



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 238 OF 2008

BETWEEN

BENSON MUGO MWANGIAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 3rd October, 2008

in

H.C.CR.A. NO. 276 OF 2007)

JUDGMENT OF THE COURT

On the night of 6th/7th January, 2005, **Peter Wakahiu Maina** (PW1) (Peter), his daughter **Mary Wambui Wakahiu** (PW6) (Mary), his niece **Faith Wambui** (PW2) and his grand daughter were asleep in their house at Koimbi. At about 1.00 a.m. Mary went out for a short call. On her return, she was crying and said there were robbers outside. Peter woke up and armed himself but by that time assailants were already near the house. They (assailants) flashed their torches all over outside and ordered Peter to open the door. When Peter hesitated, they broke down some of the windows using stones and broke some glass panes in respect of those windows not broken down completely. Peter made attempts to restrain the attackers from accessing the house but he was overpowered. They beat him with a stone on his leg and injured Peter's grand daughter on the forehead with a stone. Peter surrendered and opened the door for them. They were more than ten and were armed with sticks. We need to point out here that Peter's story later changed and he said five who entered the house were armed with sticks whereas the others who remained outside had other weapons such as axes. In the house, the robbers demanded money and they took Ksh.10,000/= which was in Peter's coat. They also took Peter's torch. They moved to Mary's bedroom and Mary gave them Ksh.4,000/= and they also took Mary's Erickson mobile phone. After taking money from Peter and Mary, together with Peter's torch and Mary's mobile phone, they moved to the door and they divided the loot amongst themselves there. Peter says, he saw them dividing the money as the torch lights were being reflected on a mirror that was near the door and so through that reflection, he managed to identify the appellant whom he had seen previously at the nearby market. We again make haste to add here that in his evidence, Peter stated that he could identify two people he had previously seen at the nearby market, but later he settled for the appellant. None knows what became of the other person he said he could identify as he did not mention him to the police. Mary was categorical that she could not identify any of the robbers and in cross-examination, she made it clear that although she knew the appellant previously, on that fateful night she did not see the appellant at the scene of the robbery. Faith never identified any of the robbers. After the robbery, the assailants left. It is not certain how long the assailants took with the victims in Peter's house as Peter said the robbery took ten (10) minutes, whereas Faith said they stayed in the house for about one hour having taken two hours to break the windows. Whatever time the robbery took, after they left, Peter, Mary and Faith screamed for help and members of the public responded. The next morning Peter said he reported the attack at Kahuti Police Station, but the police officers at that station did not take action. On 10th January 2005, Peter reported the incident to Muranga CID office. The then DCIO, at Muranga CID office summoned Corporal Jacob Mureithi (PW3) to attend to Peter. Corporal Jacob, together with PC Albert Kiarie (PW4), PC Thairu, and PC driver Kipchumba, after listening to the report made to DCIO in their presence, proceeded to the scene of crime where they found that Peter's house had indeed been vandalized. PC Kiarie, who was of the scenes of crime

department took photographs of the scene. As they were returning from the scene, they intercepted a lorry along Muranga/Kangema road, near Karuri market. That was the lorry that had been described to them as the lorry where the appellant was working. They stopped it and arrested the appellant together with another turnboy. They proceeded with the appellant and his colleagues to their (appellant's) house at Mukuyu in Muranga town. On searching the house which was shared by the appellant and his colleague they recovered a coat, which Peter alleged the appellant was wearing at the time of robbery. They took the appellant and his workmate to the police station but later his colleague was released. On 13th January 2005, CIP Ndungu Maina (PW5) conducted an identification parade in which the appellant was the suspect and Peter was the witness. This was notwithstanding that Peter had clearly stated that his alleged identification of the appellant was by recognition as a person he had seen several times working in a lorry at the nearby market place, and notwithstanding that it was as a result of that description that the police arrested the appellant. As would be expected, Peter identified the appellant at that parade. On 18th January 2005, Peter was examined by Samuel Wangai Kahinda (PW6), a Clerical Officer at Murangas hospital. He found several injuries on him some of which had healed and some which were still not yet healed. He assessed the degree of injury as maim and he filled and signed P3 form which he produced in court as exhibit.

The appellant was then charged with two offences, both of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the first count read as follows:-

“On the night of 6th and 7th day of January, 2005, at Koimbi village in Muranga District within the Central Province, jointly with others not before court, while armed with dangerous or offensive weapons namely axes, pangas, runqus, iron bars and stones robbed Peter Wakahiu Maina of cash Ksh.10,000/= at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Wakahiu Maina.”

And the particulars of the second charge were:-

“That on the night of 6th and 7th day of January, 2005 at Koimbi village in Muranga District within Central Province, jointly with others not before court, while armed with dangerous or offensive weapons namely axes, pangas, runqus, iron bars and stones, robbed Mary Wambui Wakahiu of cash Ksh.4,000/= and one mobile phone make Erickson T.1018 all valued at Ksh.6,500/= at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Mary Wambui Wakahiu.”

He pleaded not guilty to both charges. In his defence he gave sworn evidence and called one witness, who according to the record, was the person with whom he was working together and living together in one house and who was arrested together with him and later released. That was Julius Joel Wanyoike (PW2). In his defence the appellant stated that on 6th January 2005, he worked at Kirogo till evening. After work, he went to his house at Mukuyu and slept. On 10th January 2005, he went to work again and as he was working with Joel Wanyoike as driver of that lorry, they were stopped by police officers. Corporal searched the vehicle, found a jacket, took it and arrested him. He was not told the reason for his arrest. They went to his house where a further search was carried out and his jacket taken. His photograph was also taken. They were then taken to police station and interrogated on the events of 6th January 2005. He admitted that he knew the complainant who was operating a business at Gathinja. The colleague arrested with him was released. He stated that on that night, he was with Joel with whom he lives in the same room. Julius Joel Wanyoike said he knew the appellant as he used to work with him. On 6th January 2005, they worked together till 5.30 p.m. when they both went home. They lived in the same room at Mukuyu. The appellant spent the night of 6th January 2005 in that room together with him and he never saw him go out any time that night. Later both were arrested as suspects and police officers took appellant's jacket. Both were cross-examined but not at length. In his cross-examination, the appellant emphasized that Peter knew him and he also knew Peter to such an extent that if Peter had seen him at the scene of robbery then there would have been no need of identification parade for Peter to identify him as one of the assailants. On his part, Joel said in cross-examination that not only do they share the same room at Mukuyu but they share the same bed and he was on that bed till 6.30 a.m. when he woke up. What however, looks interesting is the registration number of the vehicle in which the appellant were allegedly working. Peter said it was registration number KWX 186. The appellant gave the number as KWX 168, whereas Joel said it was registration number KWX 618. That, in our view, is not material as the lorry was physically identified by all and there was no dispute as to the allegation that the appellant and Joel were working with that lorry from which they were arrested.

The above, were the brief facts that were before the trial court for consideration and before the superior court as a first appellate court for fresh analysis and evaluation as is required by the law – see case of ***Okeno vs. Republic, (1972) EA 32***. The trial court, after hearing the case and considering it, found the appellant guilty of lesser offence of robbery under **section 296 (1)** of the Penal Code and sentenced him to imprisonment for a term of eight (8) years. The learned Magistrate, in his judgment treated the second count as an alternative count and said so at the commencement of his judgment. The first count is that of robbery with violence contrary to **section 296 (2)** of the Penal Code. Count 2 is also that of robbery with violence contrary to **section 296 (2)** of the Penal Code. It is difficult to appreciate, in that scenario how the second count could be an alternative count to the first court. In any case the complainants in respect of the two charges were different. The superior court appreciated that the appellant was charged with two counts both of robbery with violence contrary to **section 296 (2)** of the Penal Code but for unexplained reasons convicted of a lesser offence of

simple robbery, but the superior court made no observation as to what happened to the second count. It was not withdrawn, and as we have said, it could not be an alternative count to a similar count as the learned Magistrate indicated. This was the first default by the trial court. However, for reasons that will later be apparent in this judgment, we prefer to gloss over this irregularity. We will proceed on the basis that the second count was considered by both courts and that as no conviction was entered against the appellant in respect of it, he was presumably acquitted and set free in respect of it.

The appellant felt dissatisfied with the conviction for the lesser offence of simple robbery and sentence of imprisonment for a term of eight (8) years imposed. He appealed against both in the superior court. After warning the appellant of the consequences of proceeding with the appeal, and after the appellant insisted despite such warning that he wanted to urge his appeal, the superior court (Kasango and Makhandia, JJ.) after hearing the appeal, dismissed it but set aside the conviction for the lesser offence of simple robbery with violence, substituted for it the conviction for the offence of robbery contrary to **section 296 (2)** which was the original charge and sentenced the appellant to death. That is what has prompted this appeal before us premised on three grounds set out in a supplementary grounds of appeal filed on the appellant's behalf by his learned counsel H.K. Ndirangu. These grounds are that:-

“1. The learned Judges of the superior court erred in law and misdirected their minds on the issue of identification by a single identifying witness and therefore came to the wrong conclusion in convicting the appellant.

2. The learned Judges of the superior court misdirected their minds in re-evaluating the evidence on record and came to the wrong conclusion that the appellant was properly identified and thus wrongly upheld conviction by the lower court.

3. The learned Judges of the superior court in law (sic) and misdirected their minds on the defence evidence of alibi and failed to take the same into consideration while assessing the total evidence adduced and therefore came to the wrong conclusion and thus wrongly convicted the appellant.”

In his submission in support of the above grounds of appeal, Mr. Ndirangu, the learned counsel for the appellant was of the view that the trial court should not have relied on the evidence of Peter as the court's observation about him was to the effect that he was an unreliable witness. As Peter was the only witness on the issue of identification, the appellant was entitled to acquittal as the only evidence against him was unreliable and could not be a basis for his conviction. Secondly, he contended that identification which was allegedly through the aid of a reflection of torchlights through a mirror, could not be a proper identification and finally he submitted that alibi defence raised by the appellant was not given proper consideration by the trial court. According to Mr. Ndirangu, the superior court did no better on first appeal in respect of those two issues of identification and alibi defence.

Mr. Kaigai, the learned Senior State Counsel conceded the appeal on those two grounds raised in the supplementary memorandum of appeal. He felt, the evidence of Peter could not be relied upon as the trial court had found him evasive and identification by way of light being reflected on a mirror could not afford people aid for proper identification and lastly, he also felt the two courts did not properly consider alibi defence raised by the appellant at his trial.

This is a second appeal. Only matters of law are to be considered except where it is demonstrated that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or that looking at the evidence as a whole, the decision they came to was plainly wrong in which cases such failure amount to issues of law.

In the appeal before us, two main issues were raised in the supplementary grounds of appeal and we feel they were advisedly raised, for they were both matters of law. These are issue of identification and issue of alibi raised by the appellant at his trial and how the two courts below responded to those issues.

Seven witnesses gave evidence. Of those seven, only one witness, Peter claimed to have identified the appellant. Mary (sometimes referred to as Mercy) who was the complainant in the second appeal was clear in her evidence that although she knew the appellant as she had seen him on several occasions prior to the incident, but on the night of the incident she never saw the appellant at the scene. Faith was commanded by the thugs to remove all her clothes and go under the bed and she complied so she did not identify any of the thugs. Three other witnesses were police officers who were not at the scene at the time of robbery and of course the seventh witness, was clinical officer who saw the complainant about eleven days later.

The law is clear, that a conviction can be based on the evidence of a single witness. Indeed **section 143** of the Evidence Act provides that a matter can be proved by any number of witness, unless the law under which one is being tried sets out the number of witnesses required to prove it. That legal principle, spelt out in several cases including the cases of ***Abdallah Bin Wendo & another vs. Regina (1953) 20 EACA, 166***, and ***Rovia vs. Republic (1967) EA 583***, carries a rider as regards identification of an accused person. That rider is that in all such cases where one witness's evidence is to be relied upon to convict an accused person, the Court has to exercise greatest care and ascertain beyond any doubt that the witness is reliable. If the conditions under which such identification is to be done are difficult, then the standard of care required before the court can convict on such evidence of a single witness is even higher. In the case of ***Abdallah Bin Wendoh and another vs. Regina (supra)***, the predecessor to this Court had this to say:-

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.” (Underlining supplied)

Thus on the issue of identification, provided the trial court tests the evidence of a single witness with the greatest care, a conviction can be based on the evidence of a single witness. What then is meant by the clause “testing the evidence of a single witness with the greatest care”? In our view the first consideration in testing the evidence of a single witness is to consider as to whether the witness is honest and reliable. The integrity of the witness is of paramount importance before a court directs its mind to his evidence. If the witness gives the impression at the time he is testifying that he is not an honest witness or is a witness of doubtful integrity, then, without much a do, the court cannot rely on his evidence to convict. This Court had been faced with such a situation in the case of ***Ndungu Kimanyi vs. Republic, (1979) KLR 282***. It laid down the minimum standards of a witness upon whose evidence the court can rely to enter a conviction as follows:-

“We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

That was a case where after the appellant’s confessionary statement had been removed from the entire evidence before the court, only the complainant’s evidence remained against the appellant. It was a case very close to the case before us. Honesty and integrity of the witness are the matters to be considered first before the circumstances under which identification took place are considered.

Once the court is certain in its mind that the witness is honest, the court must proceed to consider whether the circumstances prevailing at the time and place of the incident favoured proper identification. The matters to be considered are matters such as the time when the offences took place, i.e. whether it was at night or in broad daylight. If at night what source of light was available for proper identification, what was the strength of such light, its distance from the scene and its position *vis a vis* the scene, whether there were obstacles between the witness and the accused such as people or vehicles passing nearby blocking the witness from continuously seeing the accused. In case of identification by recognition, how often had the witness seen the accused, their relationship etc. All these are properly spelt out in the well known cases of ***R v. Turnbull and others (1976) 3 All ER 549***, and ***Maitanyi v. Republic (1986) KLR 198***, both on the matters to be considered by the courts when faced with the issue of identification whether by a single witness or by more than one witness. It has to be put in mind that even if the witness is found honest and of undoubted integrity, still he may make mistakes even on identification by recognition.

In this case, the record shows that as Peter was being cross-examined by Mr. Njoroge, the learned counsel then representing the appellant, the trial court made a note and stated:-

“Court: I note the witness is evasive while answering question.”

It is not clear whether Peter was evasive when answering one question or several questions, but that remark by the trial court was a clear censure on the reliability of Peter as a witness. The trial court, does not appear to have remembered that impression he got from this witness in his judgment. If that remark is considered, then it would be clear that Peter’s evidence could not attract the required probative value on which a court could rely to convict on identification by a single witness. In short, his evidence could not have met the minimum standard required of a witness’ evidence before a conviction could be based on it. The superior court, with respect did not direct its mind to this aspect, although it did set out the correct principles required to be considered by a court before convicting on the evidence of a single witness on identification. In our view, having considered the evidence on record, we agree with the trial court’s remarks that Peter was evasive in his evidence. Few examples will suffice. In his evidence in chief he stated that he was able to see two men who he usually saw at their centre, but to the police he stated that he could identify only one of the robbers. Second, he stated in his evidence in chief that he reported the incident at Kahuti Police Station the following morning, but in cross-examination, he said he reported the incident at Kahuti Police Station after 2 days. There were many other parts of the record that supported the learned trial Magistrate in his observation that Peter was an evasive witness. It was not safe to rely on his evidence to convict the appellant. As he was the only witness on identification, once his evidence was found unreliable as it was, no other evidence remained upon which the appellant could be convicted as there was no circumstantial evidence implicating the appellant in the offence. Further, and in any event, even if he were to be regarded as an honest witness, still there would have been difficulties in relying on his evidence. He allegedly identified the appellant as the appellant and others were dividing the money. He allegedly saw the appellant through a torch light that was reflected by a mirror. The superior court felt that was proper. In our view, and with profound respect, we do not think a torch light that it reflected by a mirror can provide proper source of light for proper identification to a witness. A reflection by a mirror always produces a different object from the one being reflected. For example, one looking at

himself in a mirror will see his right side reflected as left and vice versa. We agree with both counsel that, even if Peter was an honest witness, such evidence on identification by a single witness could not suffice.

We are thus certain in our minds that identification, being that by a single witness who had been found evasive and whose only source of identification was though a reflection of a torch light by mirror, could not be a safe basis for conviction.

That would have been enough to dispose of this appeal. However, there was also the complaint that alibi defence raised by the appellant was not given proper consideration by the two courts. That complaint is, in our view sound. The trial court shifted the burden of proving the defence of alibi to the satisfaction of the court on to the appellant. That was wrong and the superior court was plainly right in correcting that error by the trial court. The two cases cited by the superior court i.e. the cases of ***Republic vs. Johnson (1961) 3 All ER 969*** and ***Kiarie vs. Republic (1984) KLR 739*** are cases on the point and we cannot do better than reiterate the principles therein which is in a nutshell that an accused person who raises an alibi as a defence to a charge against him does not in law assume the burden of proving that alibi defence. All he needs to do is to bring that to the notice of the Court and the prosecution's duty to disprove it still remains. What however, causes us concern is that the superior court, having rightly pointed out the error in the magistrate's judgment on that issue, did not improve matters either. The superior court in dealing with that aspect, "weighed" the alibi defence against the prosecution evidence and ended up finding that alibi defence was bound to founder. That approach was proper in law – see the decision of this Court in the case of ***Wang'ombe vs. Republic (1980) KLR 149***. What causes us concern however, is that having applied the correct principles, the superior court, in purporting to weigh the alibi defence did not direct its mind to the evidence of the appellant and the evidence of his witness and re-evaluate the same as is required by law. The alibi raised, supported by evidence of one defence witness, was not, in our view seriously challenged and when one considers that Peter the single witness on identification was declared evasive by the trial court, one cannot altogether rule out the possibilities of alibi defence being available to the appellant.

We think we have said enough to show that the conviction in this case was unsafe. Mr. Kaigai rightly conceded the appeal. The benefit of doubt must go to the appellant. We allow the appeal, quash conviction and set aside the sentence of death imposed by the superior court. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 25th day of June, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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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