel urged us to find that that evidence was not sufficient to sustain recognition and to be relied on to convict, particularly considering that the said **Mwangi** was not presented to testify. He further submitted that the husband and wife did not state in their report to the police that they had recognized the appellant at the scene or that he bore a scar on his forehead. It was not sufficient therefore for the two witnesses to only describe the clothes – a black jacket and trousers – which the appellant wore on the material night, without adding any physical description about him.

As for the scar on the forehead, we were told that the appellant stated in his defence that he sustained it after the robbery on the day he was arrested and roughed up by members on the public. He never had it before. That he even denied visiting one, **Mwangi**. Accordingly, **Mr. Obok** continued, had the learned Judges re-evaluated all the evidence before the trial court, they could have concluded that it did not suffice to found a conviction.

Briefly on the ground of contradictory evidence, **Mr. Obok** urged us to note that while the complainant (PW1) claimed that the mobile phone stolen during the robbery belonged to him, his wife (PW2) told the lower court that she was the one who bought it. Thus ownership of that phone fell in doubt.

On his part, **Mr. Nderitu** began by pointing out that Section 137(d) of the Criminal Procedure Code alluded to in ground 2 in the memorandum of appeal, was not relevant here since that provision concerned plea-bargaining, a subject that did not feature in the proceedings herein. Moving to the ground of recognition, counsel posited that the evidence of the complainant and his wife (PW1 and PW2) supported each other. They saw the appellant in the house as he severed the TV wires. There was electric light on. They recognized him as a person who had in the past visited one **Mwangi**, their neighbor. He had a scar on his face and when the robbers were leaving the two witnesses again saw him well through the security light in the compound. Both the courts below made a concurrent finding that the

2 witnesses recognized the appellant at the scene and that finding should not be faulted.

**Mr. Nderitu** continued that it was no matter the number for witnesses that testified. There was no requirement in law to present a particular number of witnesses to prove a fact. In his view, those that the prosecution herein presented proved the charge laid and that sufficed. While referring to one **Mwangi**, whom it was said was visited by the appellant, counsel told us that he was not a necessary witness and in any event PC **Wycliffe Mukonyole** (PW5, Investigating Officer) testified that he met this **Mwangi**. **Mwangi** did not want to talk to PW5 or give him a statement.

**Mr. Nderitu** concluded that the learned judges properly re-evaluated the evidence as recorded, including the defence and dismissed the appeal. The appellant was not identified in the dock and he had his scar on the forehead before and not after the robbery. It was seen by PW1 and PW2 at the scene. **Mr. Obok** made a brief response reiterating that identification was through a scar and not recognition. He also emphasized that **Mwangi** was non-existent.

This being a second appeal we are bound by the provisions of **Section 361(1) of the Criminal Procedure Code** as set out in many past decisions of this court, including **Njoroge vs Republic [1982] KLR 388** wherein it was stated that:

**“On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the Court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.”**

Beginning with the ground of recognition raised by the appellant, we are not in doubt that where the visual identification of an accused person is not so positive as to link him to an alleged offence, want of proof of that aspect may entitle him to an acquittal if it be the only aspect. Recognition is linked to identification for a witness who knew or had seen the accused person before, meaning that it was not for the first time that the witness saw the suspect/accused person during the alleged offence. Here the 3 witnesses (PW1, PW2 and PW3) told the learned trial magistrate that they had seen and therefore known the appellant before the night of the robbery, when he used to visit one **Mwangi**, their neighbour. So when they saw him among the robbers that night in their plot they recognized him.

In the case of **Anjononi & Others vs Republic [1980] KLR 56**, where the appellants attacked and robbed a certain family at night and then escaped. There was evidence that the robbers had been seen and identified. The couple testified that they recognized the robbers whom they knew very well previously. The appellants were convicted and their appeal was dismissed by the High Court. When they came before this Court, still impeaching the finding of identification, this Court delivered itself thus:

**“The proper identification of robbers is always important in a case of capital robbery, emphatically so in a case like the present one --- Being night time the conditions of identification of the robbers in this case were not favourable. This was however, a case of recognition, not identification, of 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 another.”**

The Court went on to state how the couple in the **Anjononi** case knew the appellants before and how they had seen them well in torch light thereby obviating any mistake of identification.

In the present appeal the principal witnesses (PW1, PW2 and PW3) saw the appellant in the electricity-lit room and in the security light outside. They knew him before when they saw him visiting one **Mwangi**, a neighbour. He had a scar on the forehead which PW1 and PW2 testified on and were not cross-examined on whether the scar was there before or after the robbery. The trial court said this about identification/recognition of the appellant:

**“The question that now begs (an) answer is whether the identification of the accused person was beyond reasonable doubt. Although it was at night, it is the evidence of PW1, PW2 and PW3 that there was sufficient light which could make them positively identify the accused person. They also described the clothes he was wearing. The light was so bright to the extent that they were able to see the scar which was on the accused person’s forehead. I am therefore satisfied that there is no possibility of an error in the identification of the accused person. Therefore the accused person’s alibi is false and made-up story.”**

To be precise, it was only PW1 and PW2 who spoke of the scar while PW3's evidence mainly focused on seeing the appellant in the security light.

And just before the quotation just made immediately herein-above, the learned trial magistrate had said the following about the 3 witnesses (PW1, PW2, PW3) in connection with the robbery:

**“The complainant said that he was able to recognize the accused person whom she (sic) had seen before. He was aided by security light in order to identify the accused person. He said he used there before whenever he came to visit a neighbor called Mwangi. This means that he had seen him several times prior to the material night.”** (underlining added.)

As for PW2:

**“...she was also able to identify (and/or recognize) the accused whom she knew physically. She used to see him visiting a neighbour who lived in their plot.”**

And for PW3 (Norman Lunalo) who lived opposite PW1 and PW2, he woke up when they raised alarm and looked through the window. He saw a person holding a panga and facing his direction:

**“That person was facing his direction and he recognized him as the accused person. He had seen him two(2) times coming to visit a neighbour in that plot. ... when he reached outside, he saw the accused person disappearing...”**

The learned trial magistrate rated the evidence of PW1, PW2 and PW3 as consistent regarding the identification or recognition of the appellant in the electric light.

For its part, the High Court said as follows after reviewing the evidence of the 3 witnesses:

**“The appellant was not a total stranger to PW1, PW2 or PW3. And on the material day, he did not cover his face. Also there was sufficient lighting inside and outside the house. Those circumstances were conducive for positive identification.”**

And:

**“When PW1 reported the incident to the police, he told them that he recognized one of the robbers.”**

In this connection PC Mukonyole (PW5) told the lower court:

**“The complainant told me that he identified the accused person since he used to visit his neighbour.”**

This neighbour was no doubt the said Mwangi, whom PW5 spoke of in cross-examination:

**“The accused person used to visit the house of one Mwangi. I met with Mwangi in the plot in question. He was outside his house. He did not want to talk with me. He refused to record a statement.”**

From the foregoing, the two grounds of recognition and failure to call a vital witness have been exhausted. There was sufficient evidence regarding recognition of the appellant at the scene where there was electricity light. PW1, PW2 and PW3 recognized him. There was no error in this and both the trial as well as the first appellate Court, made a concurrent finding on this aspect. We see no reason to disturb the same. There was evidence in support thereof. As to omitting to call vital

witnesses, it was not a prejudicial omission to leave **Mwangi** and not call him as a witness. There is no law requiring the prosecution to call any and all who would pass as witnesses so long as it adduces sufficient evidence to prove its case. **Mwangi** existed and he declined to talk to the investigating officer, PW5, or even record a statement. He was not a vital witness to the prosecution case and the appellant, who is under no duty to prove anything, was at liberty to summon him as a witness.

Accordingly, we find no merit in the 2 foregoing grounds and we dismiss them.

The third ground was what **Mr. Obok** referred to as contradictory evidence as between PW1 and PW2 regarding the ownership of the stolen mobile phone. He did not demonstrate in what way this ground had substance impacting on his client's appeal, or how the ownership of the phone prejudiced his client. The phone was one of the items stolen by the robbers from the house of PW1 and PW2. This ground too must fail.

All in all, we find no merit in this appeal which we hereby dismiss in its entirety.

**Dated and Delivered at Nairobi this 3rd day of October, 2014**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**