IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 298 of 2006

JOSPHAT KARANJA MUNA ……...APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu, JJ) dated 27th September, 2006

in

H.C.CR.A. NO. 356 OF 2003)

****

JUDGMENT OF THE COURT

This is a second appeal and that being so, ***section 361*** of the Criminal Procedure Code provides that we confine ourselves to matters of law and not matters of facts except where it appears to us that such matters of facts were either not considered or that irrelevant matters were considered such that their non consideration or consideration of irrelevant aspects ended in failure to properly analyse and evaluate such facts that the trial court's and/or the first appellate court's conclusion was rendered a misjustice.

The appellant ***Josphat Karanja Muna*** (hereinafter the appellant) was, together with two others, charged with two counts, in the Senior Principal Magistrate's Court at Muranga. The first count was that of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, the particulars of which were as follows:-

> ***"On the 9th day of December 2001, at around 8.00 p.m., in Theri Sub-location Muranga District within Central Province jointly with others not before the court, while armed with dangerous weapons namely a pistol, pangas and knives robbed Ben Cheche Gikonyo of 4 dozens of eveready batteries, 100 packets of supermatch cigarettes, one torch and cash Ksh.57,000/= all to a total value of Ksh.64,548/= and at or immediately before or immediately after the time of such robbery wounded the said Ben Cheche Gikonyo."***

The second count was that of assault causing actual bodily harm contrary to ***section 251*** of the Penal Code. As that charge is not relevant in this appeal, we would not reproduce its particulars here save to say the charge was either withdrawn midstream and all accused before the court discharged under ***section 87 (a)*** of the Criminal Procedure Code or the appellant was acquitted of it under ***section 215*** of the Criminal Procedure Code. The record is not clear on the fate of that charge but whatever was the final fate of it, the three were not convicted of it and it is thus not before us in this appeal.

They all pleaded not guilty to the charge of robbery with violence. After the full hearing however, the trial court (F. F. Wanjiku) found the appellant guilty of the offence, convicted him and sentenced him to death. The other two were acquitted. In doing so, the learned Magistrate stated in pertinent part of the judgment as follows:-

> ***"The court therefore finds that the accused was one of those that robbed PW1. The accused was armed with a pistol and he shot PW1 and PW2 was injured in the robbery. The court therefore dismisses the 1st accused's defence as untrue, finds that the prosecution has proved its case against the accused as charged in count 1 beyond reasonable doubt and convicts him accordingly on count 1."***

He felt dissatisfied with that conviction and the resulting sentence of death imposed on him. He appealed to the superior court vide Criminal Appeal No. 356 of 2003. That appeal, was in a judgment delivered on 27th September 2006, dismissed. In their judgment dismissing the appeal, the learned Judges of the superior court (Khamoni and Okwengu, JJ.) had this to say:-

> ***"In his defence the appellant simply denied having committed the offence and tried to blame the investigating officer whom he claimed had a grudge against him. Nevertheless the evidence of the complainant and his wife was quite clear that the appellant was one of those (sic) who attacked and robbed them. Neither the complainant nor his wife knew the appellant before nor did they have any reason to lie against him. We therefore find that there was no substance in the appellant's defence and the same was rightly rejected.***
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> ***We note that there were some minor contradictions regarding the round of ammunition which was recovered from the scene by PW7, PW4 states that it was a live bullet 9 mm whilst PW8 produced a 0.38 calibre ammunition in court as the one recovered. This contradiction did not however in any way affect the substance of the case against the appellant.***
>
> ***We come to the conclusion that there was sufficient evidence to sustain the charge against the appellant. We accordingly***

dismiss his appeal against conviction and sentence."

Still dissatisfied, the appellant has now come before us in this appeal on eight grounds prepared by himself before he was assigned an advocate by the court. His advocate has filed on his behalf a supplementary memorandum of appeal composed of twelve (12) grounds of appeal. Mr. Gathiga Mwangi, the learned counsel who represented him before us however argued the appellant's homemade first ground together with grounds 1, 6 and 7 of the supplementary memorandum of appeal which he felt covered all other grounds. We shall discuss these hereafter but first, the salient facts of the case that was before the trial court as is apparent on the record.

Ben Cheche Gikonyo (PW1) (Cheche) was a businessman at Theri Trading Centre in Murarandia, Murang'a. He was working at the shop with his wife Grace Wangari Cheche (PW2) (Grace). On 9th December 2001 before 8.00 p.m. he had been to a meeting that was arranging his father's funeral. Grace remained in the shop. At about 8.00 p.m. Cheche returned to the shop. He told Grace they would close business and he went outside to start closing the shop. He heard screams and on checking, he saw a man infront of him pointing a pistol at him. That man ordered him to surrender money. There was pressure lamp and solar light and these provided light. He looked at that man and saw he was dark and had a gap between his upper teeth. That man whom he identified as the appellant, shot him. He ran and fell outside a bar bleeding. He was followed by the appellant together with two others who were acquitted at the end of their trial and was further cut on the shoulder, on the wrist, and right ear with a panga by the other two. The appellant continued to demand money. When Cheche said he was not able to give them money from where they were, they held him and took him back to the shop. People responded to the commotion but were scared by the thieves when they shot in the air and they ran away leaving the thieves to carry Cheche into the inner room of the shop where he was put on a bed. They continued to torture him and the appellant asked him to produce money or else he would be killed. He pleaded with them not to kill him and told them money was in the cupboard. They took Ksh.30,000/= from that cupboard. Appellant further took Ksh.5,000/= which Cheche gave him from his pocket. Grace was not spared either. When she saw a man raising a panga as she was closing the shop, she screamed and was cut on the head, on the forehead and ring finger. She was ordered to lie down and was asked for money. She heard two gun shots but was not shot. She was taken to a room and was asked to lie down and to produce money, but after they took money from her husband they left. She stood up and noted that Cheche was seriously injured. She screamed again. People came and Cheche was taken to the hospital at Murang'a via Kahuro Police Station. Later he was transferred to Aga Khan Hospital in Nairobi. The thieves took batteries and cigarettes valued at Ksh.12,548/= as well, making a total value of Ksh.57,000/= stolen from the shop. At Kahuro Police Station, the complainant and Grace made a report of robbery to Sergeant Bernard Ngure (PW4) (Sgt Bernard) who gave them a note to go to the hospital for treatment. That was at about 10.00 p.m. of the night of 9th December 2001. Sergeant Bernard said in evidence that the complainant did not identity any of the robbers but one must accept that Cheche was at that time suffering serious injuries of gun shot and several panga cuts. Grace also had serious panga cuts. These injuries were less than two hours old by the time they were taken to police station on their way to the hospital. On 10th December 2001 Corporal Dan Kagambo (PW6) (Cpl Kagambo) who took over the investigation of the incident went to Murang'a District Hospital where he met Cheche. Cheche described the three suspects to him. He then proceeded with the investigation of the matter. On 2nd April 2002, Cpl Kagambo, with the help of an informer, arrested the appellant within Murang'a Hospital Yard. He arrested the other two later. On 11th April 2002, I.P Muli (PW5) (IP Muli) conducted identification parade in respect of the appellant. Cheche and Grace were the witnesses at the parade. Both identified the appellant at the parade as one of their attackers on that fateful night. Kaka Mohamed (PW3) Clinical Officer at Murang'a General hospital examined Cheche and Grace and confirmed injuries which were both classified as grievous harm. There were other witnesses at the trial such as Simon Chege Kamau (PW7) who picked a fired bullet at the scene which he took to Cheche and was taken to Kahuro Police Station, I.P. David Kimani (PW8) who received a 0.38 calibre ammunition from Cheche and produced it in Court and Chief Inspector Abdul who took cautionary statement from one of the accused who was acquitted. We do not attach much importance to their evidence as we do not see much value added to the case by their evidence. When the appellant was put on his defence, he gave a sworn statement and stated that he was identified at the parade because of a missing tooth which the witness said had been extracted but he had had that tooth since 1996 and he produced a photograph as evidence of that allegation. He then went on and stated:-

"The investigation officer accused me for (sic) another case where I had been denied to go for treatment. The other case is Cr. 1193/01. There was also another case Cr. 393/02 of Kigumo Court and I was acquitted. This (sic) also another file Cr. 494/02 and 493/02 in this Court. He said he will charge me with cases that are not bailable."

In cross-examination, he said he did not know the complainant and admitted that the complainant and his wife identified him at the identification parade but he maintained that they did not identify him because of the mark they talked about.

The above, are in brief the facts that were before the trial court and upon which both the trial court and the superior court reached concurrent findings leading to the appellant being found guilty of the offence of robbery with violence as charged.

In urging the appeal on behalf of the appellant, Mr. Gathiga Mwangi raised several matters some of which were strictly not in the two memoranda of appeal, but as we inadvertently allowed him to proceed with them, we shall consider all matters he raised in his address to us. His complaints were that the provisions of ***section 72 (3)*** of the constitution was violated as the applicant was arrested on 2nd April 2002 but was not produced in court till 26th April 2002, - a delay of over fourteen days allowed by the Constitution; that the appellant was not provided with copies of witnesses statements; that the prosecution was conducted by unqualified prosecutor contrary to the provisions of ***section 85*** of the Criminal Procedure Code; that the learned Magistrate called and considered the contents of other cases in the absence of the appellant and that prejudiced the appellant; that one witness Cpl Dan Kagambo was not sworn; that the provision of ***section 214 (1)*** of the Criminal Procedure Code was not complied with as the charge was substituted and also charges were consolidated without the appellant being informed of his legal rights in law; that the language used when plea was taken was not shown and that was in violation of ***section 72 (2)*** of the constitution; that the language used in cross-examination of witnesses was not indicated; that evidence of co-accused which was a confession was wrongly admitted and relied upon to convict the appellant; that the identification parade was not properly conducted in that the witnesses were not informed that their attacker might be on the parade or might not be there; that the courts below erred in relying on the evidence on identification as the circumstances obtaining were not favourable and, lastly, that the trial court and the superior court failed to appreciate that the appellant's evidence was not challenged on the main issues. For all the above, Mr. Mwangi submitted that the appellant was entitled to acquittal and his appeal should be allowed.

Mr. Orinda, the learned Senior Principal State Counsel on the other hand opposed the appeal, contending that as the appellant faced other charges in court, it could not be said that delay in taking him to court for this charge was a breach of the Constitution as he might have been involved in other cases. He further stated on that point that in any case the charge sheet showed that he was taken to court on 15th April 2002 and that as he never raised that point in the courts below, that point could not stand. On failure to supply witnesses' statements to the

appellant; Mr. Orinda submitted that the same were not asked for and as such the same could not be supplied. He stated further that the case was prosecuted by Inspector Ndeto who was qualified to prosecute the case and as to compliance with ***section 214*** of the Criminal Procedure Code. Mr. Orinda maintained that the charge was read over to the appellant and fresh plea taken, and thus that section was complied with. As the amendment that was introduced merely amended the name of the complainant, it was not necessary to recall the witnesses, as it did not in any way alter the nature of the charge. Consolidated charge sheet was availed to the appellant. He saw no prejudice caused to the appellant on that score and felt it was curable. On the language used in taking the plea, Mr. Orinda's take was that as the appellant pleaded not guilty the omission to record the language in which the plea was taken was neither here nor there as the appellant did not suffer any prejudice. As to the language used in cross-examination of witnesses, he submitted that there has never been any requirement or practice that the language used in cross-examination be recorded and as to the language in which the appellant offered defence it need not be recorded as it is the appellant talking and he does so in a language he understands. The record shows the court indeed complied with the requirements of ***section 211*** of the Criminal Procedure Code. On identification, Mr. Orinda felt Cheche and Grace properly identified the appellant and picked him up at a properly organized identification parade. There was enough light from solar lighting and from pressure lamp. He concluded by saying that the defence was duly considered and the prosecution was at all times of hearing conducted by Inspector Ndeto who was a qualified prosecutor.

We have considered the appeal which is a second appeal as we have stated. We have considered the evidence that was before the trial court and the superior court as a first appellate court. We have considered the judgment of the trial court and that of the superior court. We have considered the original home-made grounds of appeal and the supplementary grounds of appeal as well as the submissions by both learned counsel. The first complaint is that appellant's constitutional rights were violated in that he was held in police custody for over fourteen days contrary to the requirements of ***section 72 (3)*** of the Constitution. This allegation in our view, can only succeed if it is based on clear undisputed facts. Like a preliminary objection in a civil suit, this complaint must be based on pure law and must assume that the facts are not in doubt at all. If the facts such as the date when an accused person was arrested, the date when he was produced into the court and the facts that might have militated against his being produced in court within the time stated by ***section 72 (3)*** are in doubt then the accused cannot benefit from the provision for the court has a weighty duty in deciding whether a person who may very well have committed a serious offence should be released without a full trial or not and that duty cannot be made lighter if the facts are in doubt. In this case Mr. Mwangi relies on the charge sheet at page 4A of the record and the proceedings to state that the appellant was arrested on 2nd April 2002 and presented to court on 26th April 2002 and thus after 14 days required. We have perused that charge sheet. It was substituted and cancelled, and is therefore not the operative charge sheet. It shows the date to court at the top as 26th April 2002, but at the bottom it states the date of apprehension and report to court as 15th April 2002. The valid charge sheet at page 5 of the record which was the operative charge sheet does not state the date to court at the top of it but still states that the date of apprehension and report to court was 15th April 2002. The proceedings at page 7 starts with the date 26th April 2002. If the date in the valid charge sheet is accepted i.e. 15th April 2002, then there was no delay. However, if one argues that there is no evidence of his having been taken to court on 15th April 2002, then we encounter another problem to consider. That is that, the appellant in his cross-examination of Corporal Dan Kagambo appeared to have asked Kagambo questions the answer to which brought out important aspects when one considers delay in taking him to court. Kagambo's evidence in cross-examination by the appellant was as follows:-

> ***"Accused was at large I had visited his house many times. You were needed by other police stations."***

And appellant in his defence on oath stated:-

> ***"The investigating officer arrested me for another case where I had been denied to go for treatment. The other case is Cr. 1193/01. There was also another case Cr. 393/02 of Kigumo Court and I was acquitted. This (sic) also another file Cr. 494/02 and 493/02 in this Court. He said he will charge me with cases that are not bailable."***

The above clearly shows that when the appellant was arrested, he was having other cases in other courts. Indeed the learned Magistrate who called for files in respect of those cases found that the appellant had absconded in Cr. Case 1193/2001when he was arrested in April. In that scenario, where the appellant himself said he was arrested in respect of another case where he had jumped bail and was required by the police and other courts, one would expect that he would be produced to the police station that wanted him first and to the court from which he had absconded before being arraigned in the court for the new offence he was facing. We are talking about the events from April 2002, about seven and a half years back. With the above facts and the confusion between the dates in the charge sheet and the date in the proceedings as to when the appellant was taken to court and as to whether he had to be taken to other courts immediately after arrest as he had jumped bail in other cases, we do not find clear facts to lead us to the conclusion that his rights were violated. That ground has no merit and cannot stand.

We will now move to the allegations of violation of appellant's constitutional rights as regards the failure to record the language that was used at the trial. Three aspects were raised on this ground. First was that the language in which the plea was taken was not stated, secondly that the language in which cross-examination was done was not stated and lastly that the language in which defence was conducted was not stated. ***Section 77 (2)*** of the Constitution states:-

> ***"Every person who is charged with a criminal offence …….***
>
> ***(b) Shall be informed as soon as reasonably practicable, in a language that he understands and in details, of the nature of the offence with which he is charged."***

Section 198 of the Criminal Procedure Code provides for the need for an interpreter.

In this case when the plea was taken on 26th April 2002, the record shows that the Court Clerk was one Ben Gitau; interpretation was *"English/Kikuyu"*. The appellant is described in the charge sheet as *"KIK"* which we assume means Kikuyu. His name suggests he is a Kikuyu by tribe. They were three accused from the same ethnic background and it was clearly recorded that the charge was read to them and every element thereof had been stated by court to the accused persons in the language they understood. Common sense would lead one into concluding that that language was Kikuyu as that was the language in which the charge was interpreted by Gitau to those accused persons who were Kikuyu by tribe. We do not see any merit in this complaint. In any case he pleaded not guilty and whether he understood the

language or not, he was not prejudiced. He is not saying that because he could not understand the language, he pleaded guilty to his detriment. This ground is rejected. The other ground on the same issue of language namely that the language in which cross-examination was done was not recorded, is in our view with respect a non starter. Cheche, and Grace gave evidence in Kikuyu language. Appellant, who is a Kikuyu, cross-examined them with Gitau, another Kikuyu as interpreter. Does one need to be told in which language they could have communicated other than English and Kikuyu? The other witnesses gave evidence in English and interpretation was English/Kikuyu. Surely it goes without saying that language was never an issue. We leave it at that. On the last part of the complaint on language, namely that the language used by the defence was not stated, Mr. Orinda is right. The appellant spoke the language he preferred in his defence and he cannot be said to have been prejudiced. We see no merit whatsoever in this cluster of complaints on language. An attempt was made by Mr. Mwangi to persuade us to accept that at page 20 of the proceedings Cpl Kagambo gave evidence which was unsworn. That was a novel point. We have perused that entry and it is clear that Cpl Kagambo was not giving evidence at all. He was called to explain the absence of witnesses. He was the investigation officer and was called on that score. What he stated on that day was not and could not be part of the evidence. That submission must be frowned upon as it deserves that. The other ground raised was that the appellant was not provided with witnesses statements. The short answer to that is as Mr. Orinda rightly says, he did not seek the same statements which if he had sought would have been provided to him upon certain conditions. Mr. Mwangi has not stated under what provisions of the Criminal Procedure Code such statements are to be automatically supplied to an accused person. We do not attach any importance to this complaint and nothing turns on it. On non compliance with ***section 214*** of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on 29th September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of ***section 214*** is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of ***section 214*** of the Criminal Procedure Code resulted into injustice to the appellant. Then there was the allegation that the provisions of ***section 211*** of the Criminal Procedure Code was also not complied with in that the learned trial Magistrate did not spell out in so many words how she complied with it. This is another ground of appeal which in our view should have not been raised in the first place. The record shows the proceedings on 13th August 2003 after the prosecution had closed its case as follows:-

> *"**Prosecutor***
> *The case is for defence.*
> *Section 211 CPC complied with.*
> ***Accused***
> *I will give sworn defence and no witness.*
> *2nd Accused – Unsworn and no witness."*

One is bound to ask one glaring question, and that is, if the magistrate merely recorded that she complied with ***section 211*** but did not actually do so i.e. if he was not told of his options on defence then what was the appellant responding to when he said he would give a sworn statement? Nay and what was the second accused responding to when he said he would give *"unsworn"* statement. Surely they must have been made aware of those options so as to attract those responses from them. Further, if they were not told that they had the right to call witnesses then why were they saying they would not call any witness. We think, with every respect, there are times when common sense must be allowed to take charge. In our view, the magistrate clearly complied with the provisions of ***section 211*** and it was as a result of that compliance that the appellant made his choice of how to put forward his defence and said he did not wish to call a witness. This was not only on record, it was practically carried out. This ground cannot see the light of the day as it is not based on any proper factual and legal grounds.

The other complaint raised by Mr. Mwangi, was that the prosecutor was not qualified and that offended provisions of ***section 85*** of the Criminal Procedure Code. Our short answer to that is that on all occasions when the matter was heard, the prosecutor was Chief Inspector Ndeto a qualified prosecutor pursuant to the provisions of ***section 85*** of the Criminal Procedure Code. It was unfortunate that at times Mr. Mwangi argued that where the name Ndeto appeared without the ranks of Chief Inspector attached to it like on 23rd September 2002, he could have been another Ndeto who could be unqualified. That suggestion ignores that if there was another unqualified Ndeto then it is the appellant who was alleging that who had to tell the court the rank of that other Ndeto to enable the court to act on that fact. The record is clear throughout, that the prosecutor was at all times Chief Inspector Ndeto and the name Ndeto in the record even without the prefix *"Chief Inspector"* was the same Chief Inspector Ndeto. We dismiss that ground of appeal.

That leaves one ground of appeal for us to consider and that is the ground that states that the two courts below erred in convicting the appellant notwithstanding that he was not properly identified as the perpetrator or one of the perpetrators of the offence of robbery with violence as alleged in the charge. This is a legal matter. Whenever an accused person challenges his identification in respect of any offence he is facing, the court needs to exercise extra care before convicting him of the offence. It must be established that the conditions under which he was identified were conducive for proper identification. If the conditions were not conducive then the court must warn itself before convicting the accused. In the case of ***Roria v. Republic (1967) EA 583,*** the predecessor to this Court stated:-

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdict:-***
>
> *"There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten- if there are as many as ten – it is in a question of identity."*
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> ***That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."***

The need for the court to ensure that the identification of a suspect is watertight before convicting him of the offences he is facing cannot be over emphasized. In the well known case of ***R v. Turnbull and others***, ***[1976] 3 All ER 549,*** Lord Widgery C.J. set out the requirements in the following terms:-

> ***"Each of these appeals raises problems relating to evidence of identification in criminal cases. Such evidence can bring about miscarriage of justice and has done so in a few cases in recent years…….. In our judgment the danger of miscarriages of justice occurring can be reduced if trial judges sum up to juries in the way indicated in this judgment.***
>
> ***First wherever the case against an accused depends wholly or substantially on the correctness of one or more identification 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 on the correctness of the identification or identifications. In addition he should instruct them as to the need for such warning and should make some remarks to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."***

He then went on to say in that judgment that the circumstances in which identification of each witness came to be made should all be carefully examined before a conviction can be based on such visual identification. In the case of ***Wamunga v. Republic*** **(1989) KLR 424**, this Court relying on the case of ***R v. Turnhill & others*** *(supra)* and ***Abdallah bin Wendo & another v Republic*** ***(1953) 20 EACA 166,*** held 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."***

The above cases set out the laws. In this case the trial court was clearly alive to the above. She stated in her judgment:-

> ***"The Court has considered the evidence on record and the Court finds there is no doubt that 1st accused was among those that robbed the complainant in count I and assaulted the 2nd complainant in count II This is because when the offence was committed there was light in the shop. There was light from pressure lamp and light from the solar panel. The accused was with PW1 for a long time outside the shop when he shot him and again when they took him into the house where they took the money and the cigarettes. The robbery took sometime as they demanded money and they took some torch from the cupboard and he took 5000/= from his product. All this time there was light from the two sources as shown above. It is true the 1st accused was knew (sic) to the complainant before but he had a distinct mark in that he was missing one tooth."***

Then the trial court, appreciating that the offence took place at night, delved into the circumstances that necessitated proper identification and found that there was light from pressure lamp and from solar panel. She also found that the appellant had a physical peculiarity that facilitated easy identification namely, a missing tooth. Finally she found that the robbers were with the two witnesses for sometime and that made it easy for them to properly identify the appellant. The superior court being the first appellate court and carrying out its duty as required by law, of analysing and evaluating the evidence before the trial court afresh, stated on the issue of identification as follows:-

> ***"The evidence implicating the appellant was basically that of identification. Although the incident occurred during the night, both complainant and his wife maintained that there was a pressure lamp as well as a solar light and this enabled them to clearly see the appellant who was the man armed with the pistol. Both noted that the man had a missing tooth and described him to Corporal Dan Kagambo who later managed to arrest the appellant and his colleagues through an informer. The identification of the complainant and PW2 was fortified by the fact that they were both able to pick the appellant at the identification parade."***

We have on our own perused the record and particularly the evidence on record. We find no reason to fault the two courts on their concurrent findings on the identification. We also agree that the complainant was shot as he turned in response to his wife's scream and confronted the appellant who had the gun and shot him. He was carried by the attackers to the bed in his house after they had demanded money from him and he had told them he could not give them the money there. He showed them where the money was but they still took even the amount of Ksh.5,000/= in his pocket. Members of the public responded to the screams of the complainant's wife and commotion but those members of the public were scared by a shot in the air fired by the appellant. All this time Cheche and Grace were with the appellant and his colleagues in the shop which was lit by pressure lamp and solar light from the panels. Cheche and Grace maintained in evidence that they saw the appellant well and they demonstrated that by picking him out at a properly organized identification parade. Mr. Mwangi says the parade was not proper because the witnesses were not told that the appellant might or might not be in the parade. This is neither here nor there in so far as they were also not told that the appellant was in the parade. Indeed Grace said in cross examination as concerns the identification parade as follows:-

> ***"Nobody told me you were in line."***

We have no doubt as the two courts below that the identification of the appellant was proper. The trial court was in law, entitled to base a conviction on it as she did and the superior court cannot be faulted for dismissing the first appeal.

In conclusion, from all the above, we do not find any merit in this appeal. It is dismissed.

Dated and delivered at Nyeri this 11th day of December, 2009.

E. M. GITHINJI
……..
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
……..
JUDGE OF APPEAL

ALNASHIR VISRAM
……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR