



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, GITHINJI & NYAMU JJ.A)
CRIMINAL APPEAL NO. 349 OF 2009

BETWEEN

DANSON MUKURIA NGOTHO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang & Warsame, JJ.) dated
16th March, 2009**

in
H.C.CR.NO. 485 OF 2007)

JUDGMENT OF THE COURT

Danson Mukuria Ngotho, the appellant, was charged, tried and convicted after a trial, before the Principal Magistrate's Court at Kikuyu, for the offence of robbery with violence contrary to **section 292(2)** of the Penal Code, and was thereafter sentenced to the stipulated death sentence under that section. Upon dismissal of his first appeal to the superior court, he has come before us on a second and last appeal.

The aforesaid offence was committed at night time at about 2.15 a.m. on 12th May 2006 in the home of Caroline Njeri Kabucho (PW1) then a resident Magistrate. She was married to Stephen Karanja Kabucho (PW4), an advocate of the High Court of Kenya. The two were asleep in their house at Rironi Kagia, when a gang of robbers gained access into their house by breaking the main door using large stones. They demanded money. Kshs.2300/= was given to them according to PW4, but according to his wife it was Kshs.2000/. Be that as it may the robbers who numbered more than five took away other valuables including wedding rings, radio, some shoes among other items. The robbers had torches and one of them was armed with an axe. Other than those torches, there was no other artificial light in the house. Both PW4 and his wife testified that there was moonlight which was beaming into the couple's bed-room through a large window in that room. The curtains for the window were ripped off and thus there was nothing to stop the moonlight coming in.

Both PW1 and PW4 testified that with the aid of moonlight and the torches they were able to identify the appellant as one of the people who robbed them. PW4 testified that he was able to identify the appellant

from his long hair, red eyes and wide nose. He had never met the appellant before.

PW1 on the other hand testified that the appellant personally removed her wedding rings from her finger and in the course of doing so she was able to closely observe him. The torch light from one of the robber's torches flashed on his face, and that light coupled with moonlight aided her to identify the appellant. It was her evidence that the appellant appeared to be the commander of the gang and he was the one who was armed with an axe.

The robbers were interrupted by gunshots which were fired outside the house. PW1 had contacted her father-in-law, one Kabucho Wa Wakori (PW2), who was licenced to hold a gun, and informed him of the presence of robbers in their house. PW2, while armed with his gun, came out of his house which was nearby and fired the gun in the direction of PW1.'s house. It was that firing which interrupted the robbers who at the material time were inside PW1's house. It would appear, judging from the evidence of PW2, that, apart from the five or so robbers who entered PW1's bed-room, there were others outside. PW2 testified, *inter lia*, that as soon as he came outside he saw men standing outside PW1's house. They were four in number. He fired his weapon towards them. The men on sensing danger ran away. Later, as PW1, PW4 and PW2 followed the robbers, they found two television sets, a DVD and a pair of shoes abandoned on the way. They were identified by PW1 and PW4 as theirs and among the items the robbers escaped with.

Later the police were contacted. PW1 and PW4 reported that they could be able to identify at least two of the people who robbed them if they saw them. However, no one was arrested until September 2006, when the appellant was arrested. He was not arrested in connection with the robbery at P.W.1's house, but concerning a theft of eggs in the neighbourhood.

The arrest was effected by two administrative police officers who were guarding PW1's residence. On 10th September, 2006, they had gone on patrol and it was while engaged in patrol duties that they were notified of the theft of the eggs. Both PW1 and PW4 became aware of it when the two policemen came with the appellant to their homestead. According to PW1, they needed to wear their uniforms before they would escort the appellant to the police station. It was at this time that both PW1 and PW4 had a good look at the appellant and reckoned that he was one of the people who robbed them on the night of 11th /12th May 2006. Both police officers were the same ones who were assigned guard duties at P.W.1's residence. It is curious that there was no mention as where the two policemen were when the robbers struck at PW1's residence. If they were stationed at the scene, where had they gone to when the robbery occurred?

In his defence the appellant gave an unsworn statement and denied he committed the robbery. He narrated how he was arrested by two policemen who then led him to the residence of PW1 who did not identify him as one of the people who robbed her. He further stated that he was charged along with his brother Samuel Kahinga Ngotho, but the charge sheet on record does not support that assertion. It may be he was charged jointly with his brother in a second case which the appellant said he was faced, but whose particulars the appellant did not give.

In her judgment the trial Magistrate (M.W. Muigai (Mrs)) relied on the visual identification of the appellant by both PW1 and PW4. She believed their testimony and also found as fact that the circumstances at the *locus in quo* favoured a correct identification. The superior court (J.B. Ojwang and Warsame, JJ.) concurred and dismissed his first appeal.

When the appellant's appeal was called before us, Mr. O'Mirera, (SPSC) for the respondent rose and declared that he did not support the appellant's conviction and by extension the sentence which was imposed on him. Mr. O'Mirera submitted that both courts below were in error when they concurrently found as fact that PW1 could be believed when she testified that she was able to identify the appellant when circumstances at the time as narrated by her showed that it was not possible to correctly identify a person. It was his submission that the quality of light at the scene was poor. Mr. Gichuru for the appellant agreed. He regarded the identification of the appellant as sheer dock identification and cited the case of **Kiarie v. Republic** [1984] KLR 739 to support the proposition that dock identification is almost

worthless. He also complained that the Superior Court did not fully re-evaluate the evidence and merely endorsed the findings of the trial court.

We start by stating categorically that the court is not necessarily bound by the views of counsel for the State, whenever he says he does not support the conviction of an appellant. Thus in this case and on the basis of its special circumstances it is the court's duty to itself assess the matter and make its own finding on whether or not the evidence as presented before the trial court support a finding that the identification of the accused person was unmistakable.

The factors to guide a court on the issue of identification were succinctly enunciated by the English Court of Appeal in the case of **Rv. Turnbull & Others** [1976] ALL ER. 549. The court must consider, for instance, the intensity of the light at the *locus in quo*, the distance between the witness and the suspect when he had him under observation, the length of time the witness had the suspect under observation, whether the observation was in any way impeded, whether there were special features which made the identification remarkable, and the lapse of time between the date of the offence and the time the witness identified the suspect to the police or other relevant authority. Those are only some of the factors. There could be other factors a court must consider. What is significant is that a court must exercise caution and warn itself of the dangers in relying on the identification of prosecution witnesses when circumstances that might facilitate a correct identification are difficult.

The robbery complained of in this appeal was committed at night time. PW1 and PW4 were suddenly awoken from their sleep in the wee hours of the night. There was no lamp on. The torch light which the robbers had could only momentarily, beam on anything within their bedroom. It was not suggested that a torch was pointed at any given individual for more than just a moment as would have enabled both PW1 and PW4 to clearly observe their attackers. They did not know the appellant before. While it is true that some people have clearer vision than others, and that it is possible and indeed probable that both PW1 and PW4 did identify the appellant, this is a criminal case. The standard of proof is one beyond any reasonable doubt. If the circumstances permit any slight doubt then the court would not ordinarily sustain a conviction.

The trial Magistrate, in her judgment rendered herself thus on the issue of identification:

“With sufficient light as it was, and the fact that the accused person was in close contact with PW1, the court finds that the circumstances were conclusive for positive identification. PW IV was also in the same room... at that time the torch light was on him (the accused). He had ample time to see him too. The robbers were not hooded or masked.”

That analysis was not undertaken with the necessary caution and care. For instance she did not consider whether the torch which another robber had remained beamed on the appellant and if so, for how long. She did not consider whether the other robber was engaged in any other activity, and if he was, whether when the torch beamed its light on the appellant there was a reason for it to remain fixed on him as to have facilitated the identification of the appellant by both PW1 and PW4. The brightness of the torch was not also considered.

The superior court did not fare any better. It mainly considered the conclusions the trial court came to, but did not sufficiently analyse the evidence regarding the circumstances under which both PW1 and PW4 said they identified the appellant.

For the foregoing reasons we agree with both Mr. O'Mirera for the respondent and Mr. Gichuru for the appellant that the appellant's conviction is unsafe. In the circumstances we are constrained to quash it and set aside the sentence of death which was imposed on the appellant for the aforesaid offence of robbery with violence contrary to **section 296(2)** of the Penal Code. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nairobi this 30th day of September, 2011

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR