



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CRIMINAL APPEAL NO. 84 & 85 OF 2008**

**BETWEEN**

**ROBERT CHARLES KARIUKI GACHIRI ..... 1<sup>ST</sup> APPELLANT**

**JOHN NDUNGU KAMAU ..... 2<sup>ND</sup> APPELLANT**

**STEPHEN MWANGI NYAMBURA ..... 3<sup>RD</sup> APPELLANT**

**ASMAN IRUNGU HASSAN ..... 4<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 22<sup>nd</sup> May, 2008*

**in**

**H.C.CR. A NO. 86 OF 2005 CONSOLIDATED WITH 112 OF 2005)**

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**JUDGMENT OF THE COURT**

1. The appellants herein were jointly charged with two counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**, in the Senior Resident Magistrate’s Court at Kigumo. The particulars of the first count were that on 2<sup>nd</sup> April, 2004 at Gakoigo Village in Maragua District of the then Central Province, the appellants jointly and while armed with offensive weapons namely pangas, rungus and axes robbed Ephantus Kioma Mwangi of cash Kshs. 3,100/= and immediately before or immediately after such robbery used actual violence by beating the said Ephantus Kioma Mwangi. The particulars of the second count were that on the above mentioned date and place, the appellants jointly and while armed with offensive weapons namely pangas, rungus and axes robbed Rose Njoki Mwangi of cash Kshs. 600/= and

- immediately before or immediately after such robbery used actual violence by beating the said Rose Njoki Mwangi.
2. The appellants were charged with a third count of rape contrary to **Section 140** of the **Penal Code**. The particulars of the charge were that on the material day, the appellants unlawfully had carnal knowledge of Naomi Wanjiku Githinji without her consent.
  3. The appellants were further charged with an alternative count of Indecent assault contrary to **Section 144(1)** of the **Penal Code**. The particulars of the alternative count were that the appellants jointly and unlawfully indecently assaulted Naomi Wanjiku Githinji by touching her private parts.
  4. The prosecution called a total of 8 witnesses in support of its case. It was the prosecution's case that on 2<sup>nd</sup> April, 2004 at around 8:00 p.m. PW1, Ephantus Kioma Mwangi (Ephantus), who was in the main house opened the door to go to the kitchen which was outside and he saw the 4<sup>th</sup> appellant standing outside. The 4<sup>th</sup> appellant was armed with a panga and axe. Ephantus was able to recognize the 4<sup>th</sup> appellant using light from a kerosene lamp. Ephantus testified that he had seen the 4<sup>th</sup> appellant on numerous occasions selling miraa at Maragua Township. The 4<sup>th</sup> appellant smashed the lamp and ordered Ephantus to lie down; and he started hitting Ephantus on his back with the panga.
  5. While in the kitchen, PW2, Rose Njoki Mwangi (Rose), heard a bang coming from the main house. She opened the kitchen door and saw her son, Ephantus, being hit with a panga on his back by robbers. She locked the kitchen door and screamed for help. One of the robbers, who she recognized as the 1<sup>st</sup> appellant, broke the door and came into the kitchen. The 1<sup>st</sup> appellant tried to strike Rose with the axe he was armed with but she held it with her hand. The 1<sup>st</sup> appellant called out to another robber who came into the kitchen and started beating Rose with the sides of a panga he was carrying. Rose recognized the robber who was hitting her as the 2<sup>nd</sup> appellant. She testified that she was able to recognize the 1<sup>st</sup> and 2<sup>nd</sup> appellant using the light that was in the kitchen.
  6. Rose was dragged into the main house where she found Ephantus who was lying down being guarded by a robber who she could not identify. They were both taken to the bedroom where the 1<sup>st</sup> appellant demanded for money. Rose gave the 1<sup>st</sup> appellant Kshs. 600/= that she had. The 1<sup>st</sup> appellant claimed that the money was not enough and tied them up with a rope. Thereafter, the robbers dragged both of them to James Githinji's (Ephantus's brother) house which was in the same compound. Upon arriving at the house they found it open and empty. They were ordered to sit on the sofa set.
  7. PW5, Naomi Wanjiku Githinji (Naomi), testified that on the material day she was having supper when three men entered her house. Naomi is Githinji's wife. Immediately the robbers entered the house they hit the lamp which went off. Naomi was able to recognize the 1<sup>st</sup> appellant and 3<sup>rd</sup> appellant using the light from the lamp before it was switched off. She testified that she was also able to recognize the 3<sup>rd</sup> robber as the 2<sup>nd</sup> appellant through his voice. The robbers demanded for money and when Naomi told them she did not have any money they threatened to rape her. She was taken to the bedroom where one of the robbers who she could not identify tore her panty, held her hands, covered her eyes and raped her. Thereafter, the robbers ordered her to take them to Ephantus's house. When they arrived she discovered there were other robbers in the house. While the robbers were searching the house Ephantus and Rose were not in. After about 30 minutes she was led by the robbers back to her house where she found Ephantus and Rose tied up and seated on the sofa. Ephantus testified that when the robbers brought Naomi into the house he was able to recognize the 3<sup>rd</sup> appellant using light from the torches that were being flashed across the room by the robbers.
  8. The robbers took Ephantus and Rose into Naomi's bedroom and ordered them to go under the bed. Subsequently, according to Ephantus and Rose the robbers brought Naomi into the room and ordered her to lie down on the bed and they proceeded to rape her in turns. Ephantus testified that while he was under the bed he peeped and was able to identify the 1<sup>st</sup> appellant who was well known to him using the light from the robbers' flashlights. Thereafter, the robbers removed Rose from under the bed and ordered her to lie on the bed. The robbers decided to wait for Githinji until he came home. While Rose was on the bed she heard her son, Githinji, coming home and she shouted telling him to run away because robbers were waiting for him in the house. Githinji heard his mother and ran away screaming. The robbers ran away and the neighbours came and untied

- Ephantus and Rose. Ephantus went to his house and discovered kshs.3,100/= which was in the bedroom had been stolen by the robbers.
9. PW3, Gabriel Njoroge (Gabriel), on the other hand testified that on the material day he was in Naomi's, that is his aunt's, kitchen when four men entered the kitchen and asked him who was in the main house. He was able to recognize the 4<sup>th</sup> appellant using the light from the lamp that was in the kitchen. The three men went to the main house and started beating Naomi. Thereafter, the robbers ordered Gabriel to take them to Adam Gachoka, his uncle's house. On arriving at his uncle's house, Gabriel whispered to him not to open the house. While the robbers were looking for a rock to break his uncle's house Gabriel was able to run away and hid in a bush. After a few minutes he heard screams and came out of the bush when neighbours had gathered outside his uncle's house.
  10. Ephantus and Naomi reported the incident on the same day at the Gakoigo Police Post. Subsequently, Ephantus, Rose, Gabriel and Naomi recorded statements on 3<sup>rd</sup> April, 2004 at Maragua police station wherein they indicated that they recognized the appellants as some of the 17 robbers who had robbed them. The appellants were subsequently arrested and charged.
  11. All the appellants gave sworn statements in their defence. The 1<sup>st</sup> appellant testified that on 4<sup>th</sup> April, 2004 at around 4:00 a.m police officers went to his house and woke him up. The police officers searched his house and took Kshs. 15,000/= that was in the house. He was arrested and taken to Maragua Police Station. The 1<sup>st</sup> appellant testified that on 7<sup>th</sup> April, 2004 he was taken to Maragua District Hospital where a sample of his blood was taken. He was subsequently charged on 8<sup>th</sup> April, 2004. He denied having been involved in the robbery and maintained that on 2<sup>nd</sup> April, 2004 he was in Nairobi and only returned to Gakoigo on 3<sup>rd</sup> April, 2004.
  12. The 2<sup>nd</sup> appellant testified that on 25<sup>th</sup> April, 2004 while he was at his farm PW6, Jim Ali Rajab (Jim), the area assistant chief left a message that he wished to speak with him. After getting the message, the 2<sup>nd</sup> appellant went to see Jim who took him to Maragua police station where he was arrested. He maintained that the charges against him were fabricated by Jim who had a grudge against him for refusing to give him Kshs. 1,000/=.
  13. The 3<sup>rd</sup> appellant denied the charges against him and maintained that on 2<sup>nd</sup> April, 2004 he was at work at the Maragua stage where he worked as a tout. According to him Jim informed him that he was required to go to the Maragua Police station. The 3<sup>rd</sup> appellant went to the police station and he was arrested and charged.
  14. The 4<sup>th</sup> appellant testified that on 20<sup>th</sup> April, 2004 he left Kangori and went to Maragua. On 21<sup>st</sup> April, 2004 while still at Maragua, Jim told him that he wished to talk with him. Jim then led the 4<sup>th</sup> appellant to Maragua police station where he was arrested. He maintained that the charges against him were fabricated by Jim who had a grudge against his father.
  15. Being convinced that the prosecution had proved its case, the trial court convicted the appellants of the two counts of robbery with violence and sentenced them to death. The appellants were acquitted of the offence of rape and the alternative charge of indecent assault for lack of evidence. The appellants appealed against the said conviction and sentence in the High Court. The High Court confirmed the appellants' conviction on the two counts and sentenced them to death on one count and ordered the sentence for the second count to be held in abeyance. It is against this decision that the appellants have filed this current appeal based on grounds which can be summarized as follows:-

- ***The learned Judges erred in law in relying on insufficient and unsafe evidence of recognition to confirm the appellants' conviction.***
- ***The learned Judges erred in failing to resolve the inconsistencies which were apparent in the prosecution's evidence.***
- ***The learned Judges erred in law by rejecting the appellants' defences.***

16. Mrs. J.K. Ntarangwi, learned counsel for the 1<sup>st</sup> appellant, submitted that the evidence of PW1, Ephantus, on recognition should have been tested by the High Court. She stated that Ephantus testified that he was able to recognize the 1<sup>st</sup> appellant using light from the torches that were being flashed across the bedroom when he peeped from under the bed. According to Mrs. Ntarangwi,

- Ephantus did not give evidence as to the intensity of the light that was available and the angle from which he recognized the 1<sup>st</sup> appellant from underneath the bed. She also contended that PW2, Rose, who also alleged to have recognized the 1<sup>st</sup> appellant did not give evidence of the intensity of the light that was available. Mrs. Ntarangwi emphasized that evidence of the intensity of light available during the incident was vital in determining whether the evidence of recognition was proper and safe. She further stated that PW5 Naomi and PW7, PC Joseph Munywa (PC Joseph) testified that on the material day it was raining heavily and that there was no moonlight.
17. Mrs. Ntarangwi contended that the failure by Ephantus, Rose and Naomi (the complainants) to give the name or description of the 1<sup>st</sup> appellant, who they claimed to have recognized during the robbery, in the initial report they made at Gakoigo Police Post reduced the credibility of the alleged recognition. She further contended that the allegation that the complainants were unable to give the appellant's names in the initial report because they were still in shock did not hold any weight. This is because the allegations were contrary to the evidence of PC Joseph who testified that he got the identity of the robbers from PW3.
  18. Mrs. Ntarangwi submitted that the Judges of the High Court erred by failing to hold that the evidence of Jim, the assistant chief and PC Joseph was not credible having recorded their statements after the trial had commenced and the main witness had given evidence.
  19. She maintained that the High Court erred in rejecting the 1<sup>st</sup> appellant's defence and shifting the burden of proof from the prosecution. She urged us to allow the 1<sup>st</sup> appellant's appeal.
  20. Mr. C.M. Kingori, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, submitted that the conviction of the appellants was based on the evidence of recognition which was under difficult circumstances. He maintained that failure by the complainants to mention the 2<sup>nd</sup> and 3<sup>rd</sup> appellants as some of the robbers in their initial report raised doubt on the accuracy of the alleged recognition. He further stated that Jim who caused the arrests of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants testified that it was the complainants who gave him the names of the appellants as some of the robbers who attacked them. Yet according to Mr. Kingori, the complainants did not mention in their evidence that they had told Jim that they had recognized the 2<sup>nd</sup> and 3<sup>rd</sup> appellants during the robbery. He submitted that the evidence of recognition was not proper and safe to warrant the appellants' conviction.
  21. Ms Lucy Mwai, learned counsel for the 4<sup>th</sup> appellant, associated herself with the submissions made by Mrs. Ntarangwi and Mr. Kingori as far as the issue of recognition was concerned. She submitted that since the High Court rejected the evidence of PW3, Gabriel, the only evidence of recognition of the 4<sup>th</sup> appellant was by Ephantus. She contended that the alleged recognition by Ephantus was not proper because Ephantus was not carrying the lamp which he alleges to have used to recognize the 4<sup>th</sup> appellant but that the lamp was inside the house; therefore, the probability of mistaken recognition was high. Ms Mwai stated that the fact that 4<sup>th</sup> appellant who was arrested on 21<sup>st</sup> April, 2004 was neither searched nor interrogated clearly weakened the prosecution's case. She urged us to allow the appeal.
  22. Mr. J.K. Kaigai, Assistant Director of Public Prosecutions, in opposing the appeal supported the conviction and sentence. He submitted that the prosecution proved its case against the appellants beyond reasonable doubt. He contended that the evidence of Ephantus was unshaken during cross examination; that he identified the role each of the appellants played during the robbery. Mr. Kaigai further contended that Rose was also able to recognize the 2<sup>nd</sup> and 4<sup>th</sup> appellants. He maintained that the earliest opportunity that the complainants could have given the name of the appellants who they recognized during the robbery was when they had recovered from shock. According to Mr. Kaigai, despite the fact that the complainants did not mention the appellants in the initial report the evidence on recognition was proper.
  23. Mr. Kaigai contended that Jim was not at fault for not recording his statement prior to the hearing. This is because the police officers did not call upon him to record his statement prior to the commencement of the trial. He submitted that the light that was available during the incident was sufficient to warrant proper recognition of the appellants by Ephantus, Rose and Naomi. He maintained that the High Court re-evaluated the evidence that was before the trial court and arrived at a sound decision.
  24. 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)’***

25. We have considered the record, grounds of appeal, submissions by counsel and the law. The two lower courts made concurrent findings that the evidence of both visual and voice recognition was safe and free from error. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In this case the High Court correctly disregard the evidence of PW3 Gabriel, a standard 7 student, whose age was not disclosed because the trial court failed to carry out a *voir dire* examination on Gabriel whose estimated age was between 9-11 years to determine whether he understood the importance of the oath he took to tell the truth. We further concur with the finding of the High Court that the circumstances surrounding the recognition of the appellants were difficult. A 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** this Court held at page 426 that,

***“...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.”***

26. Therefore, in this case the issue that falls for our consideration is whether the recognition of the appellants was free from error. It was the prosecution's case that Ephantus recognized the 4<sup>th</sup> appellant standing outside the house using the light from a lamp that was in the house; and that he also recognized the 3<sup>rd</sup> and 1<sup>st</sup> appellants in Naomi's house using the light from the torches the robbers were flashing around the house. Rose testified that she was able to recognize 1<sup>st</sup> and 2<sup>nd</sup> appellants using the light that was in the kitchen. Naomi gave evidence that she was able to recognize the 1<sup>st</sup> and 3<sup>rd</sup> appellant using the light from the lamp that was in the house before it was smashed by the robbers. From the evidence adduced, we cannot help but note that no information was given as to the intensity of the light, the sizes of the sources of light and the positions of the sources of light relative to the appellants who were recognized by the complainants. This information was necessary to enable the Court carefully test the recognition evidence. As matters stand, we are not able to tell if the light from the various sources that were used was sufficient enough to enable positive recognition of the appellants. Our evaluation of the evidence on record shows that 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 lamp or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error (**see Simiyu & another – v- R, {2005} 1 KLR 192**). In **Maitanyi -vs- Republic (1986) KLR 198**, this Court at page 201 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 light available. What sort of 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 unknown because they were not inquired into....’ See Wanjohi & Others -vs- Republic (1989) KLR 415.”***

27. We further find that the fact that Ephantus, Rose and Naomi did not give the names of the appellants as some of the robbers they recognized in their initial report made on 2<sup>nd</sup> April, 2004 at the Gakoigo Police post strange. This is because the initial report was made on the material day

and the complainants alleged to have known the appellants very well. In *Maitanyi -vs- Republic (supra)*, this Court held,

*' ..There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained.'*

28. We are of the view that the earliest opportunity the complainants could have indicated that they had recognized the appellants during the robbery was in their initial report to the police. In *Simiyu & another – v- R, {2005} 1 KLR 192*, it was stated that:

*“In every case where 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 the person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given. 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 attacker’s identity.”*

We find the submission that the complainants were unable to give the appellants name or descriptions in their initial report to police because they were in shock and that they feared for their life is not plausible and this casts doubt on the evidence of identification. Furthermore, Jim, the area chief who led to the arrests of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants, testified that he arrested the appellants after being given their names by the complainants. The complainants in their evidence did not indicate that they had given the names of the appellants to Jim. This further casts doubt as to the credibility of the evidence relating to identification of the appellants. From the foregoing we find that the evidence of identification was not proper and safe to warrant the conviction of the appellants. Having found as above we see no need in dealing with the other grounds of appeal.

29. The upshot of the foregoing is that we allow this appeal, quash the conviction of all the four (4) appellants on the two counts of robbery with violence and set aside the death sentences meted out on them. Accordingly, we order that all the four (4) appellants be set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered at Nyeri this 25<sup>th</sup> day of July, 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**