



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

**CRIMINAL APPEAL 32 OF 2004**

**ALEX KATHURIMA MUTHURI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from judgment of the High Court of Kenya at Meru (Onyancha & Okwengu JJ)**

**dated 23<sup>rd</sup> September, 2004**

**in**

**H.C.C.R.A. No. 85 of 2002)**

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**JUDGMENT OF THE COURT**

Alex Kathurima Muthuri, the appellant herein, together with four others, was tried before the then the Chief Magistrate of Meru (Muchelule, Esq.) on one count of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars contained in that charge were that the appellant and his named confederates, jointly with others not before the court, while armed with offensive weapons namely rifles and axes, robbed Elias Mbanjo of cash Kshs 9,000/- two cartons of cigarettes, two dozens of torch batteries and a torch all valued at Kshs 13,000/- and that during the robbery they used personal violence to the said Elias Mbanjo. A total of eight witnesses testified on behalf of the Republic and the appellant also made an unsworn statement denying any involvement in the crime. At the end of it all, the learned trial magistrate acquitted all the other persons jointly charged with the appellant but he found the appellant guilty as charged, convicted him and imposed upon him the only sentence provided by the law, namely death. Naturally, the appellant appealed to the High Court, but that court (Onyancha and Okwengu, JJ) by its judgment dated and delivered on 23<sup>rd</sup> September, 2004, dismissed the appeal against conviction and sentence. The appellant now appeals to this Court from the decision of the superior court and in his home-made **“Petition of Appeal”** he complains:-

**“1 That the learned Judges erred in law in believing and relying ‘hearily’ (sic) on PW 1’s evidence pertaining to recognition despite of all matters pertaining to testing of such evidence having not been inquired into as required.**

**2 That the learned Judges erred in law by failing to find the omission by PW1 to state the distance the person purported to have been me the appellant was from him fatal to the conviction thus denying me a benefit of doubt hence occasioning a failure of justice.**

**3 That both trial and 1<sup>st</sup> appellate court erred in law by failing to test with great care as required having been of a single witness.**

**4 That the learned Judges erred in law by affirming the lower court's findings while relying solely on evidence of a single witness in absence of any corroborative evidence.**

**5 That the learned Judges erred in law by not finding my conduct to have been consistent with my innocence.**

**6 That the learned Judges erred in law for not having carried the task bestowed on them”.**

There is a seventh ground but it really does not and cannot call for our consideration because the appellant merely asked that he be present at the hearing of his appeal and that he be supplied with full proceedings so that he might prepare himself on time. As it turned out the appellant was present before us when his appeal was heard and an advocate, Mr Obiria Mokua, argued the appellant's appeal before us. Mr Obiria condensed the six grounds into three sub-heads, namely:-

**(i) identification;**

**(ii) Conviction being based on the evidence of a single identifying witness**

**and**

**(iii) Misapprehension of the evidence by the superior court.**

This being a second appeal we are not required to go into factual issues and where the trial court and the first appellate court have made concurrent findings of fact, we can only interfere with such findings if it is shown to us that the findings were not supported by any evidence at all or that though there was evidence, the two courts below totally failed to appreciate the nature, weight and bearing of such evidence to the circumstances of the case and the law applicable to such evidence. The brief facts on which the case was based were that in the night of 15<sup>th</sup> August, 2001, Elias Mbanjo (PW1 – Elias) and his wife Joy Kagendo (PW 2 – Joy) were asleep in the house. Then at about 11p.m. a gang of people broke open their door and entered the house. There was no lighting in the house as Elias and Joy had switched off the electric lights in the house. The intruders took money and other things from the house and apparently from the adjoining shop; they then left to go. Elias followed them outside pleading with them to give him back his radio which had also been taken. Elias and Joy did not identify any of the thugs while they were still in the house. There was no lighting by which they could have done so. Joy remained in the house while her husband followed the robbers outside. It was the evidence of Elias that outside the house at the entrance there was a security light on and according to Elias he was able to see those who had attacked him. It appears from the evidence of Elias that the appellant whom he had known for some four to five years, had not been in the house but had emerged from a road and was calling out “Corporal, Corporal, TOKENI”) Elias put the matter thus in his evidence in chief:-

**“..... My security light was on at the door. The man with radio took one direction and the others stayed for a while and took another direction. While here, I saw KATHURIMA come from the road calling, Corporal Corporal, TOKENI’. The other people had jumped over the fence. KATHURIMA was in the glare of security light out here. He is a person I knew. He is 1<sup>st</sup> accused. He comes from the same area and even buys from my shop. I had known him for 4 to 5 years. He walked upto were I was and I saw him clearly. I heard many gunshots. I heard the gunshots after KATHURIMA had left.....After 30 minutes KATHURIMA came calling “Corporal, Corporal” When he saw me he turned and ran away very fast.....”**

It was only Elias who said he recognized the appellant at his home. That is the basis of the complaint that the appellant was convicted on the evidence of a single witness who identified him under difficult circumstances and in urging that point before us, Mr Obiria submitted that the intensity of the security light was not described and that Elias did not say how far the appellant was from him when he (Elias) first

saw the appellant. Both the learned trial magistrate and the superior court accepted the evidence of Elias that the security light was on at the entrance to his house. There is absolutely no basis either in law or in fact upon which we could possibly interfere with that finding of fact. Again the two courts found as a fact that the appellant was a person well known to Elias and even in his short unsworn statement made during his trial he did not say that Elias did not know him. Once again there cannot be any basis either in law or in fact upon which we can disturb the findings of the two courts that the appellant was a person well known to Elias. Now, our understanding of security lighting is that it is lighting intended to light at night the area in which it is located. Elias swore he saw the appellant “in the glare of the security light” and we are quite at a loss to understand what Mr Obiria meant when he submitted that the “intensity” of light was not “measured”. Elias said the appellant went upto where he (Elias) was and on seeing him the appellant turned and ran away very fast.

There was also the issue of Elias hearing gunshots after the robbers left his home. The gunshots Elias heard were coming from the nearby road where police officers such as Sgt Wilson Kimani (PW3) and Constable Oliver Silaci (PW 5) confronted the robbers and a shoot-out ensued. Thereafter the officers went to the shop of Elias and there can be no doubt from the recorded evidence that it was Elias who led police to the home or area from which the appellant was arrested. Mr Obiria contended that because the appellant was found sleeping in his house the very same night of the robbery despite his knowing that Elias had seen and recognized him, that is a factor consistent with the innocence of the appellant for if he had been involved in the robbery, he would have hidden himself elsewhere. We do not wish to speculate on the possible behaviour or thought-processes of gentlemen who involve themselves in activities such as the robbery charged herein. We totally lack such experience or expertise and whatever Mr Obiria’s experience in such matters, the fact remains that as soon as Elias met the police officers, he led them to the home of the appellant and the appellant himself agreed in his unsworn statement that he was arrested that same night. Clearly the circumstances in which Elias recognized the appellant could not be described as being difficult. Both the magistrate and the superior court appreciated that the Republic relied on the evidence of a single witness and despite that fact they still found the appellant guilty. On the material before them, they were entitled to do so. The only other issue we wish to refer to is the submission that the appellant was arrested during the night of 15<sup>th</sup>/16<sup>th</sup> August 2001 and appeared before the magistrate on 24<sup>th</sup> September, 2001, a period of about one month. There is no specific ground of appeal dealing with that complaint and the case of **ALBANUS MWASIA MUTUA VS REPUBLIC, Criminal Appeal No. 120 of 2004** (unreported) concerned an unexplained delay of eight months. That is not the position here.

As to misapprehension of the evidence the matters which Mr Obiria pointed out to us, such as “lights” instead of “light”, “appellants” instead of “appellant’s” can really take nothing away from the case established by the prosecution against the appellant and we reject that complaint as baseless. We are satisfied, on the recorded word, that the conviction of the appellant was safe and ought not to be disturbed. Mr Orinda, the learned Principal State Counsel, supported the appellant’s conviction. The sentence imposed was the only lawful one for the offence. We order that this appeal be and is hereby dismissed.

**Dated and delivered at Nyeri this 27<sup>th</sup> day of October, 2006.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**W.S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**