



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MWERA & G.B.M. KARIUKI, J.J.A.)**

**CRIMINAL APPEAL NO. 205 OF 2012**

**BETWEEN**

**STEPHEN MUTINDA MWANZIA.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

(Being an Appeal from the Judgment of the High Court of Kenya at Machakos, (Waweru & Lesiit, JJ.)  
delivered 24<sup>th</sup> August, 2008

in

H.C.CR.A. NO. 180 OF 2008)

**JUDGMENT OF THE COURT**

1. The appellant, Stephen Mutinda Mwanzia, has lodged in this Court a second appeal against his conviction and death sentence meted out to him on 25<sup>th</sup> January 2008 by the Acting Principal Magistrate (Hon. D.M. Ochenja) in Criminal Case No.80 of 2006 in the Senior Resident Magistrate court at Mwingi for the offence of robbery with violence contrary to Section 296(2) of the Penal Code Chapter 63 of the Laws of Kenya. His appeal to the High Court (H.P.G. Waweru & J.W. Lesiit, JJ.) was dismissed on 24<sup>th</sup> August 2011 in criminal appeal No.180 of 2008 at Machakos.

2. The appellant faults the High Court decision for upholding his conviction and sentence. He relies on only two grounds of appeal which his counsel, Mr. Mogikoyo, urged before us when the appeal came up for hearing on 17.02.2014. These grounds are:-

"1. That the learned High Court Judges erred in law in failing to find that the trial of the appellant at the Magistrate's Court did not comply with the provisions of the Criminal Procedure Code Cap 75 Laws of Kenya, a situation that was highly prejudicial to the appellant and indeed a miscarriage of justice to him.

2. That the learned Judges of the High Court erred in Law in failing to find that the identification of the appellate as a robber was not free from error.

3. The evidence on record shows that the complainant who was the victim in the robbery was one Johnson Kyalo Musumbi, a welder from Mwingi district, who lived and carried on welding business at

Mwingi town where he had a workshop. He testified in the trial Court as PW1. His evidence was that on the night of 23<sup>rd</sup> and 24<sup>th</sup> December 2005, he was sleeping in his 5 roomed house at Mwingi town with his wife, Lydia Kidio Kyalo. In the house also were his children the oldest of whom was aged 6 years. He woke up in the hush of the night when he heard screams in the homestead calling for help. As he opened his bedroom door, he saw light in the sitting room and his house-help, one Koki Muthoka, get out of the room. He retreated to his bedroom and his wife too started screaming. He heard a gunshot outside. The doors to his house including grill doors were locked. Then he heard a warning in Kiswahili urging calm to be kept and threatening killing. So they stopped screaming. He also heard someone climb onto the roof of the house. It is then that he pleaded for his life and opened the door whereupon he saw the appellant who "started to run away." According to the complainant (PW1), his security lights were on. He was able to see the appellant who, he said, had a torch and a club. The complainant told the trial Court that he recognized the appellant through the said light as he knew him. He testified that he had employed him in his house for three months. When he opened the house, a young man with a rungu and a torch entered after the appellant went away. The young man demanded money. His colleague also entered the house armed with a pistol. The appellant gave them 140,000/= which he had withdrawn from the bank for purchasing materials. He was also forced to give them his mobile phone and car keys for his pick-up registration number KZK 039. The robbers left in the vehicle and as they did so, the appellant told the trial Court that he saw the appellant holding the gate for the vehicle to drive out. The robbers who had not boarded the vehicle pushed the complainant inside the house and locked it from outside. All along, the complainant's wife was in the bedroom and the complainant had to tell her what had transpired. Neighbours came soon thereafter and he told them that he had identified "Mutinda Mwanzia", the appellant, whereupon his mother also stated that she too had identified "Mutinda Mwanzia," the appellant as one of the robbers.

4. The police were called. Their investigations did not lead to the arrest of the appellant but the latter was arrested on 5.1.2006 by members of the public who took him to the police station where the police re-arrested him. The complainant alleged that he had recognized the appellant through the security light of his house. The pick-up vehicle belonging to the complainant was found 15 metres from the latter's home.

5. The Occurrence Book (O.B.) in which the complainant's report of the robbery was recorded by the police was not produced as evidence.

6. The complainant's brother, James Fundi Musumbi, who lived in the same homestead with the complainant testified as PW2 and stated in his testimony that he heard one gun shot on the night of 23/24 December 2005 and a lot of noise in the compound and when he got out he saw many people at the house of the complainant whom he did not know but at the gate of the compound he saw and recognized the appellant at a distance of about 10 to 15 metres. He testified that he knew him. He told the trial Court that he used the security lights and also the motor vehicle lights at the parking area whose engine was running when he came out. In cross-examination, he testified that he recorded his statement with the police after the appellant had been arrested. He was not present when the appellant was arrested.

7. The complainant's mother, Jane Nzambi Musumbi, was also in her house in the homestead on the night of 23<sup>rd</sup>/24<sup>th</sup> December 2005. She woke up when she heard noise in the compound. She went outside. She told the trial Court that she identified the appellant as one of the robbers as the compound was lit. She went so far as to say that the appellant was wearing a black shirt with spots. There was no evidence on the quality of the light nor how intense or otherwise it was.

8. The brother-in-law of the appellant, Paul Thuua, testified in the trial Court as PW4 and averred in cross-examination that the appellant went to his house on 5<sup>th</sup> November 2006 and that he tricked him that they were going to have tea when in fact PW4 was arranging for him to be arrested by the youth. Senior Sergeant Evans Mwangi who testified as PW5 told the Court that the appellant was taken by civilians to the police station where the police re-arrested him.

9. In his defence, the appellant stated from the dock that he went to PW4's house on 4<sup>th</sup> January 2006 to inquire about money he was owed by the complainant who had promised to send PW4 to remit it to him.

He spent the night there as PW4 was away and the following day (5<sup>th</sup> January 2006) the latter came and as he did not have the money as the complainant had not given it to him, he left in PW4's company who offered to buy him tea while he, PW4, left briefly and returned in company of two youths who arrested him and took him to the police station at Mwingi.

10. This judgment is in relation to the appellant's second appeal. Section 361 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya enjoins us to address only issues of law and thus pay homage to concurrent findings of fact made by the trial and the 1<sup>st</sup> appellate Courts, unless those findings are based on no evidence or on perversion of the evidence.

11. Mr. Mogikoyo, learned counsel for the appellant, submitted on the first ground of appeal that the trial of the appellant did not comply with the law as the first trial magistrate, Hon. J. K. Ngarngar was not competent to hear the evidence of PW1, PW2 and PW3 in the case. He contended that the record was not clear if the magistrate was of the rank of a Resident Magistrate or whether he was an Acting Senior Resident Magistrate. If he was a Resident Magistrate, contended counsel, there is doubt about his competence. In counsel's view, the law does not confer jurisdiction on an acting Resident Magistrate to try a criminal case of robbery with violence under S.296 (2) of the Penal Code. He contended that this error was fatal and the trial was a nullity. A retrial was required, he contended.

12. On the second ground of appeal, Mr. Mogikoyo submitted that the identification of the appellant as one of the robbers was doubtful. He drew our attention to the evidence of PW5 and PW1 and contended that the findings of law by the High Court were erroneous to the extent to which they concluded that there was evidence of identification. But PW1 wasted no time in explaining to his mother and the neighbours after the ordeal that he had recognized Mutinda Mwanzia, the appellant. The learned counsel for the appellant submitted that police did not visit the complainant's home to view the scene of the crime. But PW5, Senior Sergeant Evans Mwangi, stated in cross-examination that he visited the scene of the crime. Counsel also urged the Court to have regard to the fact that in its judgment, the first appellate Court acknowledged that there was no evidence as to who made the initial report of the robbery to the police. It was counsel's submission that the first report after the incident was critical and the fact that the O.B. was not produced in evidence to show what the report stated weakened the prosecution case. We observe that the prosecution did not produce the O.B. and that the reason assigned for the failure to do so was that it could not be traced.

13. Mr. Nzambi Musumbi, the father of the complainant testified as PW3. It was his evidence that he was sleeping in his house in the homestead on the material night when he was woken up by noise in the compound. He testified that there was security light at the gate which illuminated the whole compound. He looked through the window and saw two people heading towards the complainant's place. He attempted to talk but he was warned to remain mum. Alarmed, he subsequently screamed and was threatened with death if he persisted in screaming. He remained in the house throughout the ordeal. When it was over, the door was opened from the outside by his son and when he went out he told the complainant that he had recognized Mutinda Mwanzia as one of the robbers as Mutinda Mwanzia walked towards the gate from the door of his house. Contrary to what the learned counsel submitted, we observe that there was no contradiction between the evidence of PW1, PW3 and PW5.

14. Counsel for the appellant also submitted that the appellant maintained his innocence throughout and that he had been framed by the witnesses who, he said, were all relatives. He pointed out that it took a long time for the appellant to be arrested and that the arrest was because the relatives alleged that they had recognized him on the night of the robbery as one of the robbers. This evidence, contended counsel, was extremely weak when one took into account the fact that it was at night and the intensity or otherwise of the security light was not known, coupled with the lack of evidence as regards distance/s from which the witnesses, save for PW2, said they saw the appellant. Moreover, the counsel, the fact that no description of the robber was given and the fact that the witnesses were scared, all added up to render the evidence as unreliable.

15. Counsel relied on the case of Mohamed Bin Allui V.R. [1942] IX EACA 72 in which the importance of the description given by an identifying witness was emphasized by the Court of Appeal for Eastern

Africa, the predecessor of this Court. Counsel also referred to the decision in *Antphace Herman V.R.* (CR APPEAL NO 40 OF 1997(unreported)) relating to an appeal from a conviction for the offence of stock theft contrary to section 278 of the Penal Code in which this Court pointed out that the trial Court had failed to consider whether the appellant's defence "was probably true or whether it raised some doubt as regards him having been actually involved in the theft of the cattle." The Court expressed the view that "it was possible that the appellant's version could well be true, more so if looked at in conjunction with the evidence of the co-accused in the cause."

16. The Court in that case referred with approval to the Tanzanian case of *R. V. Wilbald v. Tibanyendela* [1948] EACA III in which it was held "that the fact that an accused person has made a statement denying his guilt very soon after he has been charged with the offence may often be very relevant as showing the consistency of his conduct at that early date with the version of facts as given by him at his trial and may in some cases be the last ounce which turns the scales (of justice) in his favour."

17. Mr. Mogikoyo urged us to allow the appeal.

18. On her part, the learned Senior Assistant Director Public Prosecutions, Miss Mary C. Oundo, opposed the appeal. She submitted that the trial Magistrate, J. K. Ngarngar, Ag. S.R.M had jurisdiction and regretted that the record may have had a typographical error by reflecting that the trial magistrate was merely a Resident Magistrate. In her view, there is no jurisdictional distinction between an acting Senior Resident Magistrate and a Senior Resident Magistrate.

19. On the issue of identification, she contended that the evidence was of recognition which is more reliable. She submitted that the appellant was known to the witnesses. She referred to the evidence of PW1, PW2 and PW3 and highlighted the fact that there was illumination from the security light and that the appellant was seen twice by the complainant (PW1) and his father (PW3)). Although the Occurrences Book (O.B.) was not produced, counsel contended that there was evidence that the report of the robbery was made to the DCIO who in turn instructed PW5 to carry out investigations. Section 143 of the Evidence Act, Chapter 80, of the Laws of Kenya was referred to by counsel in her submission to buttress the proposition that it was not necessary for many witnesses to testify to prove a fact as the evidence of a single witness could also achieve the same effect. Section 143 states:

"143. No particular number of witness shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

20. In the instant case, three witnesses saw the appellant, submitted counsel. The trial and the first appellate court made concurrent findings of fact in relation to the evidence of recognition of the appellant. She urged us to dismiss the appeal as lacking in merit.

21. In reply, Mr. Mogikoyo contended that errors could be made in recognition just as they are made in identification. He tried to persuade us that as the witnesses were in fear, they were hardly likely to make an accurate observation of those they saw even if they were not total strangers to them.

22. We have perused the record of appeal. We have also considered the grounds of appeal and the submissions made by the learned counsel for the appellant and the learned Assistant Director of Public Prosecution.

23. The first issue in this appeal is on jurisdiction of the trial magistrate to hear the evidence of PW1, PW2 and PW3 between 4<sup>th</sup> January 2007 and 8<sup>th</sup> March 2007. The Magistrate in question was Hon. J. K. Ngarngar, Ag. S.R.M., Mwingi District, Eastern Province. The original record which we have perused shows that the said Magistrate was an Acting Senior Resident Magistrate. As an Acting Senior Resident Magistrate, he was competent and had jurisdiction to try the case, and hence to take the evidence of the said witnesses as he did. The competence of an Acting Senior Resident Magistrate is the same as that of a Senior Resident Magistrate. This ground of appeal has no merit.

24. With regard to the evidence of recognition which constituted the second ground of appeal, the robbery

was at 2.00 a.m. on the night of 23<sup>rd</sup> and 24<sup>th</sup> December 2005. It was dark. The robbers went through the main gate into the complainant's homestead. The complainant's brother and father had each a house in the compound. The complainant heard screams calling for help. He also heard a gunshot. He saw flash lights outside. He realized the house was surrounded. His wife started screaming. He heard a voice warn in *Kikamba* - "keep cool or we (will) kill you if you continue." *Then he* heard somebody on the roof of his house. In our view, it is reasonable to deduce that PWI must have been terrified because he told the trial Court that he started pleading for his life. In his words, he said, "I told them not to kill me and I opened for them". He did not state that he put on the lights in the house. However, he said security lights were on the outside of the house and that is why he was able to see the appellant. He did not state how the appellant was dressed nor did he give any description of the person he saw and recognized to be the appellant. All he said was that the appellant was running away from the house towards the gate. There is no evidence that he saw his face.

He testified that he saw a torch and a club in his hands. These circumstances, as pointed out by Mr. Mogikoyo, paint a picture of a person who was so frightened that he was hardly in a position to properly observe or give an accurate description of the person he saw.

He was fretting with fear for his life, family - wife, brother, mother and children who lived in the homestead. Although he came up with the name of Stephen Mutinda Mwanzia, the circumstances under which he said he saw the robber were not conducive to positive recognition and are not likely to have facilitated proper observation of the robber he saw. In our view, the name he gave is one he already had in his mind as belonging to the person he thought he saw. But whether the person he saw was the appellant depended on the description of the person he said he saw. In this case, there was no description by any of the witnesses of the person they said they saw. They gave no description of any kind whatsoever of the person they saw such as, for instance, whether he was tall or short, slender or stout, or whether he had hair or was bald or how he was dressed. Such description would have gone a long way to show whether the appellant fitted the description.

Evidence as to what weapon the robber carried is not descriptive of the robber. Though it is difficult to discern colours in darkness or in insufficient light, the ability to tell colour of clothes or to give a description of features of the person seen shows the degree of observation by a witness as it goes to details and shows whether the locus in quo was well lit. The complainant alleged that the compound was well illuminated. If so, he ought to have been able to observe and describe the robber he saw whom he said was the appellant. In this case, the only description attributed to the appellant was the name which the witnesses already knew as it belonged to a person who worked for them as a domestic worker. The name was in their minds. Whether the person they saw was the appellant and hence the owner of the name required a description to determine whether he was the person the witnesses said they saw. There was no such description. None of the witnesses said they saw the face of the robber much less described it. PWI saw the back of the robber as he walked away towards the gate.

25. This Court has time and again pointed out the need to examine with great circumspection the evidence of identification or recognition as it is alive to the fallibility of identifying witnesses.

Witnesses are capable of observing attackers, some with greater circumspection than others while, still, others may imagine what they have seen are persons known to them when they are not. Therefore, the circumstances under which a witness claims to have seen a suspect are crucial in determining whether the observation was accurate or not. That is why it is of crucial importance what an identifying witness states he saw at the earliest available opportunity after an incident. A statement by an identifying witness that he saw a suspect without attributing any description to the person he saw leaves a lot to be desired and lacks cogency. It is insufficient on its own, without more, as evidence of identification or recognition.

26. In the instant appeal, none of the witnesses attributed any description to the robber they said they saw. Besides, none said they saw his face. Evidence of identification or recognition must be approached with caution. In the case of *Cleopas Otieno Wamunga v. R* [Cr. Appeal No.20 of 1989] (UR) this Court pointed out the danger posed by evidence of identification when it held -

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant on reliance of the correctness of identification. The way to approach the evidence was succinctly stated by Lord Widgery, C.J. in the well-known case of R. V. Turnbull [1970] 3 All ER 549."

27. The trial and the first appellate courts made concurrent findings of fact on the question of identification in the instant appeal. That finding was premised on the evidence adduced at the trial. It is an accepted principle of law that an appellate court will only interfere with the trial Court's findings of fact, in exceptional circumstances. This principle is borne out of the realization that it is the trial Court which saw, heard and observed the witnesses as they testified before it and had vantage position in evaluating the evidence and making findings of fact including their demeanour and credibility. However, where such findings of fact are not supported by evidence, or are at variance with the evidence, or are plainly wrong, an appellate court will be justified in interfering. The question of evaluation of evidence and whether the lower court correctly evaluated it is a question of law.

28. This is a second appeal and the law as contained in Section 361 of the Criminal Procedure Code, Chapter 75 of the laws of Kenya requires this Court as a second appellate court to deal only with issues of law. In the instant appeal, both the trial and the 1<sup>st</sup> appellate courts made concurrent findings of fact that the appellant was recognized by PW1, PW2 and PW3. But the point whether there was evidence or not to support the finding is a point of law and although not challenging the finding, an appellant is entitled to show, as the appellant has done, that the concurrent findings of fact had no support in evidence. If this

Court were to find that there was no evidence to justify the concurrent findings of fact by the two lower courts, it would be its duty to correct any miscarriage of justice occasioned by it. In the instant appeal, none of the witnesses attributed any description to the robber they said they saw and there was therefore no legal basis on which the person seen could be said to fit into the name given. In the ungodly hour when the robbery in this case took place and regard being had to the threats by the robbers to kill, giving rise to fear in the circumstances, and the fact that the quality of the security light was unknown, justified the benefit of doubt being given to the appellant. The fact too that the appellant was arrested long after the incident despite his alleged recognition and there being no explanation given for this delay, adds further weight to those doubts. In a nutshell, it was risky to convict on the evidence which clearly fell far too short of the standard required in criminal cases to wit, beyond any reasonable doubt. It matters not that three witnesses claimed to have seen the appellant. None of them gave a description. They were family members. The police record containing their report was not tendered in evidence.

29. In Robert Gitau v. Republic, Criminal Appeal No.63 of 1990 (unreported), this Court stated:

"... Evidence of identification should be tested with great care especially when it is known that the conditions favouring correct identification were difficult. The witnesses who testified that they could identify the appellant in the circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the appellant's face in the manner described by the witness. We are doubtful how the witnesses were able to identify the appellant in the identification parade."

30. In Mohamed Elibite Hibuya & Anor. V. Republic, Criminal Appeal No.22 of 1996 (unreported), this Court held that:

"...it is for the prosecution to elicit evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal - this being a

proven reliable way of testing the power of observation, accuracy of memory of a witness and the degree of consistency in his evidence."

31. In *R.V. Turnbull* [1946] 3All ER 549, some of the relevant issues that a Court grappling with questions of identification of an accused person should bear in mind were pointed out as follows:

"How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If occasionally had he any special reason for remembering the accused? How long had elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them, and his actual appearance."

32. We have also considered the case of *Anjononi & Others* unreported [1976-80] 1KLR 1566 where this Court stated as follows:

"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. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya V The Republic* (unreported)."

In our view this case is distinguishable because there was no evidence of the nature or form through which the witnesses purported to recognize the appellant. They simply said they recognized him without more.

33. In the light of the evidence in this case, it would be unsafe to uphold the conviction in view of the lingering doubt whether the robber the witnesses saw was the appellant. We think Mr. Mogikoyo, the appellant's counsel was right in his submission that it was unsafe to convict the appellant on that evidence.

34. Accordingly, we quash the conviction and set aside the sentence and unless otherwise lawfully held we order that the appellant shall be released and set free forthwith.

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

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**