



**REPUBLIC OF KENYA**

**Court of Appeal at Nyeri**

**Criminal Appeal 307 of 2006**

**BETWEEN**

**GEORGE KIMATHI MICHUBU ..... 1<sup>ST</sup> APPELLANT**

**JULIUS KABERIA M'RINGERA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Meru (Sitati & Lenaola, JJ.)*

*dated 28<sup>th</sup> September, 2006*

**in**

**H.C.CR.A No. 205 & 206 OF 2005**

**JUDGMENT OF THE COURT**

**1. George Kimathi Michubu and Julius Kaberia M'ringera**, the appellants herein were charged in the Principal Magistrate's Court at Maua (trial court) with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 30<sup>th</sup> June, 2004 at Njoune Sub- location, Kiengu Location in Meru North District they jointly robbed Stephen Kirimi of Kshs. 1,200/= and at or immediately before or immediately after the time of such robbery struck the said Stephen Kirimi.

**2.** The prosecution called a total of four witnesses. It was the prosecution's case that on 30<sup>th</sup> June, 2004 at around 8:00 p.m while PW1, Stephen Kirimi (Stephen) was heading to his home at Amaku in the company of PW2, Timothy Muriithi (Timothy) they met two drunken people who started demanding money from them. Stephen testified that one of the robbers who he identified as the 1<sup>st</sup> appellant started hitting him with a stone and threw him down into a ditch while the other who he also identified as the 2<sup>nd</sup> appellant attacked Timothy. While Stephen was lying facing upwards in the ditch the 1<sup>st</sup> appellant searched his pockets and removed Kshs. 1,200/= from Stephen's jacket's breast pocket. Timothy managed to escape leaving the two appellants with Stephen. After a short period the appellants left Stephen lying in the ditch. Both Stephen and Timothy were able to recognize the appellants as the assailants with the aid of

the moonlight. Stephen testified that he knew both appellants prior to the incident as the 1<sup>st</sup> appellant came from his home area while the 2<sup>nd</sup> appellant was from Maua and had married from Stephen's home area. He further testified that he was also able to recognize the appellants by their voices which were familiar to him. Stephen and Timothy reported the incident the following morning at Maua Police station to PW4, PC Geoffrey Muriithi (PC Geoffrey). PC Geoffrey testified that when Stephen reported the incident he indicated that he was able to recognize the robbers with the aid of the moonlight because they were known to him. PC Geoffrey confirmed that Stephen gave the names of the appellants as the robbers who attacked him in his initial report. The appellants were subsequently arrested and charged.

3. Being satisfied with the above mentioned evidence, the trial court convicted the appellants and sentenced them to death. Subsequently, the appellants appealed to the High Court against the conviction and sentence. The High Court (Sitati & Lenaola, JJ.), in its judgment dated 28<sup>th</sup> September, 2006 dismissed the said appeal and confirmed the conviction and sentence. The appellants were aggrieved with the High Court's decision hence this second appeal.

4. The appellants raised the following grounds of appeal in their memorandum of appeal:-

1. ***The High Court Judges erred in law when they upheld the conviction without observing that the report claimed to have been made to the police was totally an afterthought since it was not made immediately after the incident.***

2. ***The High Court Judges erred in law when they upheld the conviction failing to observe that the trial magistrate conviction was based on insufficient evidence.***

3. ***The High Court judges erred in law when they upheld the conviction by failing to observe that the intensity of the said moonlight was not given.***

4. ***The High Court judges erred in law when they upheld the conviction without observing that the trial magistrate had rejected the appellants defence of alibi.***

5. Mr. Muchiri wa Gathoni, learned counsel for the appellants submitted that the main ground of appeal was that the identification of the appellants was not proper and therefore it was not safe for the conviction of the appellants to be based on the same. He stated that since the incident took place at night around 8:00 p.m and there were trees at the scene, visibility was not possible. He maintained that there was no way that Stephen could have been able to see in the dark that the colour of the jacket and trouser worn by one of the assailants were black in colour. He submitted that Stephen had testified that it was one M'mbundi who had identified the appellants as the robbers yet the said M'mbundi was not called as a witness by the prosecution. Mr. Muchiri contended that Stephen's evidence was contradictory because on the one hand he had testified that it was M'mbundi who had identified the appellants and on the other hand he testified that he had recognized the appellants with the aid of the moonlight. He further submitted that no evidence was tendered by the prosecution in respect of the intensity of the moonlight. He urged this Court to allow the appeal.

6. Mr. J. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal submitted that the prosecution's case was proved to the required standard. He maintained that the case was one of recognition as opposed to identification and that the appellants were recognized by Stephen and Timothy with the aid of the moonlight on the material day. He pointed out that Stephen mentioned the appellant's names when he made his initial report to the police because he knew them prior to the incident. He further submitted that the intensity of the moonlight was sufficient because Stephen was able to state the role that each appellant played on the material day. He maintained that based on the above mentioned circumstances the possibility of mistaken identity does not arise. He finally submitted that the two lower courts had made concurrent findings on the issue of recognition.

7. This being a second appeal and by dint of **Section 361(1)** of the Criminal Procedure Code, Chapter 75, this Court's jurisdiction is limited to matters of law only. In **Chemagong vs. Republic (1984) KLR 213** at page 219 this Court held,

***'A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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. (Reuben Karari s/o Karanja vs. Republic 17 EACA 146)'***

8. The two lower Courts made concurrent findings that this case was one of recognition and that the circumstances were such that enabled proper recognition of the appellants by Stephen and Timothy. Therefore, this Court is being called upon to determine whether there was sufficient evidence on recognition that supported the concurrent findings by the two lower courts.

9. In **Wamunga vs. Republic (1989) KLR 424** this Court held at page 426,

***'..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 safely make it the basis of a conviction.'***

10. In this case Stephen gave evidence that he was able to recognize the appellants who were known to him prior to the incident with the aid of the moonlight. He testified that when the 1<sup>st</sup> appellant assaulted him they were facing each other and that when the 1<sup>st</sup> appellant was searching his pockets as he lay in the ditch facing upwards the said appellant was on top of him. Stephen testified that he was able to recognize the 2<sup>nd</sup> appellant when they approached him demanding for money. Timothy (PW2) corroborated Stephen's evidence and stated that he had also recognized the appellants during the robbery. It was also Stephen's evidence that he was also able to recognize the appellants by their voices when they were demanding for money. PW1 testified he knew the appellants before the crime and knew their voices. This testimony on voice recognition was not challenged. In **Karani vs. Republic (1985) KLR 290** this Court held at page 293:

***'Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.'***

11. We believe that the circumstances that were prevailing during the robbery were favourable to warrant the recognition of the appellants free from error. Furthermore when Stephen made his initial report to the police the following morning after the robbery he mentioned the appellants by name as the assailants. We are satisfied that there was recognition of the appellants by the complainant both by voice and prior knowledge or familiarity. In **Anjononi & Others vs. Republic (1976-80) 1 KLR 1566** at page 1568 this Court held,

***'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.'***

12. Mr. Muchiri had raised an issue that Stephen had testified that it was one M'mbundi who had identified the appellants as the robbers. He contended that the said M'mbundi was not called as a witness by the prosecution and that the same contradicted Stephen's evidence that he had recognized the appellants during the robbery. We have gone through the trial court's proceedings and we cannot help but note that Stephen testified that after the robbers left one M'mbundi came to the scene and Stephen told him he had recognized the robbers. Therefore, there is no contradiction in Stephen's evidence. We are

13. also of the view that the failure by the prosecution to call the said M'mbundi as a witness did not in any way affect the fact that the appellants were positively recognized by Stephen and Timothy. Section 143 of the Evidence Act, chapter 80 Laws of Kenya provides,

***'No particular number of witnesses shall in the absence of any provision of the law to the contrary be***

*required for proof of any fact.'*

14. In **Julius Kalewa Mutunga -vs- Republic Criminal Appeal No. 31 of 2005 (Unreported)**, this Court held,

*'..As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive..'*

15. The upshot of the foregoing is that we find that there was sufficient evidence to support the concurrent findings on recognition of the appellants by the two lower courts. Accordingly, the appeal herein is dismissed.

**Dated and delivered at Nyeri this 29<sup>th</sup> day of May, 2013**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

**MARTHA KOOME**

.....  
**JUDGE OF APPEAL**

**OTIENO-ODEK**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**