



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OMOLO, O’KUBASU & GITHINJI, JJ.A)**

**CRIMINAL APPEAL NO. 180 OF 2002**

**BETWEEN**

**MAJALIWA MOHAMED MANENO..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Mombasa (Hayanga, J & Omwitsa, Comm. of Assize) dated 29 th October, 2002 in H.C. Cr. Appeal No. 340 of 1999)**

**JUDGMENT OF THE COURT**

Despite the very spirited efforts of Mr. Monda, learned counsel for the Republic, in trying to convince the Court that the conviction of Majaliwa Mohamed Maneno, the appellant herein, on the charge of attempted robbery with violence contrary to **section 297(2)** of the Penal Code was safe, we ourselves have not the slightest doubt in our mind that the conviction was clearly unsafe and cannot be sustained.

The attempted robbery, the subject of the conviction and the attendant sentence of death, took place in the house of Helmut Willy Beck (**PW1**) and was said to have been witnessed by Beck himself, his girlfriend Catherine Njoki Njoroge (**PW2**) and Catherine’s daughter Milka Maina (**PW3**). During the attempted robbery, Beck was stabbed with a knife and was seriously injured. The offence was committed on **5th July 1999** and it appears from the recorded evidence that the appellant was arrested on 9th August 1999 ; the arrest was because of an alleged rape. **On 12th August 1999** , the appellant was put on identification parades to see whether Catherine and her daughter Milka would be able to identify him as one of the people who had participated in the commission of the crime in their house on **5th July 1999** . Only Catherine was able to identify the appellant; Milka failed to do so. It would appear that even Beck was available at the police station during identification parade, but as Mr. Kingi for the appellant rightly pointed out, Beck never took part in the parade proceedings. However, when Beck and Milka gave evidence before the trial Magistrate, both of them purported to identify the appellant; that was nothing more than a dock identification and could not really be relied on as constituting positive identification, particularly in view of the fact that Milka had previously failed to identify the appellant at the parade and Beck himself, though available, did not participate in the identification parade. So that in law only one person, namely Catherine, had consistently identified the appellant at the parade and in court before the trial Magistrate. Although Mr. Monda contended that the trial Magistrate was alive to the fact that there was only one identifying witness, this is not borne out by the Magistrate’s judgment.

She stated in the judgment: -

**“..... On the identity of the robbers PW1, PW2 and PW3, all said the electric lights in the house were on and brightly lit the premises. They said they clearly saw the robbers in the holes [house?]. These two witnesses said the accused 1 wore a green T-shirt and was armed with the knife which he used to stab the complainant. They also said that accused 2 [appellant] wore a red T-shirt. They were consistent on this point. I am satisfied that conditions were favourable for positive identification of the accused persons as some of the robbers. Further accused persons were identified on an identification parade by PW2 to be the robbers. The identification parade was in my opinion, regularly and properly conducted by PW6 IP. Musinji (sic). The identification parades corroborated of (sic) accused persons as the robbers.”**

It is clear from this passage that the trial Magistrate accepted the dock identification of **PW1** and **PW3** as being proper identification and the fact that Catherine had identified the appellant at an identification parade only went to corroborate the dock identification of the appellant by **PW1** and **PW2**. She, therefore, made no reference at all to the issue that the appellant's identification was merely by a single witness (**PW2**) doing so under obviously difficult circumstances. Mr. Monda contended the circumstances of identification were not difficult because the premises were well lit with electric lights. Yet the three witnesses were operating under the same circumstances, and Milka totally failed to identify the appellant at the parade, while Beck did not even participate in the parade. Clearly, the circumstances of identification were difficult and the Magistrate was bound to warn herself as provided for in **ABDULLAH BIN WENDO V. REPUBLIC (1953) EACA 166, RORIA V. REPUBLIC [1967] EA 583** and finally in **MAITANYI V. REPUBLIC (1986) 1 KAR 75**. The principle set out in those cases is trite law but it can bear repetition: -

**“Subject to 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.”**

Mr. Monda conceded before us that the only proper evidence of identification was that of Catherine, and we have already pointed out that her identification of the appellant in her house was obviously under difficult circumstances. The Magistrate was accordingly required either to look for corroborative evidence in support of that of Catherine or to administer to herself the usual warning when relying on an uncorroborated evidence. No such warning is apparent from the record and the Magistrate appears to have introduced a novel principle of using the identification parade evidence of Catherine as corroborating the dock identification evidence of Beck and Milka. We can find no lawful authority for that approach.

We have concentrated entirely on the Magistrate's judgment because the approach of the High Court on first appeal to that court was, regrettably, almost casual. The High Court merely summarized the evidence given by each side and having done so concluded as follows: -

**“We have analyzed the evidence in the lower court and evaluated the judgment of the honourable magistrate which we have found as being consistent with the testimony of the prosecution witnesses. We find that the magistrate properly arrived at her conclusion and convicted the appellants in accordance with the evidence on record. We dismiss the appeals accordingly and confirm the sentences of death imposed upon the appellants.”**

Had the High Court analyzed and evaluated the evidence as they pronounce in their judgment, it is incredible that they would have thought that even Milka had identified the appellant at an identification parade. Milka did not do so and yet the High Court stated at page four of its judgment:-

***“The identification of the appellants by PW2 and PW3 at the identification parade was confirmed by a police witness, police Inspector Benson Musingi who conducted the parade. The appellants at the conclusion of the parade did sign the parade form (Exb.3), after being satisfied that the parade was conducted fairly.”***

The parade forms themselves show that Milka was unable to identify the appellant. Had the High Court carried out the duty imposed on it as set out in **OKENO V. REPUBLIC [1972] EA 32**, we doubt whether it would have come to the same conclusion.

Accordingly, we allow this appeal, quash the conviction recorded against Majaliwa Mohamed Maneno, set aside the sentence of death imposed on him and order that he be released from prison forthwith unless he be held for some other lawful cause.

Those shall be our orders in the appeal.

**Dated and delivered at Mombasa this 21st day of January 2005.**

**R.S.C. OMOLO**  
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**JUDGE OF APPEAL**

**E.O. O’KUBASU**  
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**JUDGE OF APPEAL**

**E.M. GITHINJI**  
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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**