



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 424 of 2007

BETWEEN

JASAN MAINA NGAUAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Kimaru, JJ.) dated 23rd March, 2003

in

H.C.C.R.A. NO. 1 OF 2002)

JUDGMENT OF THE COURT

On the night of 10th/11th November, a pub and a shop at Kirima Trading Centre in Naivasha were attacked by thugs. These two business premises were adjacent to each other. The first to be attacked was the pub operated by Peter Kimani (PW4). Unfortunately for the attackers, Peter Kimani had his bows and arrows ready immediately he heard a window of his pub being hit by thugs. He shot several arrows at the attackers who, according to him, were all men. He identified one of them as the appellant. The raiders ran to the neighbouring shop which belonged to Luka Kariuki Githinji (PW2) who is the complainant in this appeal and who was that night in the shop with his wife Rebecca Kathure Luka (Luka). Luka said in his evidence in the trial court that as he was asleep in the shop with his family, he heard a commotion in Kimani's pub. Some people were saying they would attack Luka's shop. These men climbed on to the roof of his shop and started removing iron sheets. Rebecca screamed and Luka also screamed but the response from the thieves was that they could "continue screaming like a choir." Those on the roof removed one iron sheet and one of them fell down into a room the place where maize flour was stored. At that juncture, Luka opened the door. Several men entered the house. One of them had a torch and what looked like a pistol. That thug ordered Luka to give him battery cells. Luka complied and thug put the cells into his torch. Two others told Luka to give them all the money he had. Luka put Ksh.4,000/= into a bag they had in response to their order. Another man, identified by Luka as the appellant asked Luka why he (Luka) was looking at the thieves. He cut Luka on the face with a panga and Luka fell down. They ordered him to put shop goods into the bag. Later he heard them say Rebecca, his wife, had escaped. Another man cut him on the head and the man with the bag told him to collect all the coins and put them into the bag. The one man who remained on the roof came down. He had an axe and tried to cut Luka with it on the head but Luka evaded it and his finger was cut. They then ordered him to open sodas for them. Thereafter they left. In her evidence supported the evidence of Luka to the extent that she heard the neighbouring shop or pub being broken into and she screamed. Thugs then came to their shop and some climbed on to the roof, and removed an iron sheet. They ordered Luka and Rebecca to open the door and Luka obliged. Some of them entered the house and ordered Rebecca to go out. She had a torch and met the person she identified as the appellant at the verandah. Some of them had torches. The appellant ordered a colleague of his to ensure Rebecca was stripped naked. She stripped herself naked as ordered, but when she sensed they wanted to rape her, she ran away and hid in a kitchen near

the shop. One of the attackers followed her, got hold of her and threatened to cut her with a knife but she managed to throw him down and she escaped into the nearby bushes from where she could hear what they were saying. She heard the appellant saying she had escaped. Later they left and Rebecca returned to the shop after she borrowed clothes from a neighbour. Rebecca together with Kimani took Luka to a hospital in Naivasha as Luka was seriously injured. She also made a report at the police station at Naivasha to PC Mutuku (PW5) at about 4.00 a.m. that night. PC Mutuku and other police officers went to Light Maternity Hospital where Luka was admitted and they found him undergoing treatment. Thereafter they went to the scene and found the shop had been broken into and shop goods scattered. PC Mutuku confirmed that he had been given the identity of the appellant as the suspect. He went to the house of the appellant but the appellant was not there. Two days later the appellant was traced in Naivasha town and he was arrested, on 12th November, 2001, and taken to Naivasha Police Station. On 15th November 2001, George Kariuki, a clinical officer at Naivasha District Hospital, examined Luka and assessed the injuries he had sustained as main.

He produced a P3 form he filled and signed as exhibit at the trial. On 22nd November 2001, the appellant was charged in court with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the charge were that:-

“On the night of 10th day of November 2001 at Kirima Trading Centre Naivasha in Nakuru District of the Rift Valley Province jointly with other (sic) not before court being armed with a dangerous weapon namely panga and rungun robbed Luka Kiruki Mithinji (sic) of his six dozen dry cells, 300 packets of cigarettes, 15 packets of superrathe cigarettes, 10 packets of embassy, one dozen petroleum jerry (sic), 5 packets nice and lovely, Ksh.4,000/= all valued at Ksh.30,000/= and immediately before and immediately after the time of such robbery assaulted the said Luka Kirubi Mithinji (sic).”

He pleaded not guilty to the charge and the hearing proceeded. After Luka had given his evidence, a minor amendment to the charge was made so as to have the date of the incident read the night of 10th /11th November 2001. After all prosecution witnesses had testified the appellant, was put on his defence. He gave unsworn statement which on the main dealt with the events of 12th November 2001 when he was arrested and ended his testimony by stating that he did not know the offence with which he was charged. He also stated that Luka had earlier on caused his arrest for an alleged theft and had cut him on the leg. We understand this to mean Luka had grudges against him.

The trial court, after what we may, with respect, call a well considered judgment, found the appellant guilty, convicted him of the offence, and sentenced him to death. He was dissatisfied with that and preferred an appeal to the superior court. The superior court, (Koome and Kimaru, JJ.) after full consideration of the appeal, in a judgment dated and delivered on 23rd March 2003, dismissed that appeal, hence this appeal before us premised on three grounds of appeal which are contained in a memorandum of appeal filed by the appellant in person, which were as follows:-

- “1. That both the High Court and trial court erred in wholly believing the evidence of identification by recognition without considering that it was obtained in difficult circumstances at night.***
- 2. That the two courts below erred in failing to consider my defence of prior relationship and thus grudge as required by law. (sic)***
- 3. That the trial was irregularly conducted without any indication of the language used as required by law.”***

Later after the above memorandum of appeal was filed, a firm of Owen Magatta, Advocates, was appointed to act for the appellant and that firm filed a supplementary memorandum of appeal with three grounds of appeal which were:-

- “1. That both the High Court and the trial court erred in law in relying on the evidence or identification by recognition without being satisfied that the obtaining circumstances were favourable and free from possibility of error.***
- 2. That both the High Court and the trial court were unfair and erred in law in failing to consider the appellant’s defence.***
- 3. That both the High Court and the trial court ignored mandatory provisions of section 214 1(1) of Cap 75 Laws of Kenya.”***

In his submissions in support of all the above grounds of appeal, Mr. Nyaberi, the learned counsel for the appellant stated that the main issue in the appeal was whether the appellant was properly identified by recognition as the two courts below found in their judgment. He

contended that the trial court and the first appellate court did not warn themselves of the dangers of relying on the evidence of identification even by recognition in circumstances that obtained in this case. He referred to what he called contradictory evidence such as the hospital, to which the complainant was taken after the attack and concluded that such evidence should not have been relied upon to convict the appellant. He submitted further that the appellant's defence was not considered by the trial court and the superior court and that the trial court allowed amendment to the charge but failed to comply with the requirements of **section 214 (1)** of the Criminal Procedure Act. Mr. Nyakundi, the learned State Counsel, was of a different view. He submitted that the two courts below considered the evidence that was before them as is required by law and arrived at right conclusions as the appellant stayed for long with the complainant. R also saw the appellant well by use of the torches they had and her torch. In any case, the complainant was a person they knew only too well. In his submission, procedural defects were curable under **section 382** of the Criminal Procedure Code. He urged us to dismiss the appeal as in his view it lacked merit. We note that the two learned counsel did not address us on the complaint that there was no indication as to the language in which the trial was conducted, but as that ground was not abandoned, we shall nonetheless consider it.

This is a second appeal. We are, by dint of **section 361** of the Criminal Procedure Code limited to matters of law only. We are duty bound to respect the concurrent findings of fact by the trial court and the superior court unless it is demonstrated that the two courts considered matters that they should not have considered or failed to consider matters they should have considered or that looking at their conclusions on those matters of fact, it is clear that they were plainly wrong in which case those failures would be treated as matters of law.

In this appeal, the main issue raised is as to whether the appellant, who was allegedly identified by recognition, was properly identified. In considering that complaint, we must find out if the two courts below, considered the legal principles enunciated by this court or other courts as to the requirements that need to be considered before a court of law, properly directing itself on the evidence, could conclude that such identification was proper in law. These principles are clearly set out in several past decisions of this court, the predecessor of this Court and in other decisions of other jurisdictions. In the case of **R vs. Turnbull and others (1976) 3 All ER 549**, an English case, Lord Widgery C.J. had this to say:-

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.

Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.

Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

In Kenya, this Court, relying on the above case held in the case of **Wamunga v. Republic (1989) KLR 424** as follows:-

- “1. 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.***
- 2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”***

In this case, the complaint raised by Mr. Nyaberi is that the evidence on the identification of the appellant should not have been relied upon because the evidence was full of contradictions in that it was not certain as to which hospital the complainant was taken after the attack. The complainant said he was taken to hospital at Naivasha and treated. Rebecca said he was taken for medication at Naivasha. On the other hand, PC Mutuku said the complainant was admitted at Light Maternity Hospital, while George Kariuki, testified that he assessed the degree of his injury at Naivasha District Hospital. In our view there were no contradictions in the evidence of these four witnesses. Our understanding is that the complainant and Rebecca said the complainant was taken to a hospital in Naivasha without mentioning the name of the hospital. PC Mutuku mentioned the name of the hospital to which the complainant was admitted immediately after the attack and that was Light

Maternity. After treatment, on 15th November 2001 the complainant who had been issued with a P3 form went to a government hospital, namely Naivasha District Hospital for assessment of his injuries. This needed to be done at a government hospital and that was as it should be. George Kariuki did not state that the complainant was treated at the District Hospital or that he was admitted there for treatment. In short the evidence was that soon after the attack the complainant was taken to Light Maternity Hospital in Naivasha by his wife and Kimani, where he was admitted, treated and that is where he was seen by PC Mutuku. Later on 15th November 2001 he went to the District Hospital for assessment of the injuries and issue of P3 form. This cannot, by any stretch of imagination be treated as contradiction in evidence. In any case, even if it were contradiction, it would not affect the correct identification of the perpetrators of the incident, as it was not material to the issue of identification. The identity of the attackers of the complainant and R had nothing to do with the hospital to which the complaint was taken. Indeed even if he was not taken to any hospital, the identity of his attackers would still remain intact.

In our view, the superior court complied strictly with the legal requirements set out in the *Turnbull case* (supra). After their analysis and evaluation of the evidence adduced at the trial the Judges of the superior court they concluded thus:-

“We are satisfied that the trial magistrate properly directed himself and therefore nothing turns on this ground of appeal for reasons that this finding is based on the evidence on record that shows PW2, was engaged by the gang of robbers for some time when he was subjected to the ordeal of putting the money in the bag and giving them the batteries for the torch. This gave him ample opportunity to recognize the appellant who was known to him, prior to the robbery incident. In the case of PW3, she managed to escape after she was ordered to strip naked and said she saw the appellant and identified him as the man who checked for her and announced to the others that she had escaped. It is PW3 who led the police to the house of the appellant on the same night of the attack. This evidence was corroborated by PW4 who saw the appellant through his window.”

This conclusion, reflected a concurrent finding of the two courts below and it was based on evidence on record. We see no reason to disturb it. We may add that there were several torches, some held by the complainant and his wife Rand some by the attackers. Indeed the complainant supplied new cells to at least one of the torches and that must have been bright. Thus the light that night was ample and did afford proper opportunity for a correct identification. We note that, Mr. Nyaberi never challenged that conclusion of the superior court in his address to us. That was well advised. We are equally satisfied that the appellant was correctly identified as one of the robbers.

The other ground raised was that the appellant’s defence was not considered. As we have stated above, the appellant stated in evidence that he did not know about the offence and that the complainant had grudges with him. He stated that the complainant had earlier caused him to be arrested and had cut him on the leg. This was not a conviction upon the evidence of one witness. Peter Kimani was also attacked and repulsed the attackers who apparently included the appellant. R took the complainant to the hospital and then reported to the police. There was no evidence that any of them was involved in the alleged attack on the appellant by the complainant. In any case, in cross examination of the prosecution witnesses, no hint was given about that alleged bad blood between them. The evidence that was adduced placed the appellant at the scene. In view of that it is clear his defence of alibi was considered and was found to have been displaced by the prosecution witnesses’ evidence. We see no merit in that claim.

Lastly, on non compliance with the provisions of **section 214 (1)** of the Criminal Procedure Code, it is true that after two witnesses were heard, it became clear that the offence took place on the night of 10/11 November 2001 and not on 10th November 2001 as was stated in the original charge sheet. That necessitated an amendment to be sought. All that was changed was to insert “and 11th” between the words “10th “ and “day” so that instead of alleging the offence took place “on the night of 10th November 2001”, it read that the offence took place “on the night of 10th and 11th November 2001.” This amendment only sought to make the offence clearer than it was before, but it did not substantially alter the charge and its ingredients. There was no prejudice suffered by the appellant by the failure to read back the charge and to ask the appellant to recall any witness if he desired to because the amendment was so minor that it was only necessitated because of technicalities. In any case the complainant had given evidence prior to amendment and said the offence took place on the night of 10th and 11th November 2001 and later R was specific as to time. She said it was at 1.00 a.m. on the night of 10th and 11th November 2001. Kimani gave the similar evidence. Thus throughout the trial, the appellant was aware of the time he was alleged to have committed the offence. The minor procedural defect was in our view cured by the provisions of **section 382** of the Criminal Procedure Code. Nothing turns that complaint.

The last point raised in the original memorandum of appeal was that the trial was irregularly conducted as the language in which it was conducted was not indicated. We presume that the appellant was alleging in other words that the provisions of **sections 77 (2) (b) and (f)** of the Constitution, as read together with **section 198 (1) and (2)** of the Criminal Procedure Code were violated. As we have stated above, the

two learned counsel did not address us on this allegation and advisedly so. Right at the time plea was taken, the language in which the plea was taken was indicated as English/Kiswahili and interpreter was provided. It was indicated clearly that the proceedings would be interpreted into those languages. Whereas, we agree that the language in which each witness gave evidence should have been indicated immediately after the witness name was recorded, nonetheless, in this case, the trial court did indicate the language in which the court proceeded and we cannot fault the entire proceedings on that allegation.

In short, this appeal lacks merit. It is dismissed.

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

S.E.O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR