REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

(CORAM: BOSIRE, GITHINJI & VISRAM, JJ.A)
CRIMINAL APPEAL NO. 236 OF 2008
BETWEEN

BONIFACE KIONGO MUCHIRI

DAVID MAINA NGANGA

PATRICK MAINA WATHUO

JOHN WAINAINA NDUNGI

PATRICK MAINA MAINGI

PAUL KIMARI MUTUNGI

NICHOLAS KIMENGERE MUGO……..APPELLANTS

AND

REPUBLIC.……..RESPONDENTS

(An appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 29th October, 2008

in

H.C.CR.A. Nos. 87, 88, 89, 92, 93, 94 & 95 OF 2007)
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JUDGMENT OF THE COURT

In these consolidated second and last appeals the seven named appellants, whose names we shall give later in this judgment, were convicted after a trial for the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and were thereafter sentenced to death. Their respective first appeals were dismissed by the superior court at Nyeri and hence these appeals.

On the night of 8th and 9th August, 2005, at Kiarina Village in Nyeri District within Central Province, an armed gang of at least 9 people descended onto the home of ***Moses Nduru Muigai*** (PW1). The time was about 1 a.m. They first knocked at the door of PW1's mother's house within the same compound and demanded of her that she open the door. When she eventually opened the door she realized those who were knocking were robbers. She was able to observe their faces and later identified four of them in separate identification parades. She was used as a ruse to make PW1 open his door on the pretext that she was unwell and needed some medicine from him.

PW1 testified that when he opened his door and flashed a torch outside he was able to recognize ***John Wainaina Ndungi, Paul Kimani Mutungi***, ***George Kamari Thuo*** and another person whose name he gave as ***Mwangi*** but who was pointed out in court as ***Patrick Maina Wathuo***. At their trial they were the 1st, 4th, 7th and 9th accused respectively. PW1 observed that they were armed with dangerous weapons and quickly closed the door and barricaded it. He then opened a nearby window and flashed his torch outside to confirm the identities of the people he saw. He was able to recognize ***John Wainainai Ndungi*** (1st accused), ***Anthony Mwangi Thuku*** (5th accused), ***George Kimari Thuo*** (7th accused) and ***Boniface Kongo Muchiri*** (9th accused). All those are people he knew well before. The gang forcibly gained entry, roughed up PW1 and demanded money from him saying that they were aware he had sold cabbages for Kshs.10,000/=. PW1 gave them Kshs.5,100/=. In addition the gang took a National Panasonic radio which PW1 said belonged to his mother, a torch, a panga and an axe. In the course of their stay in PW1's house, he was able to observe the gang members with the aid of a lamp which he had lit before they gained entry into the house. After the robbers escaped, PW1 reported the matter to the police and he later pointed out some of them for purposes of their arrest. Upon arrest they were jointly charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, the particulars being that:-

"On the night of 8th/9th August, 2005, at Kiarina Village in Nyeri District within Central Province, jointly robbed Moses Nduru Muigai of cash Kshs.5,100/=, a panga, a torch and a National Panasonic radio all valued at Kshs. 9,500/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said Moses Nduru Muigai."

Before being taken to court separate identification parades were held for ***Boniface Kiongo Muchiri*** (1st appellant), ***Patrick Maina Maingi*** (5th appellant) and ***Nicholas Kamengere Mugo*** (7th appellant) with ***Jane Wachera Muigai*** as the identifying witness. She identified each of the suspects as having been a member of the gang that robbed PW1. This would have been important evidence but for the fact that the same people were used in all the parades and thus weakened the probative value of the identification except for the identification in the parade which was held first. The parades were conducted on the same day and in each of them the only different person was the suspect. It was therefore quite easy to identify the suspect. Mr. Kabira Kioni for the 3rd, 4th and 7th appellants raised the issue and we agree with him that the identification parade evidence, except as relates to Nicholas Kamengere Mugo (7th appellant) is of the weakest kind. 7th appellant was the first one to participate in the identification parades and by the time he did so, parade members had not been exposed to PW2.

At the trial, a part from the evidence of PW7, the prosecution case against the appellants was based on the evidence of visual identification of the appellants by PW1. This was basically evidence of a single identification witness at night time.

Each of the appellants denied the offence and raised an *alibi* in his defence. They all blamed an Assistant Chief, one ***Dedan Maina***, the Assistant Chief of Gikondi Sub-location, for having framed up the charge against each of them. He was not their Assistant Chief as they hailed from a different sub-location.

In his judgment the trial magistrate found as a fact that PW1 knew each of the appellants before, there was ample light which aided him in identifying each of them and that PW1 was a believable witness. In the result, he found each of them guilty as charged, convicted them and thereafter sentenced each of them to suffer death.

The superior court (Kasango & Makhandia, JJ.) on first appeal made concurrent findings of fact as the trial court, that the complainant had ample opportunity to observe each appellant even though the period he had the appellants under observation was not given; that he knew the appellants before, they had not covered their faces, the light the complainant used was bright and that they were close to the complainant. That court also considered the conduct of the complainant of immediately pointing out the appellants to the police implying that he was not mistaken in his identification of the appellants. In the end the superior court was satisfied that each of the appellants had been properly convicted and the court therefore dismissed their respective appeals.

The main issue in this appeal is identification. Nine people were charged before the Chief Magistrate's Court, at Nyeri, with a capital robbery charge. All the nine were convicted. However, while their respective first appeals were pending Anthony Mwangi Thuku and George Kamari Thuo escaped from lawful custody and the two were therefore not present to prosecute their respective first appeals. Their appeals are therefore not before us.

In **Cleophas Otieno Wamungu v. Republic Kisumu Criminal Appeal No. 20 of 1984** (unreported), this Court rendered itself thus on the issue of identification:

"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimise this danger whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

R v Turnbull (1976) 3 ALL ER 549 outlines the factors to take into account when considering whether or not a witness correctly identified or recognized a suspect. Consideration of all those factors is intended to establish the quality of the identification to obviate basing a conviction on mistaken identification of an accused person. That is what it means to test the identification with the greatest care.

In the case before us as stated earlier, the conviction of each of the appellants was largely based on the testimony of a single visual identifying witness at night time. The witness testified that he used torch light and the light from a lamp to recognize the appellants. The complainant lived in a rural house with his wife. He testified that he used a torch with powerful light to flash on the faces of his attackers. Those attackers while in the company of his own mother were standing in front of his door. They were close to him and there was no obstruction to his observation of them. He was able to appreciate that the people outside, other than his own mother, were to no good, and that is why, as stated earlier, he immediately closed the door and barricaded it from inside, after which he opened a window nearby and flashed his torch outside to confirm the identities of the people who had invaded his home. He was categorical that *"the torchlight was very bright."* That was the second time he had a good look at his attackers. They are people he knew before and he had known them for long. His observation of them cannot be said to be momentary. He intended to and had a keen look at them. This is what he said in that regard:

"I went to a window near the door. I opened it and flashed the torch light on them again."

Besides, when the robbers eventually gained entry into the complainant's house, he had already lit his lamp. He was able to observe them for the third time. He did not testify on the size of the lamp and the amount of light it emitted. That notwithstanding, the complainant's attackers had not covered their faces. Movement was limited. The attackers were waiting to enter the complainant's house and were therefore stationary. These are circumstances which made the identification of the appellants unmistakable. It is also noteworthy that some of the appellants were identified by PW2 in her house, also under some light from a lamp she had lit. She did not describe the amount of light coming from the lamp, but it was her testimony that it was sufficient to facilitate a correct identification of Patrick Maina Maingi, Nicholas Kamengere Mugo, Patrick Maina Wathuo and Boniface Kiong'o Muchiri, the 5th, 7th, 3rd and 1st appellant respectively. Unlike her son, the witness had not seen the four men before. That notwithstanding, when her evidence is taken into account along with that of her son it lends assurance to the correctness of PW1's recognition of the appellants. We do not lose sight of the fact that sometimes mistakes occur even where a witness says that he recognized a suspect. It should however be noted that the factors we have considered, above exclude the possibility of a mistake, more so considering the conduct of PW1 in contacting the police at the earliest opportunity and pointing out the persons who had attacked him and his mother.

There were other issues which were canvassed by both counsel for the appellants. Miss. Jelagat urged the view that the particulars of the charge as laid are vague, and at variance with the evidence in support of

it. It was her submission that PW1 is named as the complainant and yet the evidence shows that among the items stolen was a Panasonic radio belonging to PW2. Citing the case of **Wanjiku v. R. Criminal Appeal No. 139 of 2002** she submitted that the variance meant that the respective appellants were not made fully aware of the particulars of the charge. The submission is clearly a red herring. The aforesaid radio indeed belonged to PW2 but it was in the possession of the complainant when it was stolen. So, as rightly pointed out by Mr. Kaigai, Principal State Counsel, PW1, was a special owner thereof and he was therefore properly named as the complainant.

The other issue Miss. Jelagat raised was with regard to the particulars of the offence. It was her view that the charge as laid was not proved. She appeared to think that every limb of the particulars needed to be established by evidence. She did not appreciate that the different types of violence stated in the particulars of the charge were in the alternative. All the prosecution is required to prove is either that actual violence was meted out to the victim, or that there were more than one participants in the crime, or that the attackers or attacker was armed with an offensive or dangerous weapon. There are instances where all the factors may be present.

The other issue counsel raised was that the superior court failed to analyse and re-evaluate the evidence. We think that counsel raised this issue with tongue-in-cheek or as an excuse to argue issues of fact which under ***section 361 (1)*** of the Criminal Procedure Code, she would not ordinarily be allowed to argue this being a second appeal. The superior court analysed and re-evaluated the evidence especially regarding the issue of identification. We say no more on that issue as we have demonstrated above, that the circumstances at the *locus in quo* favoured a correct identification of the appellants. We do not also think the trial and first appellate courts shifted the burden of proof to the appellant.

The last issue counsel argued was the alleged failure by both courts below to deal with the *alibi* defences the appellants respectively raised. In view of the clear evidence on identification, the *alibi* defences were displaced. Nothing turns on the appellants respective complaints on that aspect.

Having come to the foregoing conclusions, we are satisfied that the appellants' respective appeals lack merit and each of them is dismissed. Order accordingly.

Dated and delivered at Nyeri this 7th day of July, 2011.

S.E.O. BOSIRE
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JUDGE OF APPEAL

E.M. GITHINJI
…….……..
JUDGE OF APPEAL

ALNASHIR VISRAM
……..……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR