IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KIAGE & OTIENO-ODEK, JJ.A)

CRIMINAL APPEAL NO. 19 OF 2011

BETWEEN

DUNCAN MUCHUI ..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(*An appeal from the judgment of the High Court of Kenya at Meru (Lessit, J.), dated 8th March 2011*

in

H.C.CR.C No.15 of 2005)

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JUDGMENT OF THE COURT

1. **Duncan Muchui,** the appellant herein as the 3rd accused was jointly charged with Stanley Murangiri (*1st accused*) and Wilson Muthamia (*2nd accused*) with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, **Chapter 63, Laws of Kenya**, in the High Court at Meru. The particulars of the charge were that on the 17th day of October, 2004, at Mugae village in Rwarera Location of Meru Central, jointly with others mot before the court, they murdered Francis Kathenya.
2. The prosecution called a total of 8 witnesses. At the close of the prosecution case, the 2nd accused was acquitted on the ground that he had no case to answer. At the close of the defence case, the learned Judge of the High Court upon evaluating the evidence on record acquitted the 1st accused. However, the appellant was found guilty, convicted and sentenced to death. Aggrieved by the decision, the appellant has lodged this appeal.
3. The appellant has raised seven grounds of appeal as follows:

i. ***That the learned trial judge erred in law and in fact in failing to make a finding that the appellant's constitutional rights under Section 72 (3) of the then Constitution were violated when he was placed in police cells for 146 days before being produced in court.***

ii. ***That the learned trial magistrate erred in law and in fact in failing to make the observation that there was no first report by anybody linking the appellant to the robbery thereby rendering the***

evidence on recognition very weak.

iii. ***That the analysis of the evidence on record by the trial judge in her judgement was improper, faulty and prejudicial to the appellant.***

iv. ***That the identification of the appellant was not free from the possibility of error.***

v. ***That besides not analysing whether the voice identification was reliable, the words allegedly spoken by the appellant as stated by both PW 4 and PW 6 in Kimeru language were so few as to make identification by voice impossible.***

vi. ***That in the absence of recognition or voice identification there was no corroboration of the prosecution evidence to justify a conviction of the appellant.***

vii. ***That the learned trial judge erred in law and in procedure in failing to include the contents of her summing up as part of the case record***.

4. At the hearing of the appeal, learned counsel S. K. Njuguna represented the appellant while the Senior Public Prosecution Counsel Mr. Lugadiru represented the State.
5. Counsel for the appellant expounded on the grounds of appeal stating that the key issues in the appeal relate to visual and voice identification. It was submitted that this was a first appeal and the case was heard by two learned judges of the High Court. That the prosecution case was heard by Justice Isaac Lenaola while the defence case, summing up to the assessors and judgment was done by the Hon. Justice Jesse Lessit. Counsel submitted that the alleged offence took place at 8.00 pm and the issue of proper visual recognition was critical. It was submitted that PW6 who was allegedly under the bed could not visually and properly identify the appellants as the perpetrators of the crime. In addition, it was submitted that the complainants failed to make a first report describing or mentioning or identifying the appellant as the offender. On voice recognition, counsel submitted that what was allegedly uttered by the appellant was one word in the Kimeru language(.....) which translated to three words in the English language ("*let us go*") and which word (s) were too few to give a proper and positive voice recognition of the appellant. Finally, counsel submitted that the record of appeal does not contain the content of the summing up done by the learned Judge to the assessors. It was submitted that in the absence of the contents of the summing up, it was not possible to state whether the learned Judge gave proper directions on law and facts to the assessors. The inference is that a miscarriage of justice took place and the appellant should be given the benefit of doubt.
6. The State opposed the appeal arguing that the appellant was positively identified and the prosecution had proved its case beyond reasonable doubt. It was submitted that PW 1 positively identified the appellant through the light from the torch which the appellant had. It was submitted that PW4 and PW 6 in their testimony provided the requisite corroborative evidence on the identity of the appellant. On voice recognition, the State submitted that a person who is well known to the other can recognize the voice of that other even by one word; that the complainant had known the appellant for over 20 years from when he was a child. It was submitted that due to that long period of time, there was no possibility of error that the voice which the complainants heard belonged to the appellant. As relates to the summing up, the State submitted that the record revealed that summing up to the assessors was done only that the content of the summing up and directions on fact and law given to the assessors was missing on record. It was submitted that no prejudice was caused to the appellant since summing up was done and the opinions of the assessors were recorded.
7. This being a first appeal, this Court is obligated to re-evaluate and re-analyze the facts and evidence which resulted in the decision of the High Court. In ***Okeno V. Republic*** ***[1972] E.A. 32*** it was held:-

> ***"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 v. 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 M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."

8. We have considered the grounds of appeal and submissions by learned counsel. We have also analysed the judgment and the law. On the constitutional ground raised by the appellant that the police failed to produce him in court for 146 days, we observe that there are many instances in which courts have held that a delay in arraigning a suspect in court beyond the constitutional time line does not necessarily entitle the suspect to an acquittal as urged by the appellant**. (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.***

9. We now turn to consider the issue of voice recognition. 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."***

10. What is the evidence on record relating to the voice recognition of the appellant? PW4, Geoffrey Mubichi, testified that when he had screams from PW1 house, he went to check on what was happening; he threw stones at that house and heard the appellant's voice saying ***"let us go".*** That he was about 15 meters away. That he was able to tell that was the appellant's voice because he had known him for years as he used to draw water from the same place with him. PW 6 Moses Kirimi testified that on the material day he was at home asleep at 8.00 pm and his father (the deceased) called out and asked him to start screaming; that he started screaming and two of the robbers entered his house which was different from his father's but he could not identify any of them as he was hiding under the bed. That they continued screaming and the sub-chief PW4 came and threw stones on the roof top saying he had arrived and that is when he heard the appellant say ***"Mwenda let us go they have arrived".*** That he could tell the appellant's voice because he had known him since childhood and he was his friend. In cross examination he admitted that in his statement to the police, the issue that the voice he heard was for the appellant is not recorded and the omission of the appellants name in his statement to police was surprising.
11. The learned Judge in evaluating the evidence against the appellant on voice recognition expressed herself thus:

> ***In testing voice recognition, in addition to considering the length of time the witness has known the person and the circumstances of their acquaintance, one has to consider the***

words heard by the witness in order to determine whether they were sufficient to enable her correctly recognize his voice. PW1 did not state the specific words spoken by the 3rd accused, I am unable to find that the words heard were sufficient to enable PW1 recognize the voice of the person who spoke them.... PW 4 and PW 6 each said that they recognized the voice of the 3rd accused as the one who spoke certain words during the robbery. They said that they have known the 3rd accused since he was a child. In respect to PW4, he said that he heard the 3rd accused say "Let us go". PW 6 on his part said that he heard the 3rd accused say "Mwenda, Let us go. They have arrived." When I put that point to the assessors, they stated in their address and opinion that the two witnesses stated in court that they heard the same words to the effect "Let us go, they have come". I will go by the record of the court as written by the trial Judge Lenaola J. His record shows that what PW 4 said he heard the 3rd accused say was slightly different from what PW 6 heard. Three words were however common to both "LET US GO". I have considered that PW6 was inside his house. It may be the words were not heard by the two witnesses at the same time and therefore the variation in the circumstances is not that material. As to whether the words allegedly spoken by the accused and heard by PW4 and PW6 were sufficient to enable a correct recognition of the voice, I considered that each witness knew the 3rd accused for a long time, since he was a child. The words spoken were not few as to make identification difficult. I am of the view that recognition was in the circumstances safe. I find that the 3rd accused was recognized both by facial recognition and by voice recognition by three witnesses.

12. We have reproduced the learned Judge's evaluation of the testimony on voice recognition of the appellant. Three issues stand out for consideration; first the learned Judge found that the words as heard by PW 4 and PW 6 are slightly different; second, the trial judge stated that PW1 did not state the specific words spoken by the 3rd accused and thus the Judge was unable to find that the words heard were sufficient to enable PW1 to recognize the voice of the person who spoke them. Third, the trial judge observed that "may be the words were not heard by the two witnesses at the same time". Is this possible? Were these words uttered once or twice or repeatedly? The evidence on record shows that the words were heard by the two witnesses at the same time. The statement by the learned judge seems to suggest that the words were not uttered at the same time; this is not borne out by the evidence on record. We draw the inference that the learned Judge entertained some doubt as to what words were actually uttered and when they were uttered. The learned Judge also found in relation to PW1 that the uttered words were not sufficient for PW1 to recognize the voice. If the words were not sufficient for PW1, could the same words be sufficient for PW 4 and PW 6? PW 1 in her testimony stated that "I had left Kiambi and *Mwenda* as well as Kirimi and my wife". We pose the question, who is this Mwenda that PW 1 is referring to? PW 5 Eric Kiambi testified that on the material day at 8.00 pm he was asleep in his mother's canteen with his nephew James Mwenda. That when he heard the robbers he went under the bed but Mwenda continued sleeping. Is this the same Mwenda that PW 6 is referring to? This aspect was not clarified by the prosecution and there is doubt whether there was one or two Mwendas being referred to in this case. No witness by the name Mwenda testified. There is another item of evidence raising concern. PW 4 testified that when he arrived at the scene, "***Kirimi told me to come in because they have left***". These are more or less the same words allegedly uttered by the appellant. The failure to clarify whether there was one or two persons by the name of Mwenda and the similarity in the word (s) uttered by Kirimi and allegedly uttered by the appellant reduces the weight of the evidence on voice recognition.
13. We now turn to the issue of visual identification. The only witness who gave direct testimony linking the appellant to the crime is PW1, Irene Ikuu Manene. In her testimony she stated as follows:

The door was hit with a big stone and it gave way. One person entered and went straight for my husband.... I pushed my way out and ran away, 2 other people chased me and one hit me with a stick on the head and I fell down; one of the two who were chasing me were Muchui (appellant). I did not recognize the other; Muchui (appellant) asked me for money and flashed his torch at me. I looked at him and I saw it was him as I had

known him for over 20 years. He was pointing with the torch at my pockets. I had left Kiambi (PW5) and Mwenda as well as Kirimi (PW6) and his wife. Mubichi (PW4) went there and I followed him home. At my house he threw a stone on the roof and announced our presence.

14. The time of the alleged offence was 8.00 pm. The appellant contends that the circumstances for identification were not adequate as the nature of the light from the torch and its intensity was not evaluated**.** 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."***

15.From the evidence adduced, we cannot help but note that no information was given as to the intensity and brightness of the light from the torch. This information was necessary to enable the Court carefully test the recognition evidence. The evidence of identification at night must be tested with the greatest care using the guidelines in ***Republic - v- Turnbull, (1976) 3 All ER 549*** and must be absolutely watertight to justify conviction. **(See *Nzaro -v- Republic, 1991 KAR 212 and Kiarie - v- Republic, 1984 KLR 739*)**. In the case *of* ***Maitanyi -v- Republic 1986 KLR 198,*** this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.

16.Our evaluation of the evidence on record shows that in the present case, no inquiry was made by the learned Judge as to the nature of the alleged torch light or its intensity. In the absence of such inquiry, the evidence of recognition cannot be held to be free from error **(See *Simiyu & another – v- {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 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.***

17.We further note the fact PW 6 did not give the name of the appellant as one of the robbers he recognized in his initial report made to the police. PW6 when asked in cross-examination why his report to the police did not include the name of the appellant, expressed surprise insisting that he mentioned the name to the police. 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.'***

18.We are of the view that the earliest opportunity the complainants could have indicated that they had recognized the appellant 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.

19. We find that failure to mention the appellant in the initial report to the police PW6 casts doubt on the evidence of identification. Whereas PW6 insisted that he mentioned the appellant's name to the polic, we draw an inference that either his statement to the police is not accurate or that his testimony on oath is not true. Whichever way, failure to mention and give description of the appellant to the police at the earliest opportunity reduces the weight of the identification testimony.

20. The final issue for our consideration relates to the summing up done by the trial judge to the assessors. The appellant contends that the contents of the summing up made by the trial judge to the assessors are not on record. It is not in dispute that summing up was done; the contention is that there is no record as to what the trial judge told the assessors. Our perusal of the record shows that on 10th February 2011, the learned judge recorded that "***summing up read to the assessors in open court "***; it is the content of the summing up that is not captured on record. What is the legal consequence of the absence on record of the contents of summing up?

21.Counsel for the appellant submitted that the absence of the contents of summing up led to a miscarriage of justice and the consequence should be an acquittal because this court cannot evaluate whether or not proper directions in summing up was given to the assessors. The State submitted that the record reflects summing up was done and the consequence for failure to capture on record the contents of the summing up should not be fatal. In the case of ***Washington s/o Odindo – v- R, (1954) 21 EACA 392***, the value of summing up to the assessors was stated as follows:

The opinion of assessors can be of great value and assistance to a trial judge, but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the assessors opinion is correspondingly reduced. The instant case was essentially one where the assessors should have had the benefit of a careful summing-up if any weight is to be attached to their opinions. The failure of the learned judge to sum-up largely negatives the value of the assessors."

23. In ***Kenga Kaingu Mweni & 2 others – v- R, Criminal Appeal No. 42 of 1997,*** the pertinent facts relevant to summing up were captured as follows:

After the conclusion of the evidence by the prosecution and the defence, the learned judge in what she called a "summary of the case" purported to sum up the evidence to the assessors in a manner that, having regard to the fact that the appellants were on trial charged with the most serious crime of murder, can only be described as irresponsible. The learned judge did not even bother to explain to the assessors the law relating to the offence with which the appellants had been charged and how the evidence given at the trial could be applied to that offence. She did not again bother to instruct the assessors on the most important and elementary principle of the criminal law system that the assessors could only convict the appellants if they were satisfied that the evidence adduced against them by the prosecution had established the guild of the appellants beyond all reasonable doubt. The learned judges summing up as can be seen from her "summary of the case: reproduced hereunder was not only one sided but also utterly useless...

24. **Section 322 (1)** of the **Criminal Procedure Code** provides as far as is material as follows ***"... the judge may sum up the evidence of the prosecution and the defence and shall then require each of the assessors to state his opinion orally and shall record that opinion."*** Judicial authorities spell out that although the judge may not be required to sum up to the assessors, this must be done and the authorities state how it should be done. **(See *John Kipkurui Arap Lelei – v-R, Criminal Appeal No. 45 of 1994)*.**

25. In the instant case, we have perused the original court file in **HCC Cr. Appeal No. 15 of 2005**. We have also examined the record of appeal as lodged in this **Criminal Appeal No. 19 of 2011**. Whereas the record of appeal shows that summing up was done, the content of the summing up is not reflected on the record. Our perusal of the High Court Criminal file No. 15 of 2005 shows that there is no record of the contents of the summing up. It appears that the learned Judge made an oral summing up to the assessors. In the absence of the written record of the contents of summing up, we cannot say whether the assessors had the benefit of a careful summing-up; we cannot evaluate what principles of law were explained to them; we cannot evaluate if the law relating to the offence with which the appellants had been charged was explained to them and how the evidence given at the trial could be applied to that offence. In view of the foregoing, we are inclined to emphasize that failure of the learned judge to record the contents of the summing up to the assessors makes the proceedings fatally defective. Summing up cannot be done orally only; the record must reflect the legal principles and questions of fact that the trial court is tasking the assessors to consider. We note that whereas it may not be mandatory for summing up to be done, in ***Joseph Mwai Kungu – v- R, Criminal Appeal No. 68 of 1994***, this court stated that "we would, for our part now emphatically assert that the practice of summing up to the assessors is a thoroughly sound one and has been followed for so long that it has acquired the force of law". In the instant case, the moment the learned trial Judge decided to do the summing up, it was to be done properly and this requires that the content of the summing up must be written on record. We hold that the learned Judge erred in law in failing to record the contents of the summing up.

26. The upshot of our re-evaluation a*nd* analysis of the evidence and the applicable law is that this appeal has merit and is hereby allowed. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated *and delivered at Nyeri this 18th day of September, 2013.*

ALNASHIR VISRAM

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JUDGE OF APPEAL

PATRICK KIAGE

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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