



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: MWILU, MUSINGA & MURGOR, JJ.A.)**  
**CRIMINAL APPEAL NO. 298 OF 2005**

**BETWEEN**

**LAWRENCE MAINA KABECHE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng, JJ.) dated 4<sup>th</sup> October, 2004

**in**

**H.C. C.R.A. 1077, 1078 "A" OF 2000)**

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**JUDGMENT OF THE COURT**

The appellant, **Lawrence Maina Kabeche**, together with **Patrick Ngugi Njoroge (deceased)** were convicted by Kiambu Senior Principal Magistrates' court of several counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and sentenced to death. They both preferred appeals to the High Court of Kenya at Nairobi against the said conviction and sentence. The first appellate court upheld the conviction and sentence in respect of five counts.

Being aggrieved by the said finding, the appellant preferred a second appeal to this Court. Initially the appellant was unrepresented and had prepared his own memorandum of appeal where he set out 9 grounds of appeal. But when **Mr. Nyachoti** came on record for the appellant, he abandoned the original memorandum of appeal and instead filed a supplementary memorandum of appeal which consists of 3 grounds as follows:

**"1. The learned trial judges of the superior court below erred in law and fact by upholding the conviction of the appellant by relying on the evidence of identification when the same was not conclusive and the conditions for identification were not favourable.**

2. **The learned trial judges of the superior court below erred in law and fact by failing to reevaluate and re-analyse the prosecution evidence to the prejudice of the appellant.**

3. **The learned trial judges of the High Court erred in law as they did when they upheld the conviction of the appellant when the offence was not proved to the required legal standards."**

The brief facts of the case leading to this appeal were that there was a spate of robberies in Kiambu District between the 2<sup>nd</sup> day of May and 15<sup>th</sup> day of May 1997. The said robberies were carried out at Banana market, Muchatha village, Thimbigwa village and Kiambaa market. It was alleged that on the night of 12<sup>th</sup> and 13<sup>th</sup> May, 1997 at Muchatha Village, the appellant together with two others namely, **Patrick Ngugi Njoroge (deceased)** and **James Njenga Ngugi**, while armed with dangerous weapons, to wit pistols, robbed **Nancy Wacuka Gathie, PW2**, of cash amounting to Kshs.1,500/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Nancy Wacuka Gathie. On the same night and in similar circumstances at Muchatha market, the appellant and his accomplices robbed **Esther Waruinu, PW3**, of unknown amount of money and at or immediately before or immediately after the time of the said robbery threatened to use personal violence against her. On the following night of 14<sup>th</sup> and 15<sup>th</sup> May at Thimbigwa village, Muchatha market and Kiambaa market the appellant and his accomplices also violently robbed **Godfrey Tharuba Koinange, PW1**, **Stephen Ndung'u Mwathi, PW4**, **Francis Ng'ang'a Wanjiru, PW8**, and **Patrick Kariuki Njenga, PW6**, of various sums of money.

In respect of the robbery against **Nancy Wacuka (PW2)**, which is the subject of count 2, the complainant testified that on 12<sup>th</sup> May, 1997, while working as a Barmaid at Muirini Bar in Muchatha market, the appellant and an accomplice entered the Bar and bought some drinks and cigarettes. The premises were well lit by electric lights. The appellant and his accomplice were not known to her, but since there were only a few customers at the material time, she was able to see their faces clearly. After a short while, the appellant and his accomplice left, only to return at about 11.00 p.m. They fired into the air and ordered all those who were in the Bar to lie on the floor. She was robbed of Kshs.1,500/=.

Thereafter, the robbery was reported to the police. PW2 informed the police that she was able to identify the persons who had robbed them if she were to see them again. On the following day, the appellant and his accomplices were arrested and when an identification parade was conducted, she identified the appellant as well as Patrick Ngugi Njoroge (deceased) and one James Njenga Ngugi.

The owner of Muirini Bar, **Esther Waruinu, PW3**, corroborated the evidence of PW2 in all material aspects. She was the one who had attended the robbers when they first entered the Bar as customers and ordered drinks. She also saw them when they walked out and further saw them when they returned to the Bar and opened fire.

In respect of count 4, **Godfrey Tharuba Koinange (PW1)**, was robbed on the night of 15<sup>th</sup> May, 1997 at his house by a gang of five robbers. The robbers were armed with guns and had lit powerful torches. The torchlight was shone against the complainant's window glasses and reflected back on the robbers' faces and he was able to clearly see them. Upon making a report to police, the appellant and three of his accomplices were arrested and PW1 was able to identify them following an identification parade.

In respect of count 5 where the appellant together with others were alleged to have robbed **Stephen Ndung'u Mwathi, PW4** of Kshs.500/=, the complainant testified that on 17<sup>th</sup> May, 1997 at about 3 a.m. he was walking home from his place of work when he met with three people who were dressed as police officers. He greeted them but the strangers answered back rudely and ordered him to stop and handover to them all the money in his possession. Realizing that the three were armed with a pistol, he complied and was relieved of Kshs.500/=, his wrist watch and a sweater. At the time of the robbery, the complainant had put on a torch and its light enabled him to see the faces of the robbers. There were also security lights from nearby houses which lit the scene. As a result the complainant was able to identify the faces of three

robbers, one of whom was the appellant. They were people he was familiar with, having previously seen them at Muchatha market. The complainant made a report at Karuri Police Station and on 21<sup>st</sup> May, 1997 he was called to identify some people who had been arrested by the police. He identified the appellant and two of his accomplices.

In count 6, the appellant and 3 others violently robbed **Francis Ng'ang'a Wanjiru (PW8)**, of Kshs.13,630.50, one radio cassette set and other items. The robbery took place on the night of 14<sup>th</sup> and 15<sup>th</sup> May, 1997 at Kiambaa market. On the material night, PW8 was working as a cashier at Embassy Bar in Kiambaa market when at around 11.30 p.m. a person walked in and bought a bottle of beer and sat down to enjoy it. Shortly thereafter he was joined by another. After a few minutes the two men, who were armed with a pistol, ordered everyone in the Bar to lie down, and one of them ordered the complainant to hand over all the cash in his possession, which he did. The robbers also made away with several items from the Bar. One customer was also shot by the robbers, PW8 stated. At the time of the robbery, there were electric lights in the Bar and PW8 was therefore able to see the faces of the robbers. He explained to the police how the robbers were dressed and the role played by each one of them. A few days after the robbery the police arrested the appellant and other suspects and PW8 was able to identify the appellant. He had said he had clearly seen his face on the material night.

In respect of count 7, **Patrick Kariuki Njenga, PW6**, testified that on 14<sup>th</sup> May, 1997 at about 11 p.m. he was at Embassy Bar in Kiambaa market when they were ordered to lie down by some armed robbers. He hesitated in complying with the said orders and as a result one of the robbers shot him in the stomach. He was robbed of Kshs.2,000/=. Although he was not able to identify the robbers, PW8 testified that he had clearly seen and identified them.

The first appellate court carefully analysed all the evidence that had been tendered before the trial court and reached its own finding that the appellant had been properly identified and upheld the conviction and sentence in respect of counts 2, 4, 5, 6 and 7. That notwithstanding, in the supplementary memorandum of appeal, Mr. Nyachoti, learned counsel for the appellant, submitted that the High Court Judges erred in law by failing to re-evaluate and re-analyse the prosecution evidence and that was prejudicial to the appellant. However, in our view, that ground of appeal is without any merit because a perusal of the High Court judgment shows that the learned Judges re-evaluated the evidence on record and reached their own conclusion as required of them. See **OKENO v REPUBLIC [1972] E.A. 32**. There is no yardstick for the manner in which a first appellate court ought to carry out the duty of re-evaluation or fresh scrutiny of evidence. This Court so held in **SIMON KARIUKI MURIITHI v REPUBLIC [2006] eKLR**. The extent and manner in which the re-evaluation may be done depends on the circumstances of each case and the style adopted by the Judges.

The gravamen of this appeal is on the issue of identification of the appellant by the various prosecution witnesses. Mr. Nyachoti submitted that the robberies occurred at night when there were no favourable circumstances for a positive identification. In respect of count 2, it was submitted that the victims of the robbery, PW2 and PW3 had no time to identify the appellant as the attack was sudden and there was insufficient light at the Bar. The two witnesses were also in a state of shock and had seen the robbers for a very short while.

Mr. Nyachoti made more or less the same submissions with regard to count 4. He said that PW1 did not have time to identify the attackers and there was insufficient evidence that the alleged reflection of torchlight on the window glasses was sufficient to enable him see the attackers. He reiterated that line of submissions in respect of the other counts. He cited, inter alia, this Court's decision in **CHARLES O. MAITANYI vs REPUBLIC [1986] KLR 198** where the Court cited with approval the case of **ABDULLA BIN WENDO & ANOTHER v R (1953) 20 E.A.C.A. 166** where it was held:

**"Subject to the well known exceptions, it is trite law that a fact may be proved by the 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 shown 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 possibility of error."**

In response, **Mr. Orinda, Assistant Director of Public Prosecutions**, submitted that the appellant was not convicted on the evidence of a single identifying witness. He was positively identified by at least 5 prosecution witnesses, each one of them stating that there was sufficient light at the scene of the robbery that enabled them to see the appellant clearly. He added that the robbers had not disguised their faces and the identifying witnesses had no difficulties in picking the appellant out when identification parades were conducted. He urged the Court not to interfere with the concurrent findings of the two courts below.

This is a second appeal and by dint of **Section 361(1) (a)** of the **Criminal Procedure Code**, the Court has jurisdiction to consider only matters of law. It is also trite law that the Court cannot interfere with concurrent findings of the two courts below unless such findings are not based on any evidence. In **KARINGO v REPUBLIC [1982] KLR 213**, this Court held as follows:

**"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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."**

Since the outcome of this appeal will turn on the evidence of identification of the appellant, it is of paramount importance that we carefully consider the findings reached by the High Court on this issue. In relation to count 2, the learned Judges of the High Court in analysing the evidence of PW2 and PW3 stated as follows:

**"However, a perusal of the record shows that although PW2 conceded that she was scared, she told the police that if she saw the attackers she could identify them. The witness explained that she had clearly seen the robbers when they went to the Bar at 8 p.m., where she was working, PW2 said that the lights were on thus enabling her to see the appellants very well. The witness gave particulars of the weapons each of the appellants had, and the roles they played at the time of the said robbery. Later, she was able to pick out the appellants at the identification parades which were conducted by the police.**

**Secondly, PW3 also testified that she had identified the appellants. She too testified that the appellants had visited the Bar, first at 8.00 p.m, and later at about 11.00 p.m., when they carried out the robbery. Her evidence corroborated that of PW2 in all material particulars. And she too identified the appellants at the identification parades."**

The learned Judges concluded that the testimony of the two witnesses was not only consistent but also corroborative and so found no reason to doubt that the witnesses had identified the appellant. They further established that there was sufficient light in the Bar and the appellant had not disguised himself at all.

Turning to the evidence of PW4, the High Court Judges observed that the witness had seen the appellant and his accomplices prior to the date of the robbery. The area was well lit by security lights. There was also sufficient light provided by a torch which the witness shone on the appellant and his accomplices when he met them. PW4 stated,

*inter alia:*

**"My torch was on when we met. There were also security lights from nearby houses. I identified all the three of them by their facial features. I had seen them previously in Muchatha. They were people I was familiar with but I did not know their names."**

The witness added that he was with the robbers for about 30 minutes and during that time he was able to observe them clearly.

Turning to the evidence of PW1, he also stated that the four robbers who had attacked him on the material night had

spotlights. He came face to face with them when they ordered him and his wife to open the door to their house. The spotlight reflected on the faces of the robbers when it was flashed against a glass window. The witness was also able to pick out the appellant when an identification parade was mounted.

In **WAMUNGA v REPUBLIC** [1989] KLR 426, this Court held 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 make it a basis of conviction."**

We have carefully examined the evidence on record, particularly as regards the issue of identification of the appellant. Unlike the holding in **ABDULLA BIN WENDO & ANOTHER v R. (supra)** where the appellant's conviction was based on the evidence of a single identifying witness, the appellant's conviction herein was premised on identification evidence of five witnesses. Each of those witnesses clearly explained before the trial court why they were positive that the appellant was a member of the gang that had robbed them. The trial court was satisfied that the appellant had been properly identified by each of the said witnesses. That evidence was subjected to re-evaluation and re-examination by the High Court which upheld the trial court's findings.

On our part, we have also re-examined the said evidence and we have no reason to doubt that the appellant was properly identified by the five prosecution witnesses. PW4 had on other occasions seen the appellant and his accomplices at Muchatha market, although he did not know their names. For PW4 therefore this was a case of recognition, not identification. In **ANJONONI & OTHERS v REPUBLIC** [1976-80] 1KLR 1566, it was held that:

**"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."**

All in all, we find no merit in this appeal and dismiss the same in its entirety.

**Dated and Delivered at Nairobi this 14<sup>th</sup> day of November, 2014.**

**P.M. MWILU**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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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**

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