IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 229 OF 2004

PETER MUSAU MWANZIA ……….…….……. APPELLANT

AND

REPUBLIC …....….……………….…......................RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Nambuye & Mutitu, JJ) dated 2nd August, 2002

in

H.C. Criminal Appeal No. 95 of 2001)

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JUDGMENT OF THE COURT

This is a second appeal. The appellant, **Peter Musau Mwanzia**, was charged before the Senior Principal Magistrate at Machakos in that Court's Criminal Case No. 9 of 2001, with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge were as follows:

"On the 19th day of December 2000, at Mwea Village, Kavain Location in Makueni District of Eastern Province, while armed with offensive weapon namely rungu robbed Thomas Katambo cash Kshs. 10,200/= and or immediately before or immediately after the time of the said robbery used violence to the said Thomas Katambo."

The appellant pleaded not guilty to that charge but after a full hearing, the learned Senior Resident Magistrate (P.C. Tororey) found him guilty of the offence, convicted him and sentenced him to death in accordance with the law. In convicting the appellant, the learned Magistrate stated, *inter alia*:

"Consideringly, I do find that there is no dispute that the complainant was robbed. Instead the accused does support the prosecution case on this. He however denies that he was the one who robbed the complainant. The prosecution's evidence on the identity of the culprit is quite strong. The accused is a person known to PW 1, PW 2, PW 4 and PW 5. Each one of them has identified him. PW 1, PW 2 and PW 4 were at the scene and each one of them identified him as the person who robbed PW 1. The accused has not alleged any grudge between him and PW 2 or PW 4. The walking stick recovered at the scene was identified by PW 1, PW 2, PW 4 and PW 5 as belonging to the accused. The question of visibility has been considered and I do find that in the evidence of PW 1, PW 2 and PW 4, it was not very dark and seeing it also was a person known to them it was easy

to recognise him. Further, PW 4 told the court that when he found the suspect hidden in a ditch, he shone a torch at him and clearly saw the accused."

The appellant, as would be expected, was not satisfied with that verdict and the sentence. He appealed to the superior court vide High Court Criminal Appeal No. 95 of 2001. In a judgment delivered by the superior court (Nambuye and Mutitu JJ.) on 22nd August 2002, that court dismissed the appeal and in so doing stated, *inter alia,* as follows:

"The evidence of PW 1, PW 2, PW 4 and PW 5 was not shaken by the appellant in cross examination. PW 1, PW 2, PW 4 and PW 5 were well known to the appellant prior to this incident. Their evidence as to recognition would appear to be credible. We have noted that the trial Magistrate addressed herself to the question of identification and recognition in so far as the appellant was concerned. Her considered finding is that the circumstances which the robbery took place (sic) were adequate to enable the complainant, PW 2 and PW 4 to identify the appellant positively.

There is nothing in the judgment of the learned trial Magistrate to justify the appellant's submission that his unsworn defence statement was not given its due consideration by the trial Magistrate as she compiled her judgment. It is on record that the trial Magistrate considered the appellant's defence and found it baseless. There is nothing from the complainant's demeanor to suggest that he did not recognise his assailant because he reported the incident to the village elder (PW 5) as early as 6 a.m. next morning according to PW 5's testimony."

These were two concurrent findings of fact of the trial court and the first appellate court. However, the appellant still felt dissatisfied and hence this appeal premised on three grounds of appeal as appears in the memorandum of appeal filed by the appellant's firm of advocates, P.M. Mutuku & Company. At the hearing, the learned counsel, rightly, in our view, abandoned the last two grounds leaving only the first ground of appeal which he argued. We say he was right in doing this because, in essence, all the three grounds were on one aspect and that is that the learned Judges of the superior court erred in law in basing their judgment on the evidence of recognition only, which evidence, according to the appellant, was not credible. The only ground of appeal which was relied on by Mr. Mutuku reads as follows:

"1. That the learned Judges erred in law when they based their judgment on recognition which was not free from error."

In his brief address to us, Mr. Mutuku submitted that the evidence of recognition upon which both courts relied to convict the appellant was not free from error as the basis upon which the main witnesses claimed to have recognised the appellant was not laid down; particularly that the incident took place at night and there was no evidence of any form of light which had aided the witnesses to recognise the appellant. According to him, one witness who claimed to have seen the appellant in a ditch through some light did not specifically describe that type of light to enable the court make an informed decision. He conceded that the witnesses said they had worked together with the appellant but he submitted that even if that were so, mistakes can be made. As to the stick alleged by the witnesses to have been that of the appellant, Mr. Mutuku had the view that the court should not have relied on that evidence as no identification marks on that stick were demonstrated in evidence.

Mr. Kaigai, for the State, supported the decision by the two courts bellow.

We shall, as it is our duty, consider all the above arguments by the learned counsel against the grounds of appeal, but first, the facts.

Thomas Musyoka Katambo (PW 1) was the complainant. At the relevant time, he was a teacher at Kivaani Secondary School and was also a farmer. On 19th December 2000 at about 7.30 p.m., he was walking to his home from Kola Market. When he was about 200 metres to his house, he noticed that someone was following him. That person was carrying a stick. He became suspicious and stopped at a bush nearby. As the man made to pass near where Katambo was in the bush, Katambo asked him who he

was. The man replied that he was a late comer just like Katambo. As the man walked, Katambo claims to have recognised him as the appellant, who used to work for him and with whom he went to school together. Katambo, still suspicious, decided to take a different footpath to his home. When Katambo was almost home, he noticed a person ahead of him on his right hand side whom he recognized as the appellant, standing in a bush. The appellant raised his stick, hit Katambo and Katambo fell down. As Katambo was down, the appellant reached for his coat pocket and took Ksh.10,200/=. Katambo stood up, caught hold of the appellant and a struggle ensued. Katambo grabbed the appellant's stick and hit the appellant with it on the head. Katambo called for help as the appellant tried to strangle him. During the struggle, Katambo knocked the appellant down and sat on him. At that time, a person approached them from the bush and Katambo got scared and loosened his hold of the appellant who escaped. Katambo however, immediately realised that that other person was Francis Muindi (PW 2), Katambo's uncle. Katambo told Muindi to grab the appellant before he (the appellant) could escape. Katambo remained with the stick the appellant had. Muindi who had responded to Katambo's call for help, stated in evidence that he saw the appellant making a dash from the scene and grabbed him but the appellant wrestled his way off and escaped. Muindi also claimed in his evidence that he saw Katambo with the stick which the appellant is alleged to have left with Katambo as he dashed away to escape from the scene. He recognised the appellant and identified the stick as that of the appellant. Muindi used to work with the appellant for the complainant. Muindi claims it was not very dark when the incident took place and he was able to recognise the appellant. Many people responded to Katambo's call for help but the appellant escaped before they arrived. A search was then mounted. Kiio Nyamai (PW 4) (Nyamai) was one of those who also used to work with the appellant for the complainant. He heard the complainant raising an alarm for help. As he rushed to the scene, and before he got there, he met the appellant running away from the direction where Katambo's screams were coming. Nyamai chased the appellant calling for help but the appellant disappeared into the bush. More people joined Nyamai in search of the person they recognised as the appellant. When they came to a big ditch, they shone light into that ditch and saw the appellant standing inside the ditch which was about ten feet long. The appellant hit Nyamai and then climbed out of the ditch and ran away. Nyamai also recognised him as the person with whom he had worked for the complainant as casual labourers and as a person who was from a village neighbouring Nyamai's village. Thus, the appellant was not apprehended that night as he had disappeared. The following morning, Katambo reported the incident to Benjamin Muthiani Kithoku (PW 5) who was a village elder. The report was made at 6.00 p.m. In his report, Katambo mentioned the name of the appellant to the village elder. Katambo also described the clothes the appellant was wearing when the offence was committed which were a pair of worn out jeans trouser and a leather jacket. The village elder (Kithoku) together with the complainant and other people went to the appellant's home. The appellant came out of the house shaking and had a fresh injury above his left eye. On a quick search of the appellant's house, Kithoku found a dirty jeans trouser under the appellant's bed and a black jacket. He arrested the appellant and took him to Kola Police Post where Pc Tom Outa (PW 3) received the appellant, booked him in the occurrence book (OB), interrogated him and rearrested him. Evans Mutiso (PW 6), a community enrolled nurse at Kola Health Centre examined Katambo and confirmed he was injured during the robbery. He filled a P3 form.

Later, the appellant was charged in court with the offence as stated above. The soiled jeans trouser and the stick were produced in court during the trial.

The appellant, in his defence in court, denied the offence and stated that on the material date and time, he was at his home when he heard the complainant screaming. It was at 7.00 p.m. He went and met Katambo who alleged he had been attacked. Many people responded to the screams and he heard some of them saying that the suspect had entered a pit, but as he arrived, he found the suspect had climbed out and escaped. The people dispersed and he too went home. The following day, the village elder together with other people went to his home but did not stay long there. They left but the brother of the complainant engaged him in a talk as to whether he had seen his (accused brother's) sister to which he replied in the negative. He then went to his farm. It was when he was there that the village elder together with the complainant approached him and alleged he was the person who had attacked the complainant the previous night. His house was then searched but nothing connected to the alleged robbery was found. He was escorted to the police station and was charged with the offence he knew nothing about. He added that prior to that day, he had warned the complainant against going to his house.

The above were the brief facts that the trial court and the first appellate court considered and upon which the two courts relied on to reach the findings and conclusions parts of which we have reproduced above. As we have alluded to herebefore in this judgment, and as both the learned counsel for the appellant and for the State appreciated, the main issue that runs through the entire case is the legal question of whether or not the appellant was properly identified as the person who attacked, assaulted and robbed the complainant of his Ksh.10,200/= or any amount of money. Katambo, the complainant, Muindi, who approached the scene in response to Katambo's calls, and Nyamai who was also rushing to the scene soon after the incident, all said in evidence that they saw and recognised the appellant as the person who committed the offence. Katambo, Muindi and Kithoku stated further that they knew that the stick which was used in attacking Katambo and which Katambo grabbled from the appellant and retained as the appellant ran away, belonged to the appellant and they had seen the appellant with it sometimes earlier before the incident. Further, Katambo described the clothes the appellant wore at the relevant time and one of these clothes was a worn out jeans trouser. Katambo further says as they struggled with the appellant, Katambo managed to put the appellant down and sat on him. Nyamai also says he saw, with the help of some light (which the trial Magistrate calls torch light) the appellant in a ditch. When Kithoku searched the appellant's house, a soiled jeans trouser was found under the appellant's bed. As if the above were not enough, Katambo had stated in his evidence that he had hit his attacker during the melee and the next day the appellant was found with a fresh wound above his left eye.

Against all that evidence, Mr. Mutuku submits that there was no proper basis laid for recognition of the appellant. We are aware that the law as to identification or recognition of a suspect requires that the trial court and the first appellate court both of which have the onerous duty of analysing and evaluating the evidence before coming to a conclusion, must do so with extreme care to avoid any possibilities of convicting a suspect on mistaken identification or recognition. In this case, both counsel agreed that the main issue that arose was on recognition as opposed to identification of a stranger. However, even in cases of recognition, the law still demands that care be taken before a conviction is entered. In the well known case of **<u>R vs. Turnbull</u> (1976) 3 ALL ER 549** at page 552, it was stated:

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

We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition. If that be the case, then we are certain, in our mind, that Katambo clearly laid that basis when he said he had known the appellant since their days as school children together in the school. Further, he said the appellant worked for him at his house and, lastly, the appellant's home was about one kilometer from Katambo's home. Muindi stated in evidence that the appellant was his workmate; his home was not far from that of the appellant and that he used to see the appellant whenever he went to pick the appellant's brother to go to work while Nyamai said that the appellant was well known to him as the appellant came from a neighbouring village and he had also worked with him at Katambo's home. It is thus clear to us that those three witnesses did establish a proper basis for recognizing the appellant. However, we think what Mr. Mutuku was raising is that the circumstances that obtained that night could not allow the witnesses to see the appellant so as to establish whether he was somebody they could recognise or not. If we understood him properly, he was saying that as it was dark at the time Katambo was attacked, and as there was no evidence of any adequate light and its source, the witnesses could not see the attacker properly so as to claim that they recognised him.

First, whether the witnesses' evidence on recognition was acceptable is a matter of fact. By dint of the provisions of **section 361(1) (a)** of the Criminal Procedure Code, we are not enjoined to go into that aspect. We note however, that the trial court did analyse the evidence carefully, evaluated it and came to

a conclusion that conditions were conducive to proper recognition of the appellant. The first appellate court, aware of its duties as such a court, also carefully analysed and evaluated the same evidence as is required in law - see **Okeno vs. R. (1972) EA 32 –** and came to its own conclusion. We have reproduced the findings and conclusions of both courts hereinabove. On our own, we note that the appellant in his defence says the time when he heard the complaint's screams was at 7.00 p.m. and Muindi says it was not very dark when the offence took place. That in effect means it was still possible to see and apprehend people when they were near a witness. In any event, Katambo and Muindi both had physical contact with the appellant. Nyamai shone light onto the appellant who hit him before the appellant could escape. We feel certain that under those circumstances, the three witnesses who had known the appellant for quite sometime previously could not all of a sudden have all made mistakes as to the identity of the person the first two physically held and, in case of Nyamai, the person he saw with the help of light. We think the recognition was proved beyond reasonable doubt. In the case of **Anjononi and others vs. R. (1980) KLR 59**, this Court stated:

"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 personal knowledge of the assailant in some form or other."

We have said enough to show that in either sense, the basis for recognition was clearly laid and recognition of the appellant by the three witnesses namely Katambo, Muindi and Nyamai was proper. The trial court and the superior court accepted it and, we have, on our own, analysed the evidence on record and find no ground to disturb their findings on the same.

Lastly, and in any event, there was further evidence to enable the court conclude that it was the appellant who attacked Katambo. First, the stick the attacker used was retained by Katambo. Both Muindi and Kathoku identified the stick as that of the appellant with which they had earlier on seen the appellant. Secondly, the torn jeans trouser that the attacker had at the time of the robbery was traced to the appellant's house where it was found under the appellant's bed. It was soiled and that is explained by the evidence of Katambo that he knocked the appellant down, and also by the evidence of Nyamai that the appellant was seen hiding in a ditch after the robbery. Both these evidence tend to show how the torn jeans trouser the appellant wore at the time of the robbery could have been soiled. Finally, the evidence of the appellant having been hit by Katambo during the attack on Katambo is borne out by the appellant having a fresh injury above his left eye the next day after the incident, which he never explained. He never denied ownership of the stick in his defence. Mr. Mutuku's argument that the stick had no marks on it to show it was the appellant's stick would have only been relevant if the appellant had disputed ownership of the stick in issue. In any case, on cross examination, Kithoku stated as follows:

"I also received your stick which you had left with the complainant when you ran. I know the stick. I know it was yours. You had burnt it, and a little (sic) and it had a black mark. I was familiar with it. No one else has a stick like yours in the village."

This evidence clearly describes the stick and shows there were marks on the stick which linked it to the appellant.

In conclusion, having carefully considered the record, the submission by both learned counsel and the law, we come to the conclusion that the appellant was convicted on compelling evidence which, in our view, proved the charge against him beyond reasonable doubt. We have no reason to upset the conviction and sentence. They must stand. The appeal is accordingly dismissed. It is so ordered.

Dated and delivered at Nairobi this 17th day of October, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O BOSIRE

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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