



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MWERA, G.B.M. KARIUKI & MURGOR, JJ.A.)**

**CRIMINAL APPEAL NO.333 OF 2007**

**BETWEEN**

**PETER GATIKU KARIUKI.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from a sentence of the High Court of Kenya at Nairobi (OJWANG & DULU JJ.) delivered on 14<sup>th</sup> June, 2007***

***in***

**H.C.CR. A. 610 OF 2004)**

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

**JUDGEMENT OF THE COURT**

**1.** This is a second appeal by Peter Gatiku Kariuki (the appellant) who was convicted on 30<sup>th</sup> January 2004 by the Senior Resident Magistrate (Hon. Mwai (Ms)) in Kibera Chief Magistrate Court Criminal Case No.8299 of 2003 and sentenced to death on 6<sup>th</sup> December 2004 of the felony 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 was dismissed on 14<sup>th</sup> June 2007 by J. B. Ojwang J. as he then was, and G. A. Dulu J. on the ground that “*there were corroborative*

*circumstances which reinforced and rendered quite safe the identification and recognition of the appellant as the culprit who, together with others, assaulted and robbed the complainant on the material night*” and that “*there was proof beyond reasonable doubt*”.

**2.** The particulars of the charge against the appellant were that –

***“on the 28<sup>th</sup> day of July 2003 at Ongata Rongai Township in Kajiado District within the Rift Valley Province, jointly with another before Court, being armed with a knife and rungu robbed Mathew Kipkemboi Bunge of one Siemens mobile phone a pair of shoes, an employment card, identity card and cash, Ksh.4,700/=, all valued at Ksh. 11,400/= and at, immediately before or immediately after the time of the said robbery wounded the said Mathew***

***Kipkemboi Bunge.”***

3. The appellant was ably represented by learned counsel Mr. John Sakwa who put forward 9 grounds of appeal which comprised those in the original memorandum of appeal. The Respondent was represented by the Learned Assistant Director of Public Prosecutions, Mr. B. I. Kivihya. In summary, the appellant contended that the evidence of identification fell short of the standard required, to wit, proof beyond reasonable doubt and that the trial and appellate courts below failed to properly evaluate the evidence. It was also the contention of the appellant that the evidence tendered by the prosecution in the trial court was contradictory and unreliable. It was the appellant's contention that the charge sheet was defective and the evidence tendered in its support was at variance with the particulars of the charge.

4. As this is a second appeal, we are enjoined by dint of Section 361 of the Criminal Procedure Code to hear the appeal only on matters of law which do not include severity of sentence as severity of sentence is defined by Section 361(1)(a) as a matter of fact.

5. The evidence adduced at the trial Court on the basis of which the appellant was convicted shows that the complainant, Mathew Kipkemboi Bungei (PW1) lived in Ongata Rongai and was employed by Telecom Exchange. On 28<sup>th</sup> July 2004 at about 9.40 p.m. he alighted at the bus stage at Ongata Rongai and started walking home when he noticed 3 people walking towards him from the opposite direction. As they passed him, one of them accosted him and said he recognized him as the worker at "Posta" before calling the others who came. They demanded Shs.20/= and cigarettes. The appellant gave them these and started walking away whereupon, one of them, whom he said he recognised as the appellant, followed him and told him that he had a mobile phone which he wanted him to sell for him. The robbers then joined the appellant and attacked him, stabbed him on the head and stole his money from his pockets. According to the complainant, he recognized the appellant as one of the robbers and as the one who held his hands while the others stabbed him, removed his shoes and took the money from his pockets. The complainant fell down unconscious when he was hit. When he gained consciousness, he found himself being taken to Kenyatta Hospital where he was treated after which he went to the police station to report the incident.

6. In his testimony in the trial court, police constable Joseph Muga (PW2) stated that the complainant (PW1) reported the incident to him on 29<sup>th</sup> July 2003 at 9.00 a.m. According to PW2, the complainant reported that five (5) people had assaulted and robbed him and that he identified two of the robbers. PW2 testified that he told the complainant to report to him "*any time he traced any of them.*"

Thereafter the complainant (PW1) went to the police station and PW2 accompanied him to a butchery at Ongata Rongai where the complaint upon being identified by the complainant was arrested. None of the stolen items was found in his possession.

7. In cross-examination by the appellant, the PW1 told the trial court that he did not know the appellant nor where the appellant lived but he knew him "by face."

8. It was salient that the complainant who testified that he recognized the appellant "*by face*" told PW2, Constable Joseph Muga, that he recognized two of the people who robbed him.

9. Besides the complainant (PW1), and the police constable (PW2), the only other witness who testified in the trial court was Dr. Zephania Kamau (PW3). He told the court that the complainant had been treated at Elite Medical Services Clinic before he saw him and assessed his injuries as harm. In his testimony, PW3 stated that the complainant had a red eye and haematoma below the left eye lid. The right side of his face was swollen and he had stitched wounds on the right ear lobe and on the lateral aspect of the neck. PW3 saw the complainant 3 days after the alleged assault.

10. In his defence, the appellant told the trial court that at the material time he lived in Ongata Rongai and worked as a houseboy. He was doing his work at Ongata Rongai when he was arrested. On the day the crime was committed, the appellant told the trial court that he was at his place of work and that he did not go out at night. In effect, he set up an alibi by stating that he was not at the scene of the crime when the

offence was committed as he was at his place of work.

11. The issues of law that emerge in the memorandum of appeal which the appellant's counsel, Mr. John Sakwa, argued before us were that (1) the charge was defective; (2) the evidence of identification on the basis of which a conviction could be sustained was non-existent;

(3) the evidence adduced did not prove the guilt of the appellant beyond any reasonable doubt.

12. On the issue as to whether the charge was defective, the appellant, as shown in the particulars of the charge was charged "jointly with another before court, ..." yet only he himself was arraigned. The offence of robbery with violence under Section 296(2) of the Penal Code is constituted when the following elements are established –

1. ***if the offender is armed with any dangerous or offensive weapon or instrument or***
2. ***if the offender is in company of one or more other person or persons or***
3. ***if the offender, at or immediately before or immediately after the time of the robbery, wounds, beats, strikes, or uses any other personal violence to any person-***

13. The particulars of the charge alleged that the appellant was armed with a knife and rungus and that he robbed the complainant. The particulars of the charge also included the allegation that the appellant was with "another before court..." This additional allegation was superfluous because it did not add or take away anything from the ingredients of the offence of robbery with violence under Section 296(2), nor did the additional nomenclature introduce anything to the particulars of the charge that would place a further allegation with regard to the charge that would render it bad in law. In short, the nomenclature was innocuous because it did not in any way cause any prejudice to the appellant. We find no merit in the submission that the charge was defective. We dismiss this ground.

14. On the issue of identification or recognition, the evidence of PW1 shows that PW1 knew the appellant "by face" only. The incident was at night after 9.00 p.m. on a road as PW1 walked home. No evidence was adduced as to whether the road had street lights or was otherwise lit. It was not shown what aided the appellant to see faces in darkness and be able to recognize the face of the robber he alleged was the appellant. Besides the evidence of the complainant, there was no other evidence to lend support to the allegation that the appellant was one of the robbers.

15. In a recent decision of this Court in **Michael Kimani Kungu v. Republic** (Criminal Appeal No.686 of 2010 (R)) relating to an appeal against conviction for the offence of robbery with violence, this Court stated:

***"This court has time and again pointed out that evidence of a single identifying witness needs to be tested with the greatest care before a conviction is based on it so as to eliminate the possibility of an error or mistake (see ABDALLA BIN WENDO & ANOTHER versus REGINAM (1953) 20 E.A.C.A.155. It is accepted that even the most honest of witnesses can be mistaken when it comes to identification (see KAMAU versus REPUBLIC (1975) EA 139). In the light of this, conviction should only ensue when it is beyond per adventure that a suspect was properly identified. In the case of CLEOPHAS OTIENO WAMUNGA VERSUS REPUBLIC (1989) KLR 424 this court correctly stated in this regard:-***

***"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 a 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 in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of R. VS. TURNBULL (1976) 3 ALL ER 549at page 552***

where he said:-

*“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”*

**“Although a fact may be proved by the testimony of a single witness, *“this does not lessen the need for testing with the greatest care the evidence of such single witness respecting identification.”* This is particularly so where the conditions are not conducive to proper identification or where conditions favouring a correct identification are difficult.”**

16. This Court has considered the issue of a single identifying witness in many cases and expressed its concern and utter need to ensure that only where it is absolutely clear that there is no possibility of error or mistake should conviction be founded on it. To ensure that such evidence is free from error, this Court has emphasized from time to time the need for the evidence of such single identifying witness to show the conditions under which the witness saw the suspect and the descriptions attributed to the person seen so as to prove that the witness clearly saw and recognized or identified the suspect.

17. In **Simiyu and Another v. Republic**[2005] 1 KLR 192 this Court held, inter alia, that –

*“In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the descriptions were given. Further that *“the omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers identity.”**

The evidence of the complainant which was the only evidence on which the conviction was founded was devoid of any description of the robber said to be the appellant. Moreover, the condition of light at the scene remained unknown as no evidence was adduced in this regard.

18. We observe that when the complainant testified, he alluded to the number of robbers being three but PW2 in his testimony told the Court that the complainant informed him that the robbers were five in number. This does not show consistency on the part of the complainant any more than it reflects a mind that was clear on what PW1 observed during the robbery.

19. In this appeal, we observe that the complainant did not allude to the condition of light, natural or artificial, at the scene where the robbery took place. But being at night, it would be naturally dark unless artificially lit. In absence of evidence on the condition of light, there would be no basis to assume that the scene was lit or that the complainant could clearly see the faces of the robbers in darkness. Moreover, the fact that the complainant did not give any descriptions of the suspect he claimed was the appellant makes it very unsafe to rely on his evidence as the possibility of error is live.

20. We have carefully examined the record of appeal. It is patent that the trial court and the appellate court below did not properly evaluate the evidence and as a result, did not appreciate the danger of basing the conviction on the evidence of the single identifying witness, to wit, PW1, and the lack of cogency in that evidence which clearly shows that there was possibility of error. It is our finding that the offence of robbery with violence with which the appellant was charged was not proved beyond any reasonable doubt.

21. For these reasons we allow the appeal, quash the conviction and set aside the sentence.

22. Unless otherwise lawfully held, the appellant shall be released and set free forthwith.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of December 2014.**

**J. MWERA**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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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**