



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**(CORAM: GICHERU, BOSIRE & OWUOR, JJ.A.)**  
**CRIMINAL APPEAL NO. 162 OF 2000**  
**BETWEEN**

**1. STEPHEN MBONDOLA**

**2. FANUEL JUMA**

**3. ALI OUMA ..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a conviction and judgment of the High Court  
of Kenya (Waki, J. & Commissioner Mrs. Khaminwa)  
dated 24th May, 2000**

**in**

**H.C.CR.A. NOS. 436, 437 & 438 OF 1995)**

\*\*\*\*\*

**JUDGMENT OF THE COURT:**

The three appellants, Stephen Mbondola, Fanuel Juma and Ali Ouma, who we shall hereafter refer to as the 1st, 2nd and 3rd appellant respectively, were jointly charged, and tried with two others who were acquitted, one at the trial and the other on first appeal, and were convicted of one count of robbery with violence contrary to section 296(2) of the Penal Code and a second count of grievous harm contrary to section 234 of the Penal Code. They were each thereafter sentenced to the mandatory death sentence on the first count, and 5 years imprisonment with six strokes of the cane on the second count, with a direction that the sentences run concurrently. We wish to observe at the outset that in a case like the one before us in which one count carries a mandatory death sentence it is inappropriate and clearly impracticable for such a sentence to be ordered to run concurrently with an imprisonment term or any other sentence. The proper direction, in our view, should have been that the sentence or sentences other than the death sentence stand in abeyance and be given effect only if the death sentence is, for whatever reason, set aside on either of the respective first appeals to the High Court were dismissed, and hence their present appeals.

These being second appeals our jurisdiction, by reason of the provisions of **section 361(1) of the Criminal Procedure Code**, is confined to questions of law. The main if not the only issue of law raised in these appeals is identification. The offences the appellants stand convicted of were committed at night time. The prosecution case is that the appellants in the company of at least ten other people raided the house of one Zacharia Lulai Mwambi (PW1), at Bombolulu, Mombasa, on 29th January, 1994. They forced their way inside after seriously wounding a watchman, Peter Esike Ambale (PW2), assaulted PW1

and made away with several of his property. The house was a Swahili type with several rooms with each of them occupied by a different family. They had a common but sheltered area at 1:00 a.m. The raiders were armed with knives, pangas, bow and arrows and had torches. They surprised the watchman and ordered him to lie down and not raise any alarm. But when he defied them, blew his whistle and shouted for help saying that he had been attacked by thieves the robbers pelted him with stones and cut him with a panga on his left hand and forehead. His evidence was that before he was cut he was able to identify the 1st and 3rd appellants along with a third person who was acquitted, with the aid of bright moonlight and torch light which was "flashed on my eyes.". The attack on him was serious and sent him sprawling on the ground. Apart from moonlight and torch light no other evidence was adduced to show the conditions obtaining at the scene where the watchman was which would show that his identification of some of his attackers was unmistakable, more so in the face of his evidence that the robbers first pelted him with stones, manhandled him and flashed a torch directly at his eyes. It is quite unclear from the evidence, how, in those circumstances, and in view of the fact that it was night time, he was able to use that same torch light to correctly observe and identify some of his attackers.

The other identifying witness was PW1. His evidence was that as he slept in his house he heard the screams of the watchman calling for help. He awoke, dressed up intending to go to his aid, but before he could do so he heard a loud bang on his door accompanied by a command to open the door. He leaned against it intending to prevent it from collapsing inwards, and at the same time he raised an alarm, but notwithstanding his effort the door gave way to the attackers force and collapsed into the house. PW1 was immediately shot at with three arrows. The first one met him on his left thigh, the second on the chest area and the third on the ribs area of the right side of his body. It was during that moment that PW1 says he was able to see and identify the attackers "well as the moon was shining brightly and I could identify them. I saw Ouma who shot me with the arrows.". Immediately thereafter the witness fell down and landed on the verandah of his house. It was his evidence that as he lay there he was able to see and identify the 2nd appellant and two others whose appeals are not before us, removing his television set, radio cassette, camera amongst other items. None of the stolen items was ever recovered. A knife which was recovered from 2nd appellant, according to the witness, was recovered in the house of 2nd appellant on 21st February, 1995. That appellant was not found there but his wife was. She was arrested. The 2nd appellant was arrested when he went to the police station to seek her release. The 2nd appellant's name had been given to the police by PW1 as having been one of the people who robbed him on 29th January, 1994.

There is also the evidence of Lucas Bwayo Wanguire (PW3). He was asleep in one of the rooms in the aforesaid house, quite close to that of PW1. He testified that he heard the sound of breaking coming from PW1's door and also his screams pleading that he should not be killed. He was able to identify the 1st appellant, he said, through the eaves of his house with the aid of moonlight as the 1st appellant walked out of the building armed with a bow and arrows.

The appellants were people both PW1 and PW2 knew well before. It is in evidence that the 1st appellant had been seen at the scene at 7:00 p.m. on the previous day. PW2 stated that the said appellant came to see PW1. At the time of the visit, he said, the 1st appellant had a white cap on. A similar cap was recovered at the scene soon after the robbery. The evidence is silent on whether or not it had any special features. The second appellant was well known to both PW1 and PW2. PW1 testified that he had known him for over five years. They had worked together for sometime.

PW2 too had known the 2nd appellant for long although only by appearance. The 3rd appellant had worked for PW1 before. He had been hired at one time to dig a pit latrine for the witness, and besides, the 3rd appellant lived nearby. PW2 also stated that he knew the 3rd appellant as a neighbour. The import of the evidence of both PW1 and PW2 is that they recognized the appellants as having been among the several people who violently robbed PW1 and assaulted PW2, causing him grievous bodily harm.

In **Patrick Nabiswa v. Republic**, Criminal Appeal No. 80 of 1997 (unreported) this Court while dealing with the issue of reliability of visual identification of suspects, said:

*"This Case reveals the problems posed by visual identification of suspects. This mode of*

*identification is unreliable for the following reasons which are discussed in BLACKSTONE'S CRIMINAL PRACTICE, 1997, Section F 18.*

*(a)Some person may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances;*

*(b)Visual memory may fa de with the passage of time; and*

*(c)As is in the process of unconscious transference, a witness may confuse a face he recognised from the scene of the crime (it may be of an innocent person) with that of the offender."*

To deal with such problems this Court has often stressed the need for the trial and first appellate Courts to examine and analyse with the greatest care the evidence tendered on the issue to exclude the possibility of mistaken identification of a suspect. The English Case of *R v. Turnbull* (1976) 3 ALL ER. 549 which has often been cited by this Court with approval sets out the test. This case was not cited both at the trial and the first appellate proceedings, we presume, because the appellants were unrepresented. Nor was it cited before us by Mr. T. Bryant, for all the appellants. However, in his submissions before us, Mr. Bryant appeared, generally, to have had those tests in mind. His submissions, in the main, were that the circumstances obtaining at the locus in quo, did not favour a correct identification of the appellants. In his view moonlight, however bright, will not enable a person to identify another. We of course are unable to agree with him and eschew any suggestion that at no instance can identification by moonlight be accepted. Each case has to be considered on its peculiar facts and circumstances. Mr. Bryant further submitted that the circumstances at the time of the robbery as given by the eye witnesses were stressful and could not therefore permit a correct identification.

Mr. Gumo for the state was of a different view, and urged that the moonlight and the tin lamp in PW1's house produced ample light which enabled both PW1 and PW2 to correctly identify the appellant, more so, he said, because all the appellants are people both the witnesses knew well before. He conceded, quite properly, that both the trial and first appellate courts did not make any inquiry as to the circumstances at the scene of the robbery and assault to satisfy themselves that they were conducive to a correct identification.

Looking at the judgments of the trial and first appellate courts, it is clear that both courts looked at the evidence which was adduced at the trial and analysed it and drew their own conclusions from it. However, neither court subjected the evidence to close scrutiny as indeed they were obliged to do to satisfy themselves that the evidence on identification or recognition of each of the appellants left no doubt as to the correctness of the identification or recognition. There can be no doubt that the circumstances on the material night of the alleged offences were difficult. The robbers were many. They surprised the Watchman (PW2). According to PW1 the watchman used to sit inside the Swahili house near the main door which was often left open. It opened into some sort of court yard which according to PW1 had a roof over it. The moonlight the witnesses talked about could only have come into the area through that door. The moon did not light the area directly but only a reflection of its light lit the area. PW1's house was further inside. Moonlight into his house could only have come in through the main door. This is an aspect both courts below did not address their minds to. Besides, there is no description on record of the general area, both at the main door and the door leading into PW1's house. For instance we do not have any evidence on record as to how much of the reflected moonlight streamed into the court yard and PW1's house. It was not sufficient in our view, merely for both the courts below to say, there was bright moonlight which facilitated a correct identification of the suspects. That would not satisfy the tests in **R v Turnbull**, (Supra).

Besides, if the robbers attacked both PW2 and PW1 at the main door and the inner door in the latter's house respectively, it would be reasonable to assume that as the robbers entered, the moonlight would be behind them and would not have lit their faces to facilitate their proper identification or recognition. Moreover, no evidence was adduced to show where PW1 had positioned his tin lamp which he said was on, how much light it produced and whether it was behind or before him when he went to lean against the

door. If behind him, as was probably the case, then he obstructed the light that should have shone on the faces of his attackers to enable him to identify or recognize them. In those circumstances it would not matter how long the robbers remained in PW1's presence, or that the robbers were people he had known for long. He simply could not in those circumstances be able to recognize them by their appearances if the light there was insufficient.

A part from moonlight PW2 testified that he was able to identify the appellant using torch light from a torch they had and which they flashed directly at his eyes. His evidence in that regard cannot possibly be believed. In answer to a question which was put to him by the 1st appellant the witness answered that the torch light blinded him. Yet later on while still being cross-examined by the same appellant he answered that "... after you flashed the torch at me, I could clearly see." If indeed the torch light blinded him it is unthinkable how PW2 could be able to use the same light to see his attackers as to be able to identify them.

Then there is the evidence of PW3. As we stated earlier he testified that he only identified the 1st appellant through an opening in the ceiling of his house. We suppose he peeped through the eaves of his roof. He testified that he was able to see the 1st appellant armed with a bow and arrows. At the time he saw the appellant he was walking out of the building. His observation could only have been momentary or for a fleeting moment.

The final aspect of the case we need to consider is the alleged recovery in the house of the 2nd appellant of a knife which PW1 identified as his. Not much turns on that evidence. In the first place PW1 did not say it was one of the items which was stolen from his house on the material night of the robbery. He was categorical that none of the items stolen from him on that night was recovered. Mere recovery of an item from a person's possession is insufficient to invoke the doctrine of recent possession as the superior court sought to do. The possession must be of an item stolen on the material date of the offence charged. In our case it cannot be assumed that merely because the item in question was found with the suspect without evidence that it was one of the items which had previously been stolen from PW1 was one of the items which were stolen from him on the material night.

In view of what we have stated above, it is clear that the trial and 1st appellate courts merely perfunctorily dealt with the evidence without subjecting it to thorough scrutiny. It is an exercise which this court, in **Maitanyi v. Republic** (1986) 2 KAR 75 described as testing with the greatest care the evidence against a suspect. Both the courts below having failed to do so as we have endeavoured to demonstrate, the identification of all the three appellants as having participated in the commission of the offences in the two counts hereinabove alluded to, cannot be said to have been free from the possibility of error. It is a doubt which should have but was not identified and applied in favour of the appellants. Both the courts below erred in that regard.

In the result we allow the appellants' respective appeals, in both the first count of capital robbery contrary to section 296 (2) of the penal code and the second count of causing grievous harm contrary to section 234 of the same. We accordingly quash their respective convictions and set aside the sentences which were imposed on them as aforesaid. We order that they be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Mombasa this 25th day of January, 2001.**

**J. E. GICHERU**

.....

**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E. OWUOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**