



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KIAGE & ODEK, J.J.A.)**

**CRIMINAL APPEAL NO. 102 & 109 OF 2011**

**BETWEEN**

- 1. DAVID KOOME MUGIRA**
- 2. MARTIN KOOME MBAE .....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Meru (Lesiit & Kasango, JJ.)  
dated 13<sup>th</sup> April, 2011*

in

*H.C.CR. A. Nos. 94 & 95 of 2009)*

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**JUDGMENT OF THE COURT**

The appellants herein **DAVID KOOME MUGIRA** and **MARTIN KOOME** were charged, tried and convicted on a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. For this, they were sentenced to suffer death as provided by law. They were acquitted on a similar charge of robbery with violence which had constituted count 1. Their co-accused, four in number, were acquitted on

both counts and set at liberty by the learned Senior Principal Magistrate at Nkubu

before whom the case was tried.

The particulars of the capital robbery charge on which the appellants were convicted were that ;

***“On the 9<sup>th</sup> of April, 2006, at Tanta Sub-Location in Meru Central District within the Eastern Province, jointly with others not before court, while armed with dangerous weapons namely pangas, rungus and iron bars (they) robbed FRED KAIMENYI of one pair of shoes, one trouser, one coat and cash Ksh.2,500/= all valued at Ksh. 10,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said FRED KAIMENYI.”***

Aggrieved by the conviction and sentence, the appellants preferred separate appeals to the High Court at Meru. Their appeals were heard together before J. Lesiit and M. Kasango, JJ, who by a judgment rendered on 13<sup>th</sup> April, 2011, found them, to be devoid of merit and dismissed them, hence the present appeal.

The appellants have taken issue with the High Court's dismissal of their first appeals on various points which are captured in their identical grounds of appeal as follows;

1. *That the High Court Judges failed to find that the alleged identification/recognition was not free from possibility of error.*
2. *That the High Court Judges failed to note that the trial magistrate failed to question the Prosecution in absence of vital witnesses mentioned during trial.*
3. *That the High Court Judges failed to find that the trial Magistrate erred in law in not noting that the Prosecution tendered uncelebrated (sic!) evidence.*
4. *That the High Court Judges erred in law and facts in failing to observe that the presentation of the exhibited items fell short of the required standard in law.*
5. *That the High Court Judges failed to observe that the trial Magistrate erred in law in not questioning the Prosecution in absence of vital witnesses mentioned during the trial for a just decision to be reached.*
6. *That the High Court Judges failed to note that the trial was conducted partially and irregularly.*
7. *That the High Court Judges failed to find that the trial Magistrate flouted Section 168(1) of the Criminal Procedure Code in rejecting the appellant's defence without sufficient reasons.*

Learned counsel for the appellants, Mr. S. K. Njuguna argued the two appeals jointly and collapsed the aforesaid grounds into two broad rubrics of complaint which we consider dispositive of the appeal namely that the identification of the appellants as the perpetrators of the offence was unsafe as it was not free from the possibility of error, and that the learned Judges of the High Court did not conduct a proper evaluation of the evidence as they were obligated to do.

On the issue of identification, it was contended for the appellants that the robbery occurred at about 8.00 o'clock in the night when visibility was poor and that, moreover, the complainant **FRED KAIMENYI**, who testified as PW 2, did not previously know his attackers and, as no identification parade was ever conducted, a conviction based on such evidence was improper.

From the record before us, it is not in dispute that PW 2 had been approached by **ROBERT MUTWIRI INOTI (PW 1)** to help in the recovery of some items which had previously been stolen in a robbery raid at the latter's home. The items included assorted electronics gadgets and mobile phones. The robbery had been reported to the police and it was then agreed that PW 2 would pose as a buyer of two of the phones. The information that the suspects in the robbery at PW 1's home were looking for buyers reached PW 2 though one **DAVID MWEBIA** who introduced PW 2 to two of the suspects, who happen to be the appellants herein.

After a discussion which involved PW 2, PW 4, the appellants herein, and three other suspects who were acquitted after the trial, it was agreed that PW 2 and PW 4 be taken by the appellants to where the phones were. The other suspects had gone ahead leaving the four behind.

As the four proceeded to go get the phones, they reached a place called Huruma Centre and here PW 2 saw some people creeping towards them. At first he thought they were the police officers that were to be part of the trap for the suspects but discovered it was not so when the creeping men sprung to attack PW 2 and his group. As PW 2 turned to face the attackers who he noted were armed with some blunt

objects, he was startled to find that the 1<sup>st</sup> and 2<sup>nd</sup> appellants who were walking with him had now turned on him. The 1<sup>st</sup> appellant hit him on the neck while the 2<sup>nd</sup> appellant took hold of PW 2 and tried to wrestle him to the ground. The attackers, who were apparently working in concert with the appellants then demanded from PW 2 all the money and everything else he had while giving him a thorough beating. They relieved him of Ksh.2,500/= which he had in cash as well as his mobile phone and clothes including his coat, pair of trousers as well as shoes.

As he was being thus brutalized, PW 2 screamed and a certain pastor emerged from the children's home outside where the attack occurred. Before he got to where PW 2 was, the thugs took flight towards Makaburini. The pastor took PW 2 and PW 4, who was also seriously injured in the attack, to Nkubu Police Station where the robbery incident was reported. Undeterred by the beating, PW 4 still led PW 2 and the police to a house at Makaburini where the appellants and two of their co-accused resided and they found them all together. Even though none of the items stolen from PW 2 in the attack were found on the appellants that night, his pair of trousers and belt, which he had on and were taken off him when he was attacked, were found next morning in the compound of the house where the appellants and their former co-accused were found and arrested. They were identified as PW 2's by himself as well as other witnesses.

The foregoing sequence of events was narrated by PW 2 in his evidence before the trial Magistrate and was confirmed by the testimonies of PW 4 as well as by **MOSES KIRIMI (PW 3)** and **P. C. JAMES AMOLO (PW 6)** who were part of the team that was meant to pounce once PW 2's ill-fated phone-buying trap had netted the suspects.

Whereas it is true the attack on PW 2 and PW 4 did occur at about 8 pm in the night, the evidence on record is that it occurred right outside Huruma Centre which was well-lit. In answer to a question posed to him by the 4th accused in cross-examination, PW 2 is recorded as stating thus; ***“There were (sic!) very clear floodlight there at the scene and I saw you and others very well”***. He said much the same thing on re-examination; ***“The scene of the attack had very strong security floodlight. I saw those who attacked me very well”***. PW 4 is also recorded as having stated that there was sufficient light at the place from the four security lights around Huruma Centre.

The issue of visual identification, especially if the conditions are less than ideal, is fraught with the risk of miscarriage of justice and courts must approach such evidence with the requisite degree of circumspection so as to be sure that there is no possibility of error. The evidence needs to be tested with care as laid down in the English case of ***REPUBLIC -VS- TURNBULL [1976] 3 ALL ER*** and followed by this Court in numerous cases that have restated the need for such evidence to be watertight. See, for instance, ***KIARIE -VS- REPUBLIC [1984] KLR 739*** and ***NZARO -VS- REPUBLIC [1991] KAR 212***.

Where the visual identification is alleged to have occurred at night such as in the case before us, it is imperative that the quality, distance, source and strength of light by the aid of which a witness was able to identify a suspect be keenly interrogated. This was placed in perspective by this Court in ***MAITANYI -VS REPUBLIC [1986] KLR 198 at p 201*** as follows;

***“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 known because they were not enquired into....”***

We are satisfied that the learned Judges of the High Court had these cautionary authorities and the proper principles in mind when they dealt with the issue of identification as follows;

***“The attack on Kaimenyi occurred at night. It is therefore necessary for us to warn ourselves of the evidence of identification by Kaimenyi. This would be in line with the holding of the case *Karanja & Another vs Republic [2004] 2 KLR*;***

***'Evidence of visual identification in criminal cases can bring about miscarriage of***

***justice and it is of vital importance that such evidence be examined carefully to minimize this danger.'***

***The evidence of Kaimenyi was that at the place where the attack took place there were floodlights. The lights were such that they enabled him to see people creeping towards them....He was also able to see that these people were armed with blunt weapons. We are of the view that there is no possibility of error in the identification of both appellants."***

We respectfully agree with the learned Judges' assessment which is bolstered by the fact that this was not a case of PW 2 alone identifying the appellants. Rather, his co-victim of the attack and who testified as **PW 4, DAVID MWEBIA**, was also able to identify the appellants during the attack and also stated that the place was well lit by the four security lights at Huruma Centre. Other witnesses besides these two, were unanimous and consistent that the light was '*strong*' or '*very clear*' and always from, not merely security lights, but **floodlights**, which we are prepared to conceive of as very strong and powerful lights capable of clearly illuminating a place by flooding it with light. It is instructive that the Concise Oxford English Dictionary (12<sup>th</sup> Edition, Oxford University Press) defines a floodlight as "***a large powerful light used to illuminate a stage or sports ground***".

Further assurance is lent to the appellants' identification by the fact that they did not suddenly ambush PW 2 and 4 on their way to '*purchase*' the phones. They were not among the creeping people who emerged and ambushed the group. Rather, they were in the company of the two witnesses and had been with them for well over an hour that evening. PW 4 had introduced PW 2 to the appellants as a potential cell-phone purchaser and they were together in conversation for a long time at the Ice Bar. In short, the identification of the appellants was safe.

In view of what we have found on identification, the complaint by the appellants that the learned Judges of the High Court did not properly and independently evaluate the evidence cannot be right. The Judges were keenly aware, and reminded themselves of their obligations as the first appellate court. This was succinctly expressed in the off-cited case of **OKENO -VS- REPUBLIC [1972] E.A. 32** as follows;

***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -vs- R [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal Ruwala -vs- R [1957] EA 570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions; it must make its own findings and draw its own conclusions."***

It cannot be said that the learned Judges of the first appellate court undertook a merely mechanistic or ritualistic rehash of the trial court's analyses and findings. They did, in fact, address all the evidence exhaustively and in the process found, correctly in our view, that nothing turned on the non-testifying of the Investigating Officer. They were right in their appreciation and application of this Court's holding in **REUBEN GITONGA NDERITU -VS- REPUBLIC, Criminal Appeal No. 349 of 2007**;

***".....with regard to the complaint that the investigating officer was not called to testify is neither here nor there. It is not mandatory that he be called, unless there is an allegation that he would have said something adverse to the prosecution's case. There is no such argument here, nor do we believe his evidence would have added to the overwhelming evidence before the court."***

We are equally satisfied that the learned Judges attached the right weight and importance to the fact of the recovery of PW 2's pair of trousers and belt in the compound where the appellant's house was located and where they were arrested at Makaburini. The Judges viewed the evidence on recovery of the trouser as corroborative of the fact that PW 2 had been robbed; they did not attach more weight than that and, to that extent, no prejudice of whatever kind was suffered by the appellants.

The upshot of our consideration of this appeal is that the appellants were properly convicted. The appeal is devoid of merit and is dismissed in its entirety.

*Dated and delivered at Nyeri this 18<sup>th</sup> day of September, 2013.*

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***P. O. KIAGE***

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***JUDGE OF APPEAL***

***J. OTIENO – ODEK***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**