



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ENVIRONMENTAL & LAND CASE 786 OF 2007

KENNETH MWONGERA MARIMBAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against conviction and sentence in Maua Chief Magistrate's Court in Criminal Case No.1038 of 2008 by Hon. P. W. Macharia(SRM), dated 20.7.2009).

J U D G M E N T

The appellant in this case was charged with another with an offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the prosecution case as stated in the charge sheet are as follows:-

On the 2nd day of May,2007 at Limbine village Thinyanie Location in Meru North District within the Eastern Province, jointly with others not before court being armed with dangerous or offensive weapons namely pangas, matchet and rungus robbed CELESTINO MUGAMBI of cash 9,000/- a pair of eye glasses, a mobile phone and a wrist watch all valued at Kshs.25,400 and at or immediately before or immediately after the time of such robbery used actual violence to the said CELESTINO MUGAMBI.

After full trial, the appellant, who was the 1st accused at the trial court, was found guilty and convicted by the trial magistrate. Consequently, the appellant was sentenced to suffer death by the learned trial magistrate. The appellant being aggrieved by the conviction and sentence of the learned trial magistrate, preferred this file while relying on the following grounds of appeal:-

- 1. That the learned trial Magistrate erred in law and fact in failing to observe that recognition and or identification couldn't be positive in the circumstances that prevailed during the attack.**
- 2. That the learned trial magistrate erred in law and facts in failing to observe that the prosecution failed to avail vital witnesses for a just decision to be reached.**

3. That the learned trial Magistrate erred in law and facts in failing to note that the prosecution gave contradictory and conflicting testimonies.

4. That the learned trial magistrate erred in law and facts in failing find that there was an existing grudge between PW1 and PW2.

5. That the learned trial Magistrate erred in law and facts in failing to observe that the complainant failed to report with my names at the police station.

6. That the learned trial magistrate erred in law and facts in dismissing and disregarding the preferred defense without any cogent reasons.

During the hearing of the appeal, the appellant's counsel Mr. Ayub Anampiu submitted that the appellant was not positively identified. He submitted that PW1, Celestino Mugambi, who was the complainant testified that the alleged robbery took place at around 10.30 p.m at night. PW1 claimed he was able to identify the appellant through the use of torch light. That there were seven suspects, three on his right side and four on his left side and all shone torch lights on the appellant. The learned appellant's counsel submitted that the complainant did not state that he had torchlight himself and that since he did not have a torchlight and light was shone on him he could not identify the appellant. The learned appellant's counsel further submitted that PW2, Romano M'Rithumai M'Rinjuri contradicted the evidence of PW1, Celestino M'Rarama, in that he stated that he did not see any torchlight and that the persons did not spotlight him. He submitted PW2 stated that the people who were attacking the complainant were 20 metres away from him. The learned appellant's counsel further submitted PW2 said that the attackers wore hats and had clothes tied on their heads; it therefore meant, it was impossible for PW2 to identify people who were 20 metres away and who were wearing clothes on their heads. According to the learned appellant's counsel as PW2 did not go to the scene of the offence, PW2 could not be able to recognize and identify the appellant. The learned appellant's counsel submitted that PW2 said he suspected that it was the complainant who was screaming for help as he was familiar with PW1's voice. Under the above circumstances the learned appellant's counsel submitted that it was important that an identification parade ought to have been conducted.

The learned appellant's counsel further submitted that PW1 and PW2 in their evidence did not talk of there being moonlight yet the trial court in its judgment stated that PW1 and PW2 were able to pick out and recognize the appellant at the scene of crime through torch light as well as moonlight.

According to the learned appellant's Counsel the trial court introduced new evidence that was not there and Counsel in view of the above, what trial court remained with was evidence of the complainant alone as there was no other evidence connecting the appellant with the offence for which he was charged for.

According to learned appellant's counsel there were material witnesses who were not called, such as wife of the complainant one Hellen Mukokinya Mugambi, amongst others, hence the evidence tendered was not sufficient to convict the appellant.

According to the learned appellant's counsel the trial magistrate did not analyze the evidence of the witnesses and had the court done so it could have come to a different conclusion. The learned counsel submitted that the appellant gave credible evidence and explained the grudge between the parties. The learned counsel referred the court to the following authorities;

1. *Gitonga Amos & others – V- Republic*

HCCRA NO.124/125/2005 and 162 & 164/2006**2. Masaki & Another- V – Republic****SUPREME COURT OF UGANDA CASE NO.18/2003**

On the basis of the above, the learned counsel concluded by urging this court to allow the appeal and set the appellant free. On the other hand, Mr. Mungai, the learned State Counsel, who appeared for the Republic supported the conviction of the appellant. According to the learned State Counsel, sufficient evidence was adduced to support conviction as there was identification and recognition of the appellant and that the appellant was at the scene of crime and committed the offence.

According to the learned State Counsel the appellant was well known to the complainant previously and before the trial as the appellant and complainant were neighbours and the latter had known the former since his childhood. The appellant's home according to learned State Counsel is about 300 metres from that of the complainant. According to the State Counsel the complainant identified the person he had known since his childhood. The complainant shouted the name of Mwongela Thurairira which show that he recognized the appellant. The complainant according to State Counsel was able to recognize the appellant through full moonlight and torch light which was projected on the face of the men. He submitted that the torch light were said to be on for about a minute. He submitted that in the circumstances there were favorable conditions for identification. According to the learned State Counsel, PW2 corroborated the evidence of PW1 by stating that they were able to identify four attackers. The learned State Counsel submitted that a distance of 20 meters is not far for one not to be able to see and identify someone. The learned State Counsel contended that the wife of the complainant and children came to the scene after the attack and if they were to testify they would have testified only on the attack. He further submitted there was no dispute that the complainant was attacked and that he sustained some injuries. In conclusion, the learned State Counsel, Mr. Mungai submitted that the trial court was right in convicting the appellant and that an accused person can be convicted by a court while relying on the evidence of a single witness. On the basis of the above submissions, he concluded by supporting the conviction and sentence.

On the other hand, the learned appellant's counsel in reply, submitted that the allegation that the complainant called assailants by their names was not corroborated by PW2 as he did not hear the complainant shouting the assailants names. The learned appellant counsel contended that PW1 did not state the intensity of the moonlight. He further submitted that it was not possible for PW2 to see the accused and fail to see the complainant. That PW2 said he recognized complainant by voice. The learned appellant's counsel reiterated what remains is evidence of a single witness. He concluded by submitting that the appellant introduced issue of grudge in the proceedings which was not considered. In conclusion he urged the court to allow the appeal.

Being the first appellate court, we have the obligation and duty to re-analyze and re-evaluate the evidence that was tendered in the lower court before reaching our own independent conclusion. We also do appreciate and are alive to the fact that we did not see or hear the witnesses during the trial. Those basic principles were clearly enunciated in the case of **ODHIAMBO –V- REPUBLIC(2005) KLR PAGE 565** in which Court of Appeal stated:-

“On a first appeal, the Court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor.

The Court is not under any obligation to allow an appeal simply because the State is not opposed to the appeal. The Court has a duty to ensure that it subjects the entire evidence tendered before the trial court to a close and fresh scrutiny and reassess it and reach its own determination based on evidence.”

In this particular case PW1 Celestino M'Rarama introduced himself as a retired teacher and that he now runs a cereals shop at Kianjai market. He recalled on the night of 2/5/2007 at about 10.30 p.m he was outside the gate to his house. That as he was opening the gate he was spotlighted with a sharp torch from both his right and left side. He was able to see 3 men on the right and 4 persons on the left side. There were 3 men and one lady. PW1 saw the lady because she was wearing a full dress. PW1 stopped opening the gate and turned both right and left. Using torch light he was able to identify one Luka Mboroki, Thurania Gitirime, and Charles Kobia on left. PW1 was unable to identify the lady. From the right side he saw and recognized Kenneth Mwongera, that all four men he saw were persons known to him because they are his neighbours. PW1 had known them since childhood.

PW1 was aided to see and recognize the four men because there was full moonlight and he used both torch light from both his left and right side. The torch light was bright. The torch beams were projected on the face of the men. The men, PW1 said were advancing to him. The torch lights were on for one minute. He saw Kenneth Mwongela who was armed with a C-Line Panga(Long sharp-panga), Lucas Mboroki was armed with crow-bar. Thurania was armed with an iron bar. Kobia was armed with a horse stick. Charles Kobia had a torch. The other persons who the complainant could not identify were armed with a panga and the lady had what looked like a rifle(AK 47 rifle).

PW1 stated that he had known the appellant from childhood. That PW1's home is about 300 metres to that of the appellant. PW1 said the other persons he recognized are not in court. PW1 said when Kenneth Mwongela got to him at his gate and ordered him to surrender money. PW1 stated he did not have money at that time. Immediately the appellant cut him on the left hand. He was cut on the upper arm once. He was cut 4 times on the left ulna. His left forearm was fractured. PW1 was left down in pain. PW1 then shouted "My children Mwongela and Thurania why are you doing this to me and I am like your father". That the men became violent. PW1 was cut deeply on the left jaw. He was cut severally on the legs. He was also cut on the left knee. The middle section of his left leg was cut and ankle joint. The right leg was cut and the lower leg. He was hit on the head with the club. From complainant's left coat pocket appellant removed Kshs.9,000/= in cash and from the right coat pocket they stole his reading glasses valued at Kshs.8500/-, his wrist watch Lumax 5 valued at Kshs.1500 was removed from his hand. That as the robbery was going on PW1 was screaming for help. That amongst those who came to his rescue was his wife Hellen Mukokinya Mugambi, his grandchildren Makena aged 6 years and Kimathi a toddler. Mr. Romano Rithumani also came to the scene. PW1 then lost consciousness and was rushed to hospital. PW1 gained consciousness at Kenyatta National Hospital on 4/5/2007. He was discharged from Kenyatta National Hospital after 10 days. Kenyatta National Hospital issued PW1 with a patient correspondence form dated 21/8/2007 which he took to Miathene District Hospital, which form was used to complete a P3 form. The P3 form and form from KNH were identified and marked MFI P 1(a),(b). PW1 returned the P3 form to Tigania Police Station. Initially the wife to PW1 made a report about the incident of robbery to the District Commissioner Tigania District and Tigania Police Station. At the police station, PW1 was advised part of the property had been recovered and was found with a man called Patrick Kinyua. PW1 said Patrick Kinyua was not known to him. What had been recovered from Patrick Kinyua was PW1's wrist watch Lumax 5, which had a panga cut on the strap. At the base of the watch PW1 had initiated letters "CM". The Lumax wrist watch was marked MFIP2.

On 9/8/2007 PW1 was called at Tigania Police Station and was told some suspects had been arrested. PW1 was told an identification parade was to be done. PW1 stated to the trial court that

Mwongela was in court and that he was accused No.1. PW1 identified appellant in dock. PW1 stated that he was told his watch was recovered from a man called Patrick Kinyua. He said Patrick Kinyua was accused No.2 and was not known to him previously.

PW1 and his witnesses recorded their statements. The other stolen items were not recovered. PW1 stated that the men that he recognized at the scene are at large, save accused No.1 who was arrested. PW1 was not present when appellant was arrested. PW1 stated that when police came to his rescue he told the officers the names of his attackers. PW1 contended that prior to the attack he did not have any grudge with accused No.1 or his parents. During cross examination, the complainant explained that at his gate there is no bush and when he saw the attackers he was surprised but not shocked.

PW1 said he used moonlight and also torch light from the attackers whose beams were directed at the robbers on both his right and left. The complainant said when he recorded his statement he said he used moonlight and torch light to identify and recognize his attackers. He further stated that his wife was among the first persons to come to his rescue and he informed her that the attackers were appellant; Thurania, Gitirime, Lucaks Mboroki and Charles Kobia and others. He said that he did not lead police to the arrest of the appellant. PW1 said appellant is his neighbor. That when he came from the hospital he was put on bed rest and the appellant was by then at large.

In his evidence PW2, Romano M'Rithumai M'Rinjuni testified that he is a farmer and knows one Celestino Mugambi and that they are neighbours. That appellant is his nephew being son of Marimba brother to PW2. PW2 recalled that on the night of 2.5.2007 at around 10.30 p.m he was walking to his home from Ngundune market. He was alone. That there was moonlight. He was carrying a walking stick but he did not have a torch. PW2 heard screams of someone wailing as if in pain. He was calling for help saying he was being beaten by robbers. PW2 rushed to where the screams were coming from and he met those who were assaulting the victim. He was able to identify 4 of the attackers. They were Kenneth Mwongera Marimba, Luka Mboroki, Thurania, Gitirime, and Charles Thairora. PW2 stated that he could only see Kenneth Mwongera Marimba in court. PW2 stated the appellant was armed with a rungu and a sword. That the others were armed with rungu and pangas. That the 4 attempted to attack him and he had to run for his dear life. PW2 hid in a maize plantation. The raiders left. PW2 managed to run up to his house. That the next morning he went to the house of Mugambi to check what was the matter. PW2 found that the complainant had been attacked and had been taken to hospital. PW2 came to see complainant after he had left the hospital and found that complainant had several panga cut wounds on head and hands. PW2 was called later to record statement. He stated from where he met appellant and others to where screams were coming from was about 30 metres. He stated that he used moonlight to see the 4 suspects. PW2 stated the people he saw were from his village and he knew them well. PW2 said the suspects were about 20 metres away when he saw them and started running. PW2 admitted he did not go to the home of the complainant the following day. PW2 stated that appellant is not immediate neighbour to the complainant.

On being cross examined PW2, said that he was going to the home of his 2nd wife at the material night. PW2 said he saw the persons when they were 20 metres away and that he did not see any torchlight. PW2 said the persons he saw did not spotlight him. PW2 suspected that the people were robbers because a man was screaming ahead. PW2 testified that he was about to answer to the call for help from the screaming man but when he encountered the robbers, he ran away. He testified that the men wore hats and had clothes tied on their heads and they did not talk to him. PW2 testified that the road where he saw the men is commonly used by people. PW2 testified he suspected it was complainant who was shouting for help because he is familiar with his voice. PW2 testified when he escaped he went to his home and did not take any steps that night to help the complainant.

PW2 said he did not go to Tigania Police Station to report because he was in shock. PW2 testified he did not go to complainant's house that night of attack. He also testified that he was told by Mugambi, the complainant that appellant had been arrested and he helped in identifying appellant at police station. PW2 said appellant was in a group of others. PW2 testified that he has not had land dispute with the appellant.

On the other hand PW3, Geoffrey Nabea introduced himself as a village elder at Limbine village. PW3 testified that he knows complainant but he does not know the appellant. That he knows accused No.2 and that he is the one who had arrested accused No.2. He recalled that on 14.8.2007 at 10.00 a.m. he was called by a villager called Ikunyua who complained that his house had been broken into by a person known to him. That together with a Mr. Mugambi they teamed up with other villagers and arrested accused No.2. Accused No.2 had a wrist watch and a radio. That the watch the accused No.2 had belonged to the complainant, who had been robbed within his area sometimes in May, 2007. PW3 escorted accused NO.2 to Tigania Police Station whereby accused NO.2 was placed in cells and he surrendered the recovered watch. The watch was identified and marked MFI-PW2. The appellant did not cross examine PW3.

PW4 John Mugambi introduced himself as a villager at Tware sub location at Thinyaine location in Tigania District. He recalled that on 14/8/2007 at 10.00 a.m he heard screams of people calling out "thief" "thief" which screams were coming from the house of Mzee Francis M'Ikunyua. PW4 rushed to the scene and found a young man had been arrested. He had stolen from Mr. Ikunyua a radio, bar soap and Kshs.10. PW4 said the young man was accused No.2. PW4 and PW3 restrained members of public from lynching accused NO.2. PW4 testified that PW3 was able to identify the watch that accused No.2 was wearing as belonging to the complainant Mr. Celestino Mugambi. The watch which was Lumax by make was removed from 2nd accused hand by PW3 and PW3 and PW4 escorted accused NO.2 to Tigania Police Station and the accused No.2 was placed in cells. PW4 identified exhibit MFI P2. PW 4 testified accused No.2 was previously known to him. Appellant did not cross-examine PW4.

On the other hand, PW5, Martha Njeri Murumbi introduced herself as a Clinical Officer at Miathene District Hospital. PW5 testified that she knows Dr. Triza who is MOH. That they had worked together for 2years and that she is acquainted with the handwriting and signature of Dr. Triza. That the doctor was attending a seminar at Isiolo and that she was sent to represent the Doctor in Court. That she had a P3 form for Celestino Mugambi which had been completed on 22/8/2007 by Dr. Triza. That it bears the signature of Dr. Triza. PW5 testified that the complainant was assaulted and injured by a group of thugs. The injuries were at the back of head, wound on the nose, upper molar tooth was missing, wound on left arm upper third left forearm had multiple injuries and injuries on the left knee.

PW5 testified that the complainant was examined at Tigania Mission Hospital on 3/5/2007 and referred to Kenyatta National hospital for further management. That the patient had also sustained fracture of ulna bone (left). The degree of injury was assessed as grievous harm. PW5 testified the type of weapons used were both blunt and sharp. PW5 produced P3 form as Exhibit P 1(a), discharge summary from KNH as exhibit P1(b). During cross-examination PW5 testified the complainant did not give the names of the attackers.

PW6, Cpl. Basil Nyongesa, introduced himself as a Police Officer based at Tigania Police Station. He testified that he had known Sgt. John Wanjila who was working at Tigania Police Station. That he made efforts to bond the witness but all in vain. That when he left on transfer the present case was handed over to PW6. PW6 testified that he was informed that the accused were Kenneth Marimba and Patrick Kinyua Mborothi. PW6 was left with wrist watch make Lumax. PW6 produced MFI 2 as exhibit 2. PW6 testified that the watch had been in his custody since it was handed over to him. PW6 testified that the

accused persons were not known to him prior to the file being handed over to him. PW6 testified that vide Occurrence Book No.4 of 3rd May, 2007 at the District Commissioner, Tigania District, a report was made that one Celestino Mugambi had been robbed and attacked. That Police Officers were sent to the scene and confirmed robbery had taken place. That vide OB No.23 of 14.8.2007 Patrick Kinyua was arrested. During cross-examination PW6 testified that nothing was recovered from the appellant. He testified that it was not true appellant's father had a land dispute with the complainant.

On 12th June, 2009 the trial court ruled that each of the accused person had case to answer and upon complying with Section 211 of the Criminal Procedure Code, the appellant opted to give sworn testimony.

The appellant on the other hand, denied committing the offence in his defence. According to the appellant it is not true that he stole from the complainant. The appellant testified that he recalls that on 17/4/2007 he was called by Yusuf Mwenda from Wamba in Isiolo who requested him to supply him with miraa. That he took a vehicle and travelled to Wamba in Isiolo. That he stayed with Yusuf Mwenda until 21/5/2007. That he travelled back home and continued with miraa business. That on 18/8/2007 he left home and went to Kianjai market to have his cellphone charged. Appellant testified that he was confronted by Police Officers who wanted to know the ownership of his cellphone. Appellant did not have a receipt hence he was escorted to Tigania police station. Appellant called for a receipt from his sister. That on 19/8/2007 appellant gave the receipt for the cell phone to a Police Officer called Wanjila who never returned the same back to the appellant. That on 23.8.2007 the said Wanjila called appellant from cells and took him to a room where complainant was, who was asked whether he knew the appellant and he confirmed so. That is when the appellant was told he was being investigated for robbery with violence against the said Celestino Mugambi. That in January, 2007 the appellant's father called him and told him he wanted to sell land to the complainant to which sale the appellant objected pointing out that his mother was dead and that it was from the said parcel of land that they relied on for their subsistence. That bad blood developed between the appellant and his father over the intended sale of land. That the matter was later resolved by elders and he resolved to refund Kshs.5000/- that Mr. Celestino Mugambi, the complainant herein, had paid the appellant's father. Appellant testified that he was surprised to hear the complainant tell the police that he had been robbed him. During cross examination the appellant confirmed that the complainant had known him since birth. That PW2 is his paternal uncle. Appellant confirmed that both PW2 and PW4 identified him. He testified that he did not have document to support that he was at Isiolo. Appellant testified that he had a problem with complainant purchasing land from his father as it would have made him destitute. Appellant denied he was at large.

This court has carefully considered the evidence which was tendered in the lower court together with the judgment by the learned trial Magistrate. We have also considered the submissions by both the learned Counsel for appellant Mr. Ayub Anampiu and Mr. Mungai for State as well as the authorities relied upon by the appellant's counsel.

The learned trial Magistrate in his judgment stated that the issue of identification and recognition had been proved beyond reasonable doubt. He further stated that PW1 and PW2 were able to pick out and recognize appellant at the scene of crime. That appellant was immediate neighbor to the complainant and he was known to the complainant.

That PW2 met robbers at the scene of crime. That he recognized all of them because they are men from his village and that the appellant was son of elder brother of PW2. That complainant used torch light that robbers had as well as moonlight to identify the robbers. That the complainant said the torch light was projected on face of the appellant. In our analysis of this evidence we do find

identification/recognition to have been a major issue.

The evidence by PW1 and PW2 is that the offence was committed at around 10.30 pm or thereabouts. It is admitted that PW1 and PW2 had no torchlight. The complainant at the time of the attack was alone. That he was spotlighted when he was opening his gate with sharp torchlight from his right and left side. Complainant testified that he was able to see 3 men on the right and 4 persons on the left. He did not explain how he was able to see the three men and 4 persons. He did not explain how he was able to use the torchlight to identify the people he mentioned. The complainant herein mentioned torch beam being projected on the face of the appellant as the trial court held. Complainant did to state how far the assailants were when they spotlighted him. The complainant testified at the time of attack he shouted the name of the appellant and another. That amongst those who came to his rescue was his wife Hellen Mukokinya Mugambi, his grandchildren and Romano Rithumani(PW2).

The complainant testified that he used full moonlight also to identify the assailants. PW2 said also he was able to identify the assailant through moonlight. Interestingly enough none of the two witnesses PW1 and PW2 gave evidence on the intensity of the moonlight and its position and whether it shone on the faces of the robbers or their backs when they purportedly identified them.

In is evidence PW2 admitted that he did not go to the scene of crime at the material night nor the following day. PW2 only heard screams coming from about 30 metres away. He suspected that it was Mugambi who was shouting for help. PW2 did not witness the attack of the complainant neither does he know who attacked the complainant. He saw people who were 20 metres away. They had no torchlight nor did they spotlight him. PW2 suspected the people to be robbers because a man was screaming ahead and he ran away. PW2 stated the men wore hats and had clothes tied on their heads.

In case of **Abdullah Bin Wendo & Another – V – Republic(1953)** Vol.XX 166 and Cleophas Otieno Wamunga Criminal Appeal No.20/89 it is held:-

“That evidence of identification should be tested with great care especially when it is known that conditions favouring a correct identification were difficult. The witness who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because of the duration of observation was short. We are doubtful whether the witnesses could have identified the appellant’s face in the manner described by his witness. We are also doubtful how the witnesses were able to identify the appellant in the identification parade. In this respect, the appellant complained that it was easy for him to be picked up because in the parade he was the only one from cell.”

The learned trial Magistrate relied on evidence of single witness. Who was the complainant in this case.

In case of **Joseph Leboi Ole Toroke – V- Republic Criminal Appeal No.204/1987(Nrb)** Court of Appeal held:-

“We too have read the record most carefully but regret to have to say that we have been completely unable to find any evidential basis for the concurrent finding by the trial and first appellate courts that conditions were favourable for seeing and recognizing the appellant. The only evidence as to there being any light in the bar was the complainant’s bare statement in his evidence in chief that there was light. There is no evidence as to what type of light it was or its intensity or the location of its source in relation to the point where it is alleged the attack took place.”

The learned trial Magistrate warned himself of the danger of convicting on evidence of a single witness but failed to test with great care the evidence of the complainant, being a single witness respecting identification. The trial court did not consider other evidence whether circumstantial or direct, pointing to the guilt of the appellant.

The appellant was on 23.8.2007 taken from cells and taken to a room where the complainant was. The complainant was asked whether he knew the complainant and he confirmed. That was when the appellant was told he was being investigated for an offence of robbery with violence against the complainant. That is how we believe the appellant was identified. There was no identification parade. The appellant's evidence on how he was identified was not challenged at all through cross-examination.

The appellant Counsel submitted that material witnesses were not called and the evidence as such was not sufficient to convict. The complainant testified that those who came to his rescue included his wife, grandchildren and Mr. Romano Rithumani. The prosecution called only Mr. Romano Rithumani as PW2. He testified that he did not go to the rescue of the complainant. The complainant's wife was not called. We nevertheless find that though the evidence of the wife of the complainant one Hellen Mukokinya Mugambi would have buttressed the prosecution case, the omission, could not have been the basis for any adverse inference as she came to scene of crime after assailants had gone.

In conclusion on identification and recognition of the appellant, we note the only witnesses who purportedly identified the appellant at the scene of crime were PW1 and PW2. PW2 purportedly met the robbers 30 metres from where the complainant was screaming. It is unclear how the complainant could recognize the appellant by use of torchlight of the robbers when he did have his torch and when all robbers had hats and had tied clothes round their heads and in a dark night. The intensity of moonlight which complainant purportedly used to identify the robber, was not disclosed nor the position of the full moon. In any event no identification parade was carried out in the instance case nor is there any evidence from the investigation Officer as to whether any particular names or description of the robbers were given to them. There is no explanation as to how the appellant was arrested. We cannot in the circumstances find that the appellant identification and/or recognition was without error. The purported identification by PW1 and PW2 cannot be said to be without any doubts. PW1 did not give description of the robbers to police and we wonder how PW1 could identify 7 men flashing torchlight at his face from both right and left at the same time when they had hats and had covered their heads with clothes. Further one wonders how PW2 could identify robbers attacking complainant at night 30 metres away. Furthermore how could PW2 who was in the state of shock and fear identify 4 men who had hats and covered their heads several metres away from him" The complainant was attacked by 6 men and 1 woman and PW2 on seeing 4 men walking along a commonly used public road and without any justification suspected them to be robbers and took off. The question is did PW2 see innocent members of public walking along the public road as he was and wrongfully assumed they were the people who were attacking the complainant and that they were robbers" It is possible that the people PW2 saw were innocent citizen going on their normal duties and suspected them to be attacking the person he had heard screaming for help.

We cannot therefore certainly hold the evidence of single witness(PW1) as regards recognition of the appellant is sufficient enough to convict on a matter of a serious nature as this one which is a matter of life and death. Such evidence must be tested with great care and must be water-tight(see case of **Kamau – V- Republic EA 139 and Republic – V-Eria Sebwato(1960)** EA 174

On the defence raised by the appellant, it is not denied that the complainant is neighbour to the appellant and had known him since childhood. That bad blood had developed between the appellant and

complainant when appellant objected to his father selling family land to the complainant. The appellant offered to refund Kshs.5,000/= paid by complainant as part of purchase price to appellant's father. Appellant was therefore surprised to hear complainant inform police he had robbed the complainant. We find there is good ground for appellant to allege that there had been malice against him. We think that the appellant's defence may not be far-fetched and we agree the trial court should have looked at it with some seriousness. On our part we rather believe the defence rather than the shaky evidence of PW1 and PW2. Briefly we wish to resolve the above doubts in favour of the appellant.

We hereby find that the conviction is not safe. We find that the appeal has merit. We allow the appeal and quash the conviction. The sentence is also set aside. The appellant to be released forthwith unless lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF JULY, 2012.

MUGA APONDI
JUDGE

J. A. MAKAU
JUDGE

Judgment delivered in open court in presence of:

.....State Counsel

.....appellant's counsel

.....appellant

MUGA APONDI
JUDGE

J. A. MAKAU
JUDGE



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