



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NYERI**

**CORAM: VISRAM, KOOME & ODEK, J.J.A.)**

**CRIMINAL APPEAL NO. 24 OF 2010**

**BETWEEN**

**ANTHONY KANGETHE MWANGI..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

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

*dated 25<sup>th</sup> January, 2010*

**in**

**H.C.CR. A NO. 81 OF 2008)**

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**JUDGMENT OF THE COURT**

1. **Anthony Kangethe Mwangi**, the appellant herein was charged together with John Muranguri Maina with the offence of robbery with violence contrary to **section 296(2) of the Penal Code, Chapter 63, Laws of Kenya**, in the Senior Principal Magistrate's Court at Nanyuki (trial court). The particulars of the offence are that on 25<sup>th</sup> February, 2007 at Likii bridge, Nanyuki Township in Laikipia District within Rift Valley Province with others not before the court, they robbed Mr. Anthony Mwai Kirima, one cell phone make Motorola C 118 valued at Kshs. 4,000/=, one cigarette holder valued at Kshs. 600/= and cash Kshs. 5,000/= and immediately before or immediately after the time of such robbery threatened to use actual violence on the said Anthony Mwai Kirima.
2. The prosecution called a total of three witnesses. It was the prosecution's case that on 25<sup>th</sup> February, 2007 at around 8:00 p.m. while Anthony Mwai Kirima (Mwai) (PW1) was heading to his house at Likii, he met the appellant at the BP petrol station which was near the Likii bridge. The appellant was well known to Mwai as they had lived together for three years at Majengo Estate in Nanyuki before Mwai moved to Likii. While they were walking together towards the

- bridge, Mwai gave the appellant a cigarette and a matchbox which the appellant had requested for. When they arrived at the bridge, Mwai saw a man armed with a club standing on the bridge. The appellant informed him that the man was his friend from Nanyuki and that he had given him a place to spend the night. Suddenly, after the three men started crossing the bridge, the appellant's friend hit Mwai on the left leg with the club. The appellant told his friend to leave Mwai alone because Mwai was his friend. Thereafter, the appellant asked Mwai for money and Mwai told him that he did not have any money.
3. The appellant and his friend brandished knives at Mwai and knocked him down. The appellant stole Kshs. 5,000/= from Mwai's trouser's back pocket, a mobile phone and cigarettes that Mwai was carrying in a paper bag. After stealing the said items the appellant ran away leaving Mwai with his friend who ordered Mwai to run away. Mwai ran away and left the appellant's accomplice behind. He later reported the incident at the Nanyuki police station and gave the name of the appellant 'Kangethe' as one of the robbers who robbed him. Mwai maintained he was able to identify the appellant from the light that was from the petrol station where they met up to the bridge. However, Mwai was unable to identify the appellant's friend because of the darkness at the bridge.
  4. Joseph Runyenye (Joseph) (PW2), the assistant chief of Likii Village testified that on 27<sup>th</sup> March, 2007 at around 9:00 a.m while he was in his office, he was informed by members of the public that the three people who had been robbing people at Staff Village with a pistol were arrested by members of the public. Joseph together with three police officers namely; PC David Gitahi(PC David) (PW3), PC Mutembei and PC Gikindi who had been sent by the OCS of Nanyuki as reinforcement headed to Patricia's house where the three men were. On seeing the police the three men fled from Patricia's house and the appellant and his co-accused were arrested at Ndegwa's house where they had fled to.
  5. PC David corroborated Joseph's evidence and pointed out that they were unable to recover the pistol after carrying out a search of the house where the appellant and his co-accused were arrested. The appellant and his co-accused were then taken to the police station for further investigations. At the police station, PC David discovered that Mwai had made a report on 25<sup>th</sup> March, 2007 that he had been robbed by two men and one of them was known as Kangethe. Mwai identified the appellant as one of the robbers. PC David testified that Mwai had told him that he knew the appellant very well but did not know his co-accused. Thereafter, the appellant and his co-accused were charged with the offence of robbery with violence.
  6. The appellant in his defence gave an unsworn statement. He testified that on 25<sup>th</sup> February, 2007 he was working in Sagana and only came back to Nanyuki on 27<sup>th</sup> March, 2007. While on his way to get a handcart to carry the luggage he had on a bus, he met Joseph and PC David who asked him to identify himself. When he identified himself they told him he was one of the robbers who had been robbing people with a pistol and he was arrested. He was later charged with an offence of robbery with violence which he denies committing.
  7. After hearing the above evidence the trial court convicted the appellant and sentenced him to death while acquitting the appellant's co-accused for lack of evidence. Aggrieved with the decision of the trial court, the appellant filed an appeal in the High Court which appeal was dismissed, hence this second appeal. The appellant has raised the following grounds of appeal:

***1. The first appellate court erred in law in failing to note that the trial was occasioned with procedural technicalities in that the safeguards of section 207 and 198 of the Criminal Procedure Code were not observed to the letter during the plea taking as neither language nor interpretations were indicated.***

***2. The first appellate court erred in law in failing to note that the respondent declined to avail any of the mentioned members of***

*public leaving the allegations unproven to the required standard of proof.*

*3. The first appellate court erred in law in failing to note that the respondent's charges has no investigations as required by law.*

*4. The first appellate court erred in law in failing to determine the quality of the convicting evidence.*

8. At the hearing of this appeal, Mr. H.K. Ndiragu, learned counsel for the appellant, indicated he would only submit on the issue of recognition. He submitted that the first appellate court did not evaluate the evidence properly as required by law. He pointed out that no evidence was tendered as to the intensity of the light which was allegedly used by Mwai to identify the appellant. Mr. Ndiragu contended that the High Court did not address its mind on the inconsistencies in Mwai's evidence; Mwai testified he was unable to identify the appellant's accomplice due to the darkness yet he was able to see his assailants produce knives. He also submitted that the appellant's recognition was not free from error because it was not explained why Mwai who knew him well was not able to give the police the appellant's full name when he reported the incident. He further pointed out that the appellant had been arrested over a different issue and it was not the complainant who had led the police to the appellant. He urged this Court to allow the appeal.
9. Mr. J. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal submitted that this was a case of identification through recognition. He pointed out that Mwai had properly laid down the basis of recognition. Mwai walked with the appellant who was known to him from the BP petrol station that was well lit up to the Likii bridge and therefore Mwai could not have been mistaken as to the appellant's identity. He further stated that the appellant's conduct of running away when he was about to be arrested clearly indicated his guilt. Mr. Kaigai finally submitted that under **section 143 of the Evidence Act**, no particular number of witnesses is required to prove any fact. Therefore, the court properly relied on the evidence of a single witness.
10. 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 EACA 146)”*

11. 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 appellant by Mwai. 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. In this case the appellant's conviction was based on the evidence of a single identifying witness. 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. See **Roria vs. Republic (1976) EA 583**. In this case the High Court while re-evaluating the evidence correctly found that the trial court had failed to warn itself on the danger of convicting the appellant based on the evidence of a single witness. However, despite the High Court warning itself on the same, it found that the evidence of recognition was sufficient to support the appellant's conviction.
12. 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.”***

Having examined the evidence tendered, we are of the view that the appellant's recognition was not free from error. This is because firstly, the prosecution did not tender any evidence as to the source and intensity of light that was at the petrol station which enabled Mwai to recognize the appellant. This evidence would have shed light on whether the light was sufficient to warrant proper recognition of the appellant. In Maitanyi vs. Republic (1986) KLR 198 at pg 201, this Court held,

***“...The strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light, its size and its 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 not known because they were not inquired into.”***

Secondly, Mwai gave evidence that he was not able to identify the appellant's accomplice who was standing at the bridge because of the darkness at the bridge. Yet he was able to see the appellant and his accomplice brandish knives at him when they were crossing the bridge. Further, no explanation was given as to why Mwai reported the incident on 25<sup>th</sup> March, 2007, a month after the incident, giving the appellant's name as one of the robbers yet the appellant was well known to him. This evidence in our view was contradictory and weakened the probative value of the prosecution's evidence on recognition of the appellant.

13. We are convinced that there was no proper testing of the evidence of recognition by the two lower courts. Had the evidence been thoroughly tested and analysed we cannot be sure that the two courts below would still have come to the same conclusion. Therefore, we find that the appellant's conviction which was based on recognition cannot be safely supported.
14. Accordingly we allow this appeal, quash the appellant's conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered at Nyeri this 6th day of June 2013**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**