



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**CRIMINAL APPEAL 74 OF 2008**

**BETWEEN**

**HENRY KURIA MUCHIRI .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a judgment of the High Court at Nyeri (Kasango & Makhandia, JJ.) dated  
10<sup>th</sup> May, 2008*

in

H.C.Cr.A. 281 of 2005)

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**JUDGMENT OF THE COURT**

**HENRY KURIA MUCHIRI**, the appellant herein, was arraigned before the Senior Principal Magistrate's Court at Murang'a where he was charged with robbery with violence contrary to **section 296(2)** of the Penal Code. He was tried and eventually convicted of that charge and sentenced to the mandatory death penalty. His appeal to the superior court was dismissed and thus provoked this appeal. The summary of the background facts is as follows.

On 27<sup>th</sup> December, 2004 at about 8.30 p.m. **Stephen Gachugu Chege** (PW1), the complainant, was walking home from his place of work when he was attacked by a group of people who hit him on the head, strangled and wrestled him to the ground. While he was on the ground he was robbed of Kshs.2,200/= and he recognized the appellant as the person who was strangling him. The complainant testified that he knew the appellant as they were both from the same area and were indeed, neighbours who have known each other since their childhood. It was the complainant's evidence that at the time of the attack there was moonlight. During the attack the complainant screamed and as a result a number of people who included **Joseph Gichuha Mwangi** (PW3) came to the scene. According to Mwangi (PW3) the complainant mentioned the appellant as one of the robbers that had attacked him. **John Kuria Wangui** (PW4) also responded to the complainant's screams. It was Wangui's evidence that when he reached the scene he was unable to identify anybody since it was dark. According to **Pc. Gituma** (PW5) of Gatara Police Base it was the appellant who made a report that his house had been burnt by five people. Pc. Gituma observed that the appellant had a deep cut on his

head when he made the report. The appellant also reported to Pc. Gituma that a person had been burnt to death. Pc. Gituma called the Officer Commanding Kahuro Police Station (OCS) and briefed him about the report he had booked in respect of the appellant, but Pc. Gituma was surprised when the OCS ordered him to arrest the appellant. When the OCS arrived he informed Pc. Gituma that the appellant had committed a robbery on the material night. It was as a result of the foregoing that the appellant was arraigned in court on a charge of robbery with violence as already stated at the commencement of this judgment.

**Mr. J. Macharia** appeared for the appellant while **Mr. J. Kaigai** (*Principal State Counsel*) appeared for the State when the appeal came up for hearing on 11<sup>th</sup> May, 2010. Although Mr. Macharia relied on the eight grounds of appeal filed by the appellant in person, his submissions were directed at the issue of identification, the failure of the superior court to re-evaluate the evidence and the failure of both the trial court and the superior court to consider the defence of the appellant. On the issue of identification Mr. Macharia pointed out that although the complainant claimed to have recognized the appellant due to the fact that there was moonlight this could have been a mistake or contradiction since another witness (PW4) who is said to have come to the scene of the robbery testified that it was a dark night.

On the issue of the duty of the superior court to re-evaluate the evidence Mr. Macharia faulted the superior court for having merely opted to prefer the prosecution's evidence to that of the appellant's defence. It was his view that it was doubtful whether the prosecution proved its case against the appellant beyond any doubt. He therefore invited us to resolve this doubt in favour of the appellant by allowing this appeal.

As regard the appellant's defence it was submitted that there was no doubt that a house had been burnt on the material night and that it was the appellant who made the report to the police.

On his part Mr. Kaigai conceded the appeal on the ground that this could have been a case of mistaken identity. Mr. Kaigai observed that the conviction of the appellant was based on the evidence of a single witness (PW1). It was also pointed out that when the appellant reported about his house having been burnt he had a deep cut on his face but there was no explanation for that.

The facts of this case are rather interesting. On the one hand there is the complainant who testified that he was on his way home when he was attacked by a group of people who robbed him of his Kshs.2,200/= and that out of the robbers he was able to recognize the appellant. On the other hand we have the appellant who claimed that on the same night the complainant was among those who attacked him and burnt his house. It is noteworthy that both the complainant and the appellant made separate reports to the police and that it was after the police considered both reports that they decided to charge the appellant and not the complainant. The complainant's evidence was that he recognized the appellant as there was moonlight. This was however, contradicted by the evidence of Wangui (PW4) who testified that it

was a dark night.

On the issue of the duty of the first appellate we note that the learned judges of the superior court (*Kasango & Makhandia, JJ.*) appreciated their duty to re-evaluate the evidence and draw their own conclusions. In the course of their judgment delivered on 30<sup>th</sup> April, 2008 the learned judges stated:-

***“We have considered the evidence of PW1 and the defence raised by the appellant and we form the view that the evidence of PW1 is more believable than that of the appellant”.***

On our part we think that in view of the appellant’s defence that he had been attacked by a group which included the complainant the first appellate court should have considered that aspect of the appellant’s defence vis-à-vis the evidence of identification in difficult conditions since one of the prosecution witnesses (PW4) contradicted the complainant’s evidence as regards the source of light.

In our view the result of this appeal depends on the evidence of identification of the appellant at the scene of crime as against the appellant’s unchallenged report of his house having been burnt by people who included the complainant. It would appear that there was bad blood between the appellant and the complainant. That called for caution in handling the evidence of identification. In ***KARANJA & ANOTHER V. R [2004] 2 KLR 140 at p. 147*** this Court said:

*“The law as regards identification under difficult conditions is now well settled. In the case of ***CLeophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989*** at Kisumu, this Court stated as follows:*

***“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them. ... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize 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 alleged 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. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of *R vs Turnbull*[1976] 3 All ER 549 at page 552 where he said:-***

*‘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 view of the foregoing, and having regard to the apparent sour relationship between the complainant and the appellant, we think that there were a number of factors which militated against the complainant’s alleged evidence of recognition of the appellant. We agree with Mr. Macharia that there were doubts in prosecution case and in such circumstances the benefit should be resolved in favour of an accused person. As the appeal has been conceded by Mr. Kaigai, and, in our view, properly so, it follows that it must be allowed. In the result we allow the appeal quash

conviction for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and set aside the sentence of death imposed on the appellant. The appellant is to be set at liberty forthwith unless otherwise lawfully held. Orders accordingly.

*Dated and delivered at NYERI this 14<sup>th</sup> day of May, 2010*

**E. O. O’KUBASU**

.....  
**JUDGE OF APPEAL**

**P. N. WAKI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**