IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 436 of 2007

BETWEEN

FRANCIS NGUGI ……….……………… APPELLANT

AND

REPUBLIC …………………….…….... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Kimaru, JJ.) dated 13th day of July, 2006

in

H.C.CR.A. NO. 263 OF 2004)
****

JUDGMENT OF THE COURT

The appellants, ***FRANCIS NGUGI*** and ***STANLEY KAMWARO*** (deceased) were arraigned before the Senior Magistrate's Court, Narok on *16th September, 2003* where they were jointly charged with robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars of the offence were as follows:-

> ***"FRANCIS NGUGI, STANLEY KAMWARO: On the 12th day of September, 2003 at Olengito area in Narok District within Rift Valley Province, jointly with another not before court robbed BENARD SANKALE of his cash Kshs.420/= and at, or immediately before or immediately after the time of such robbery wounded the said BENARD SANKALE."***

After a full trial which commenced before the learned Senior Resident Magistrate (S.M. Githinji, Esq.,) on *17th November, 2003*, the appellant and his co-accused were convicted and sentenced to death as mandatorily provided by the law. Their appeal to the High Court was dismissed.

The facts of the case as accepted by the two courts below were that on *11th September, 2003* at about 9:00 p.m., the complainant ***Bernard Sankale (PW1)*** was on his way home when he met the appellant, his co-accused and one, ***Juma. Sankale*** knew all the three as they were neighbours. The three suddenly pounced on Sankale attacked him with a club and bar as a result of which he lost a total of six teeth. The assailants took Shs.420/= from Sankale's inner

pocket. As a result of this vicious attack, the complainant became unconscious until midnight when he regained consciousness, went home and slept till morning when he informed his brother ***Paul Rarau (PW3)*** what had happened to him the previous night. According to ***Rarau*** (PW3), the complainant told him that he had been attacked by Ngugi (the appellant), Stanley Kamwaro (now deceased) and one, Juma. The complainant was taken to Narok District Hospital where he was examined by ***Benjamin Cheserem (PW2)*** a Clinical Officer who confirmed that the complainant had, indeed, lost six teeth and had bruises and swellings on the right knee. ***Cheserem*** completed and signed the P3 form which he produced in evidence.

Since the appellant and his co-accused had been identified, nay, recognized by the complainant, they were arrested on *13th September, 2003* by members of the public who took them to Narok Police Station where they were received by ***Cpl. Jimmy Bwika (PW5)*** who later charged them with the offence of robbery with violence.

In the course of his judgment delivered on *21st September, 2004* the learned trial magistrate stated:-

> ***"This court must now determine as to whether the offence against the accused persons is proved by the prosecution beyond reasonable doubt. PW1, the complainant in this case stated firmly in his evidence that he was attacked while on his way home at 9:00 p.m. There was moonlight and he was able to see his assailants. The assailant (sic) were known to him before as neighbours while one is even a relative, in law. His evidence is therefore of recognition rather than identification. He gave a detailed account on (sic) which each one of them was armed with, and the role each played."***

It was on the basis of the foregoing that the appellant and his co-accused were convicted by the learned trial magistrate.

As already stated, the appellant's appeal to the High Court was dismissed. The learned judges of the superior court (Koome and Kimaru, JJ.) considered the issues raised in the appeal and in their judgment delivered on *13th July, 2006* stated inter alia:-

> ***"The complainant was able to identify his attackers to PW3 and the appellants were well known to him. From the above evidence, we are satisfied that the trial court properly assessed the evidence by the witness and we find no reason why we should interfere with its finding on the issue of identification."***

Still aggrieved by the order of the superior court dismissing his appeal to that court, the appellant now comes to this Court by way of second and final appeal. That being the case, only matters of law fall for consideration by virtue of ***section 361*** of the Criminal Procedure Code. This is the appeal that came up for hearing before us on *31st March, 2010* when Mr. D.N. Mongeri, appeared for the appellant, while Mr. G.E. Mugambi, appeared for the State. At the commencement of the hearing of this appeal, we were informed that the appellant's colleague (***Stanley Kamwaro***) had died in *January, 2006*. In his submission, Mr. Mongeri raised only two issues – ***identification*** and ***language*** used during the trial. Mr. Mongeri submitted that the evidence of a single witness ***(PW1)*** who claimed that he recognized the

appellant was not sufficient to convict the appellant. Mr. Mongeri further submitted that the complainant did not give the description of his assailants. It was his view that the evidence of the complainant required corroboration.

On the issue of language, Mr. Mongeri submitted that the record did not show what language was used during the trial.

Mr. Mugambi supported the appellant's conviction and sentence on the ground that the appellant was recognized by the complainant who gave the name of the appellant and his companions.

On the issue of language used during the trial, we note that when the appellant and the deceased appeared before the learned Senior Resident Magistrate, there was a court clerk known as Kimiriny and that the charge was read out and explained to the appellant who pleaded ***"Not Guilty"***. Ordinarily, the functions of the court clerk include interpreting proceedings to the accused persons and other litigants. The record of the trial court shows that there was a court clerk during the trial and that the language used by witnesses was indicated as English and Kiswahili. The record shows that prosecution witnesses were subjected to lengthy cross-examination by the appellant.

Having considered the issue of language, we are of the view that this ground of appeal lacks merit as the record is clear that the appellant understood the proceedings and actively participated from the beginning to the end. We therefore reject that ground.

The main issue in this appeal relates to identification. The incident is said to have taken place at about 9:00 p.m. in the rural setting of Narok. It is true that the appellant's conviction was based on the evidence of identification by a single witness in what might be described as unfavourable conditions in that it was night time. But this is not a case of identification but recognition. In ***ANJONONI V. REPUBLIC*** ***[1980]*** Kenya L.R. 59 at p. 60 this Court said:-

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in*** *Siro Ole Giteya v. The Republic* ***(unreported).***
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> ***We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyonyi reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him."***

It is interesting to compare the facts in the above stated authority and the present appeal. In the ***Anjononi*** case(supra) the complainant knew the assailants and so is the case in this appeal – indeed they were relatives. The

complainant in this case mentioned the names of his attackers immediately. Hence, we are dealing with a case of recognition in the present appeal. The issue was properly dealt with by the two courts below and we detect no error in the matter. On our part, we are satisfied that the appellant was convicted on very sound evidence of recognition by a neighbor and a relative. There can be no issue of mistaken identity. Consequently the appeal lacks merit and we order the same to be dismissed in its entirety.

Dated and delivered at NAKURU this 28th day of May, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR