



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MUSINGA & OUKO, J.J.A)**

**CRIMINAL APPEAL NO. 145 OF 2013**

**BETWEEN**

**PAUL MUREITHI NDWIGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from a judgment of the High Court of Kenya at Nairobi  
(Ochieng & Achode, JJ) dated 16<sup>th</sup> November, 2011 in **HC. C.R.A. NO. 712  
OF 2006**)*

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**JUDGMENT OF THE COURT**

Although the appellant, whose first appeal was dismissed by the High Court now challenges that dismissal in this Court on nine (9) grounds of which only seven (7) were argued by Mr. Nyaga, his advocate, we think, the only question the appeal raises is essentially whether the appellant was properly identified. This is because when the complainant was ambushed while driving his pick-up motor vehicle No. KZY 041 by a group of people the time was estimated as 10pm. He was driving slowly on account of the rough state of the road when he realized a person had boarded the pick up at the rear. The person had removed the spare tyre from the back of the pickup. The complainant stopped and came out to face the person. It is at this stage, with the help of electricity light from the nearby kiosks and moonlight that he noticed that there were in fact four men trying to steal from him. He confronted the one who had mounted the pickup and sought to know why he had removed the spare wheel. The second man lashed him with a whip which he grabbed and a struggle ensued – lasting two (2) minutes, in his estimation.

A third person came with a sword and without removing it from the sheath hit the complainant with it on the left temple sending him to the ground and immediately lost consciousness. When he recovered and realized he had lost cash and other personal items in the confrontation, he screamed calling for help. Some of the kiosk owners responded but the robbers had fled. They could only offer him first aid and thereafter he went home. The next day when he returned to the kiosks near the scene he got information from one of the kiosk owners that one of the robbers, Muriithi, was a person well known to him. The kiosk owner even showed the complainant the house where the suspect worked. The complainant then made a report at Kabete Police Station from where he went to the hospital for treatment from the injury inflicted during the robbery.

Four (4) days after the attack, the complainant saw the appellant enter a bar and was convinced the appellant was in the gang that attacked him. He went to the police station and returned with police officers who arrested the appellant. The appellant was escorted to his house where a search was conducted and a whip and sword recovered. The stolen items were however not found.

This incident occurred at night on the road near some kiosks where PW2 and PW3 were working. They both claimed that they witnessed the robbery since their businesses are close by the scene of the attack; that the complainant was attacked by two robbers; that prior to the robbery, they (the witnesses) knew one of them, who they identified as the appellant; that after the two robbers attacked the complainant the latter lost consciousness; that upon recovery he confirmed that he too knew one of the attackers but not by name; that the witnesses then gave him the name of the appellant.

The appellant in his defence maintained that he learnt from PW2 that a certain old man who he later identified as the complainant was looking for him. He told PW2 that he was going to a club in case the old man still wanted to see him. At 7pm, the old man who was a stranger to him and who was in the company of police officers approached him in the club and insisted that the appellant was in the group that attacked him. He was arrested and escorted to his house which was searched but nothing relating to the robbery was recovered. It was his evidence that the complainant handed over to the police some stuff wrapped in a newspaper which he claimed to have been used in the robbery.

The appellant in the foregoing statement was raising an *alibi* defence and denying that the alleged weapons were found in his house. It is the identification evidence of the appellant that the trial court relied on to found a conviction and rejecting the appellant's defence. In doing so, the trial magistrate in a three and half page judgment came to the conclusion that:-

**“PW2 and PW3 were all eye witnesses to the robbery and were not strangers to the accused who they knew not only where he worked but also by his names. They were able to identify him. The accused's defence was very confused and in fact a mere denial of the offence. I do believe the offence facing the accused was proved by the prosecution beyond any reasonable doubt. There was a robbery where the accused while in the company or others was armed with a *rungu* and a *simi* and they used the same to attack PW2, harm him and steal from him. I find the accused guilty as charged and I convict him accordingly.”**

The first appellate court after agreeing with the trial court that the attack was at night (10.30 pm); that the attack was carried out by four people, similarly in a terse judgment held that:-

**“15. We therefore hold that the finding of the trial court, that PW1 was robbed, was based on a sound apprehension of the law and the evidence before the court. PW1 was indeed attacked by four people who were armed with crude weapons, which included a whip and a sword. These four men did rob him of the items adverted to elsewhere in this judgment and they used violence against him during the robbery. PW7 the doctor who examined PW1 after the robbery confirmed that PW1 suffered injury to his *zygoma* which the doctor assessed as harm.**

**16. The offence of robbery contrary to section 296 (2) of the Penal Code was therefore proved and we find no reason to interfere with the conviction or sentence.”**

The appellant has complained in the instant appeal that the learned Judges of the High Court erred in law in upholding the conviction on a flawed identification evidence.

This is a second appeal and all we are concerned with are points of law. The Court will not interfere with concurrent findings of fact by the two courts below unless based on no evidence. See **section 361** of the Criminal Procedure Code and

**Chemagong V. R.** (1984) KLR 611. Where the accused person disputes identification evidence or raises a defence of *alibi*, the burden of proof is on the prosecution to demonstrate by evidence that goes beyond

any reasonable doubt, that the accused person committed the offence.

Because eyewitness testimony, which relies on the accuracy of human memory bears enormous impact on the outcome of a trial, courts have over the years developed guidelines to ensure an innocent suspect is not punished and conversely that the culprit does not escape punishment. The most elaborate guidelines were formulated by Lord Widgery, CJ. in what has come to be known as the Turnbull direction, so called after the celebrated English case of **R. V. Turnbull and others** [1976] 3 ALL ER 549 where Lord Widgery, CJ said;

**“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.**

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**Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. 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 a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long 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? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. 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. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.”**

According to the complainant, he was attacked by four (4) people, who were not known to him but who he could see with the aid of electricity and moon light; that it was the appellant who attacked him with a sword, after which he lost consciousness; the following day, the people who had come to his aid gave him the identity of the appellant.

PW2 testified that the attack on the complainant was committed a few meters from where he was; that there was electricity light in the vicinity. But he maintained that the attackers were two and that he was able to recognize the appellant. PW3, like PW2 also testified that he saw only two people attacking the complainant, one of whom was the appellant.

We reiterate that the attack was at night. According to the complainant's testimony, it lasted only two minutes after which he collapsed and lost consciousness. It is in evidence that the attackers were strangers to the complainant and the only people who knew them were PW2 and PW3.

We observe that the learned Judges of the High Court, apart from reiterating the evidence of the witnesses did not subject that evidence to fresh scrutiny as they were enjoined to. They simply said in paragraphs 15 and 16 of their judgment, reproduced above, that they were satisfied from the finding of the trial court

that the complainant was attacked and robbed by four (4) people who were armed. They did not state the basis of their conclusion, and failed to say anything about the evidence of identification yet that was the central issue at the trial. So that in our assessment the judgment of the first appellate court did not contain points for determination and the reasons for its decision to dismiss the appeal in violation of **section 169** of the Criminal Procedure Code.

Turning to the question of identification, and applying the Turnbull direction and bearing in mind that, because the robbery was at night and since the complainant and his two key witnesses maintain that, with the help of some light they saw the appellant, it is imperative to ask; how long did the witnesses have the appellant and indeed his accomplices under observation? Going by the two (2) minutes episode, the identification, we believe, was based on a fleeting glance hence the two courts below ought to have interrogated the issue further. For instance, the two key witnesses' assertion that they knew the appellant prior to this attack should have been tested, again, in accordance with the Turnbull guidelines, by inquiring how long and how often had they known and seen him; what was the time lapse between the attack and the subsequent identification; how far was the source of light from the actual scene and how bright was it? The answers to these questions were not given by the witnesses, neither did the two courts below consider them.

The two courts further failed to exercise caution before relying on the evidence of identification when the circumstances required this. If indeed there was light, how is it that PW2 and PW3 who were, in their testimony, a few meters from where the complainant was being robbed, only saw two robbers instead of four, seen by the complainant? If they were that close to the scene of the attack and bearing in mind the vicious nature of the attack on the complainant, in which a sword and *rungu* were used, leading him to collapse and pass out, can their evidence be credible that they simply watched? If PW2 knew the appellant and his employer, and if indeed the latter lived where the former worked, why did he not lead the police and the complainant to the appellant's house that night or as soon as was practicable?

The complainant testified that he returned to the scene the next day to inquire if any person saw his assailants and that it was then that he was given the name of the appellant. This is in contrast with what PW2 and PW3 told the trial court, that they gave the name of the appellant on the very night of the attack immediately the complainant gained consciousness. If the complainant identified the appellant in the gang of robbers and if at all PW2 and PW3 were present when he was attacked, what was the purpose of the appellant returning to the scene the following day to make inquiries if anyone witnessed the attack?

Likewise, it was curious as it was dramatic that after being supplied with the name, Muriithi as one of the robbers the complainant, four (4) days after the robbery purported to identify, in the streets, the appellant, whose name coincidentally turned out to be Muriithi.

In the melee, the complainant was whipped by one robber with whom he struggled before the second one (identified as the appellant) struck him with a sword sending him to the ground and in the process losing consciousness. Was it not easier for the complainant to identify the person who had the whip and with whom he came face to face during the struggle and not the one who had the sword and ambushed him while struggling with another?

We raise all these matters, bearing in mind our duty in second appeals, to illustrate the failure by the High Court to re-evaluate the evidence afresh in order to arrive at its own independent conclusion, and to emphasize that in a criminal trial, there must never be loose ends in the evidence; that the responsibility of the prosecution remains to prove the charges beyond any reasonable doubt.

The final matter in this appeal is the question of the weapons allegedly recovered from the appellant's house. Whereas the appellant admitted having led the police to his house, the burden remained on the prosecution to prove that the sword and whip found in the house belonged to the appellant and were indeed the ones used in the attack. This was critical because the appellant denied they belonged to him and also because there was evidence that there was a third party in the house, who was not called as a prosecution witness.

In conclusion, we find that the courts below failed to subject the evidence of identification to a close scrutiny and in the process omitted significant factors which affected the accuracy of the evidence of identification.

We suspect from the evidence on record that the appellant was merely suspected to have been involved in the robbery from his antecedents. For instance, it was the evidence of PW1 that the appellant was a well-known mugger in the area. That cannot be evidence upon which a conviction can be based.

In the circumstances the appeal succeeds. The conviction is quashed, sentence set aside and the appellant is set at liberty unless lawfully detained.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of December 2014.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**