IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 653 OF 2010

BETWEEN

DOUGLAS KOMU MWANGI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court at Nyeri (Kasango & Makhandia, JJ.)

dated 30th Janaury, 2009

in

H.C.CR.A NO. 338 OF 2007)

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JUDGMENT OF THE COURT

1. **Douglas Komu Mwangi**, the appellant herein was charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, Chapter 63, Laws of Kenya, in the Senior Resident Magistrate's Court at Kangema. The particulars of the offence were that on 24th September, 2006 at Kambara Village in Muranga District within the then Central Province, the appellant, jointly with another not before the court robbed John Harrison Mwangi Kahumbi of cash Kshs. 8,350/=, four safaricom cards valued at Kshs. 400/=, one torch and a bunch of keys all valued at Kshs. 8,850/= and at /or immediately before or immediately after the time of such robbery wounded the said John Harrison Mwangi Kahumbi.
2. The prosecution called a total of 4 witnesses. It was the prosecution's case that on 24th September, 2006 at around 7:30 p.m while PW1, John Harrison Kahumbi (John) was heading home, he saw a torch being flashed in front of him. When John inquired who it was, he heard a voice reply saying that it was Irungu. He pointed the torch he was carrying towards the direction of the voice and he saw two men. He recognized one of the men as the appellant. He continued walking towards the men who were about 20 metres infront of him. When he was close to the two men, the appellant

grabbed him by his neck causing John's torch to fall down. The other man who had identified himself as Irungu removed Kshs. 5,000/= from John's left trouser pocket. John started screaming and the said Irungu ran away leaving the appellant. The appellant also took Kshs. 3,000/= from John's left trouser pocket and 4 safaricom airtime credit cards valued at Kshs. 400/=. John continued screaming and the appellant ran away.

3. Thereafter, on the same evening at around 7:45 p.m, John met the area assistant chief, PW2, Jackson Mwangi (Jackson) who was patrolling Kambara market in the company of PW3, PC Joram Gichuki (PC Joram) and PC Kibuko. He informed them about the incident that had occurred. Jackson and PC Joram testified that John had told them that he was able to recognize one of the robbers as the appellant using the light from his torch. John testified that the appellant is his nephew who he knows very well. John maintained he was also able to recognize that the appellant was wearing the same grey vest he had seen him with earlier that day. PC Joram testified that the four of them went back to the scene and recovered John's cap and walking stick. On the same evening, John led the two police officers and the assistant chief to the appellant's house. They did not find the appellant in his house. The appellant was arrested the following day on 25th September, 2006 and charged with the offence of robbery which was subsequently substituted with the offence of robbery with violence.
4. The appellant in his defence gave an unsworn statement. He testified that he was arrested on 26th September, 2006 as he was going to his sister's house. Nothing was recovered from his house when the police officers searched it. He was taken to Nyagiti police post and charged with the offence of robbery with violence. He denied committing the offence and maintained the charge was a fabrication by the John who had a grudge against his family.
5. Being convinced that the prosecution had proved its case, the trial court convicted and sentenced the appellant to death. Aggrieved with the said decision, the appellant filed an appeal in the High Court. The High Court in its judgment dated 30th Janaury, 2009 confirmed the appellant's conviction and sentence hence this current appeal.
6. Mr. J. Macharia, learned counsel for the appellant, submitted that the appellant's constitutional rights under **section 72(3)** of the former constitution had been violated. He maintained as per the prosecution's evidence the appellant was arrested on 25th September, 2006 yet he was arraigned in court on 3rd October, 2006 as per the initial charge sheet. He submitted that no explanation for the delay was given by the prosecution as was required under **section 72(3)** of the former Constitution. He maintained that the learned Judges had erred in holding that they were unable to entertain that the appellant's detention was in contravention of **section 72(3)** of the former Constitution because the same was never raised in the trial court. He further maintained that the burden of proving that the delay of arraigning the appellant in court was reasonable lay with prosecution.
7. There are many instances in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessarily entitle the suspect to an acquittal**. (See Domimic Mutie Mwalimu - v- R Crim. Appeal No. 217 of 2005; and Evanson K. Chege - v - R Crim. Appeal No. 722 of 2007)**. This Court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In **Julius Kamau Mbugua – v- R Criminal Appeal No. 50 of 2008**, this Court stated that:

> **"a trial court can take cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police *per se* is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.**

8. In **Julius Kamau Mbugua – v- R Criminal Appeal No. 50 of 2008**, this Court upheld the proposition that even where violation of right to personal liberty of a suspect before he is charged

has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated exist. In the present case, the appellant has not demonstrated that he has suffered a trial related prejudice to warrant an acquittal. This ground of appeal has no merit.

9. Learned counsel Mr. Macharia, further submitted that the appellant's conviction was based on the evidence of recognition which was not proper and free from error. He stated that the prevailing circumstances during the robbery could not have warranted a proper and safe recognition of the robbers. Mr. Macharia stated that the incident took five minutes which is a short time. He further maintained that John gave evidence to the effect that when he was grabbed by his neck the torch he was holding fell down. He expressed doubts over the accuracy of the recognition by John. Therefore, according to Mr. Macharia the evidence of John on recognition could have been mistaken because of the surrounding circumstances. He further submitted that the High Court failed to re-evaluate the evidence as required by the law. He urged us to allow the appeal.
10. Mr. Kaigai, Assistant Director of Public Prosecution, in opposing the appeal maintained that this was a simple case of recognition. He emphasised that the evidence of recognition given by John was satisfactory to warrant the appellant's conviction. He further maintained that John knew the appellant very well being his nephew; and that John gave the appellant's name a few minutes after the incident to the assistant chief and the police officers. Mr. Kaigai further emphasised that in such circumstances, the case of mistaken identity could not have arisen.
11. Mr. Kaigai, submitted that the issue of the alleged contravention of the appellant's rights under **section 72(3)** of the former Constitution was considered and rejected by the High Court. He further submitted that the initial charge which indicated that the appellant was arrested on 30th September, 2006 as opposed to 26th September, 2006 was made in error. Therefore, the appellant should not benefit from an error of record keeping on the part of the prosecution. He maintained that the previous Constitution allowed the appellant to be held for fourteen days before being arraigned in court because he was charged with a capital offence. He urged this Court to dismiss the appeal.
12. This being a second appeal and by dint of **Section 361(1)** of the **Criminal Procedure Code,** Chapter 75, laws of Kenya**,** 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 EACA146)'***

13. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances, it is safe to act on such identification particularly where the conditions favouring a correct identification are difficult. In **Wamunga vs. Republic (1989) KLR 424.**

> ***' ... 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.'***

14. After taking into account the requisite caution in respect of the evidence of a single identifying witness, both courts below concluded that the evidence of recognition was sufficient to sustain the appellant's conviction. The trial court in its judgment held,

> ***'The complainant said he saw his attackers very well. The complainant is an uncle to the accused. There are no chances of mistaken identity. The complainant said the incident took five minutes. This is enough time for one to recognize someone he knows.***

….I am satisfied that the complainant recognized the accused as one of his attackers.'

The High Court in its judgment held:

'PW1 identified the appellant through the torch light. He was even able to identify the kind of clothing the appellant was wearing. We are aware that the recognition of the appellant was under difficult circumstances and the same should be tested with the greatest care. We are of the view that the recognition of the appellant by PW1 was without error.'

15. We cannot help but note that in both courts, the issue of the intensity of the light of the torch was never considered. In ***Maitanyi -vs- Republic (1986) KLR 198***,this Court in holding that an inquiry as to the nature of light is essential in testing the accuracy of evidence of identification held:

    '..it is at least essential to ascertain the nature of light available. What sort of light, its size and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into....' **See Wanjohi & Others -vs- Republic (1989) KLR 415.**

16. Both courts below concurred that the circumstances surrounding the robbery were difficult. It was crucial for intensity of the light from the complainant's torch to have been adduced by the prosecution. This is because it would remove any doubts on whether the recognition of the appellant was free from error. In the present case, neither of the two courts below demonstrated any caution and there was no inquiry as to the nature of the alleged torch or its brightness or otherwise nor its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error. We find that the evidence on recognition was not put to the proper test to establish its accuracy. The complainant gave evidence that when he flashed his torch at the two robbers who were about twenty metres away from him, he was able to recognize the appellant. In examination in chief, he stated that "I saw the accused and his accomplice very well when I flashed my torch." In cross-examination, he stated "I did not properly see the other robber for the accused was holding my neck."In examination in chief he further stated that "the accused was wearing a vest grey in colour." In his report, the complainant never told the police that the accused was wearing a vest. He further testified that when the appellant held his neck, his torch fell down. In examination in chief he stated that the appellant went with the torch and upon cross examination he testified he did not know who took the torch because it had fallen down.
17. Based on the inconsistencies disclosed in evidence, we cannot help but question the accuracy of the recognition of the appellant. How was it possible for the complainant to have properly recognized the appellant and not to have seen the other assailant properly, yet the two were allegedly together, twenty metres away from him. We find that the evidence of recognition was not free from error and could not have sustained the appellant's conviction.
18. The upshot of the foregoing is that we allow this appeal, quash the appellant's conviction and set aside the sentence. Accordingly, we order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 13th day of June, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR