REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

Criminal Appel 127 of 2005

JOHN MWAURA MUCHIRI ……..APPELLANT

AND

REPUBLIC …….....…RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ochieng' & Makhandia, JJ.) dated 27th July, 2004

in

H.C.CR.A. NO. 696 OF 2001)

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JUDGMENT OF THE COURT

John Mwaura Muchiri (or ***John Mwaura Machiri***, as appears in the original handwritten charge sheet) *("the appellant"*) comes before us on his second and last appeal after the first appeal was dismissed by the superior court (Ochieng and Makhandia JJ) on 27th July, 2004. He was originally tried and convicted before the Chief Magistrate's Court at Thika on three counts of the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code and was sentenced to suffer death on each count. In passing, we must observe that the manner of sentencing, which the superior court upheld, was improper since the appellant could not be hanged thrice over! This court has said *ad nauseum* that where an accused person is convicted on more than one capital charge, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment – see, for examples, **Muiruri v R [1980] 1 KLR 70**, **Abdihussein Kaimoi v R Cr. A. No. 47 of 2001 (ur)**, **Abdul Debano Boye & Anor v R. Cr. App. No. 19/2001 (ur)** and **Samuel Waithaka Gachuru v R. Cr. A. No. 261/03(ur).**

It had been alleged before the trial court that the appellant was among some 10 or so thugs who, on 20th December, 1998 at Makindi village in Murang'a, robbed ***Elezeo Karanja Mwangi*** (PW1), his brother ***Joseph Kinuthia Karanja***, (PW2) and their friend ***John Kamau Njogu*** (PW3), of various amounts of cash and personal property and caused injuries on each of them during the said robbery. The attack on the trio was made at Gaicha Mangu river-crossing on their way home from Kandara market some four kilometers away. The time of the attack was about 8.30 p.m. and the evidence is that it was a dark night. For a period of two hours before the attack, the three were drinking beer in a Kandara bar from 6 p.m. and they decided to go home at about 8 p.m. PW1 and PW2 were the first to arrive at the river-crossing as they had left PW3 behind at the market buying cigarettes. Suddenly, and unexpectedly, they saw a group of 8 – 10 young men one of whom struck PW1 on his face with an iron bar. He fell down unconscious. He was then stabbed on his arm which broke. He neither saw nor recognized any of

the attackers. PW2 had a torch and he shone it on the group before he too was struck on the head and the hand holding the torch. He also fell down unconscious. He says he recognized three of the attackers, who included the appellant, when he shone his torch shortly before he was struck. Soon afterwards PW3 came along at the same place and saw three young people coming towards him. He shone a torch on them and recognized two of them including the appellant. He was struck with an object and fell down but was still semi-conscious. The robbers took away his torch and money and left. They had also taken money and items of clothing from PW1 and PW2. The three victims were later rescued by members of the public and taken for treatment. The matter was reported to Kandara Police Station and the names of three suspects, including the appellant, were given out by PW2 and PW3.

It would appear from the record that one of the suspects was arrested subsequently and was tried and convicted for the offence before Thika Chief Magistrate's Court. On appeal to the High Court however, he was acquitted and set at liberty. Another suspect mentioned by PW2 and PW3 has neither been arrested nor charged. The appellant was not arrested until 3rd January, 2000, more than one year later, when ***Pc David Ali*** of Kandara Police Station received a tip-off that he (the appellant) had been seen in Kandara area. He was arrested and charged with the offence. The appellant however denied that he was at the scene of crime on the day in question. He testified on oath that he was working as a meat transporter in Kayole in Nairobi at the time of the alleged crime. He maintained that those who allegedly identified him at the scene of crime were mistaken. On that evidence, he was not cross-examined.

As there was no other evidence to connect the appellant with the alleged offence, the case stood or fell on the issue of identification at the scene. On this, the trial court, Mrs. H.A. Omondi SPM, had this to say: -

"**I have no doubt from the evidence on record that the three complainants were attacked by a group of people on the night in question. The issue for determination is whether accused was among those who attacked them. Two of the victims say they saw and recognized the accused by aid of torch light. Accused wasn't a stranger to them, they'd known him even before the incident."**

She found that the two identifying witnesses were not too drunk to recognise their assailants, as they said they did, and she concluded: -

"**Again I'll repeat – here identification is not by a single witness only. So the question of circumstances or direct evidence to fortify the identification doesn't come in for (sic) Gabriel Njoroge's case, some of the issues raised were – how long did the witness have the accused under observation at what distance, in what light? Had the witness ever seen the accused before? The question of distance was never put to any of the witnesses on xx (sic), both accused torch (sic) light (sic) and yes, the witnesses had seen the accused before. I am satisfied that the witnesses have positively identified the accused as the person who was in the group that attacked them."**

On the same issue, the superior court delivered itself thus: -

"**PW2 testified that he flashed his torch on the group of thugs, and that he was able to identify three of them, including the appellant. As the appellant was well known to the witness, we believe that it did not take much to recognise him.**

PW2 further testified that one of the thugs; Kawambui hit him on the head first. At that time, the witness was directing the torch at the appellant. He said that he was able to see the appellant clearly. He testified that it was the appellant who hit the torch which he had.

PW2 (sic) stated further in evidence that the torch was very bright. He directed the torch light toward the thugs, and was able to recognize three of them. One of the thugs, Kawambui ordered the witness to put off the torch. Before he could do so, the witness was hit with a club.

Both PW2 and PW3 said that when they reported to the police, they named their attackers, including the appellant. PW4 also confirmed that when the complainants reported the incident to

him, they named the appellant as one of the thugs. Thus the evidence of PW4 corroborates that of PW2 and PW3, on the issue of identification."

The issue has been raised by the appellant once again before us as it is one of law. Miss Celyne Odembo, Advocate, who appeared for him contended that the purported identification was made in difficult circumstances on a dark night where the only sources of light were two torches held by people who had been drinking alcohol for several hours. The intensity of the light, the distance from which it was shone, or the length of time it was shone from each of the two torches at different times was not in evidence. In her submission, reasonable doubts should have been entertained as to the accuracy of such identification.

The Republic through Mr. Kaigai, Senior State Counsel, was similarly uncomfortable with the circumstances surrounding the appellant's identification and therefore conceded the appeal on that ground alone.

We have carefully examined the record and considered the submissions of both counsel and we think, with respect, that there is substance in the criticism leveled against the concurrent findings of the two courts below in relation to identification. Both courts were acutely aware that identification was the deciding factor in the case and should therefore have minutely and critically examined the evidence tendered in that respect. In the end however they appear to have simply accepted the statements of the two identifying witnesses that they recognized the appellant, amongst others. Recognition of an assailant, as this Court has said many times before, is, of course, more satisfactory, more assuring and more reliable than identification of a stranger - see **Anjononi & others v. R [1980] KLR 59** . Each case will depend on its own facts, but generally, recognition will not be accepted simply on the 'say so' of a witness. The circumstances surrounding the recognition must be examined to the satisfaction of the court. The reason for doing so is not difficult to appreciate and is centred on human fallibility. As we stated in **Joseph Ngumbao Nzaro v R. [1982] 2 KAR 212: -**

"**It is possible for a witness to believe genuinely that he had been attacked by someone he knows very well and yet be mistaken. So the possibility of error or mistake is always there whether the case be of recognition or identification……"**

The two identifying witnesses had been drinking beer for some length of time although there was a concurrent finding of fact, which we have no reason to doubt, that they were not drunk. Nevertheless their capacity to react to the sudden and unexpected occurrence that confronted them that night was naturally impaired. None of the two witnesses testified in their evidence-in-chief on the length of time the torch light was shone on the attackers. In cross-examination however PW2 appeared to exaggerate the length of time stating at first that he did it "*for five minutes"* only to retract it and confess that he did not know how long. In his own words: -

"*I cant tell how many minutes I shone a torch on them. I flashed a torch on them and I recognized them. PW1 was behind me and he did not torch (sic) them".*

From all indications on the evidence, the torch was only momentarily flashed before the sudden vicious blow which rendered PW2 unconscious. PW2 also said nothing about the power of light emitted by the torch. Similarly, although PW3 spoke about his torch light being "bright", he said nothing about his distance from the attackers when he switched on the torch or how long he took in his observation before he too was felled. The need for testing evidence with the greatest care, especially where only one identifying witness is put forward, was emphasized in **Maitanyi v R. [1986] KLR 198** at page 201 as follows: -

"**It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential**

to ascertain the nature of light available. What sort of light, its size, and its position with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."

We appreciate that there were two identifying witnesses in this matter and the two courts below believed them on their evidence. We have no quarrel with that assessment. However, as this Court has stated before, a witness may be honest but mistaken: **Roria v R [1967] EA 583** and a number of witnesses could all be mistaken: **R v Turnbull and others [1976] 3 All ER 549**. We think in the circumstances of this case, there was a possibility of a mistake on the part of the two witnesses and it was, in our view, erroneous to base the conviction of the appellant solely on that evidence.

Furthermore the appellant put forward an *alibi* defence to which the two courts below gave short shrift. The trial court had this to say about the alibi: -

"**I note that accused is not specific as to where he was or what he was doing at the material time. Where and who was he delivering the meat to? What motor vehicle was he using. I am not persuaded by the accused's defence and it is rejected."**

As properly submitted by Miss Odembo, such finding amounted to shifting the onus of proof on the appellant. For its part the superior court, in dismissing the alibi defence, found that it had been raised too late in the day as it ought to have been revealed to the police or the prosecution before the trial, for verification.

We have re-examined the record and cannot find any basis for the finding that the alibi was not raised at any time before the appellant testified in court. As stated earlier, the appellant gave evidence on oath and was not even cross-examined by the prosecution on that evidence. It stood unchallenged. If the prosecution thought the alibi took them by surprise, they would surely have disclosed through cross-examination that they knew nothing about the story belatedly given by the appellant. At all events, the burden of proof never shifts whenever such defence is raised. As was held y this Court in **Wangombe v Republic [1980] KLR 149**: -

"**When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible; but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution."**

The superior court dismissed the alibi for being raised late and therefore precluded the weighing of it against the evidence of the prosecution. In point of fact the arresting officer, who doubled up as the investigating officer, ***Pc Ali*** (PW4) had this to say: -

"**I agree it took one year to arrest the accused. I visited accused's home several times but he was nowhere to be found. I finally arrested accused at his home early this year. I asked accused where he had been and he said Nairobi".**

Clearly therefore, the alibi defence was known by the police as soon as the appellant was arrested and there was no basis for the finding made by the superior court. Such finding was prejudicial to the appellant.

There were other minor grounds raised by the appellant but they raise, on the main, technicalities and matters of fact which under ***section 361*** of the Criminal Procedure Code we are not at liberty to upset without good cause. We find no substance in such grounds and we need not therefore make findings thereon, having taken the view we take, as conceded by the State, that this appeal ought to be allowed.

Consequently we order that the conviction of the appellant be and is hereby quashed, the sentence is set aside, and the appellant is set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 6th day of July, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

…….…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR