Case Number:	Criminal Appeal 292 of 2011
Date Delivered:	27 Nov 2014
Case Class:	Criminal
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Alnashir Ramazanali Magan Visram, Martha Karambu Koome, James Otieno Odek
Citation:	Peter Mburu Mwangi & 3 others v Republic [2014] eKLR
Advocates:	Mr Ngare for the 1st & 4th Appellants Mr Maragia for the 2nd & 3rd Appellants Mr Omutelema for the Respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	H. C. CR. A Nos. 73, 89, 88 & 91 of 2008
Case Outcome:	Appeal allowed
History County:	Nakuru
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 292 OF 2011

BETWEEN

PETER MBURU MWANGI ……..…….....1ST APPELLANT

JOHN BABU OSOCHI.....2ND APPELLANT

PERMINUS KARANJA MWANGI.....3RD APPELLANT

JOHN KAHUHI.....4TH APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Emukule & Ouko, JJ.) dated 18th November, 2011

in

H. C. CR. A Nos. 73, 89, 88 & 91 of 2008)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court at Nakuru, Emukule & Ouko, JJ. dated 18th November, 2011. The background facts are that on the night of 10th October, 2004, in Nakuru, the family of GMN (PW1) was terrorized by armed robbers who beat up G and her two sons and stole from them money and other household items. The attack happened at about midnight. G had gone to sleep in the said house with two of her grandsons. They slept in separate rooms. They were woken up by a loud bang on the door, and suddenly two people entered the bedroom where G was sleeping. They had a torch which they shone on G and demanded money while threatening to shoot her with a gun they were carrying. G was slapped on the face, and she gave them Kshs. 1,000/- ; they threatened to set her on fire after they doused a towel with paraffin and tied it round her neck. The attackers also took a T. V., radio and a bedcover from G.

2. As the attackers passed through the children's room, they demanded to know whether they were girls or boys, after the children said they were boys, they were ordered to go back to sleep and to cover

themselves. One of the minors', JN, testified as PW2. He recounted that the thugs shone torches all over and when they noticed he was looking at them they covered their faces with stockings. PW2 said he was able to recognize the 3rd appellant whom he described as Douglas Karanja. The other child, JK, who testified as PW 3 said he was able to recognize the 1st appellant, he said he knew him as Peter Mburu.

3. A critical factor in this appeal is that the appellants lived in the same village with the complainants; the 1st appellant is an immediate neighbour to the complainant ,PW1, and their homes are next to each other; however, the complainants neither indicated that they were neighbours to the appellants nor gave the names or description of the appellants to the police; the first time the complainants identified the appellants was at the identification parade but none of complainants was able to identify all the appellants.

4. At the scene of crime, the thugs blindfolded G and forced her to cause her son (PW4 MM) to open for them his house. G knocked the house of PW4 and asked him to open the door. PW4 hesitated but when the thugs numbering about five threatened to kill his mother, he opened for them. They stole his mobile phone, money, a torch, two watches and a panga. They also beat M on the head with a huge stick and he fell down, while lying down, they threatened to kill him. PW4 was able to recognize two of the attackers; this is what he stated in his own words:

"All this time I realized these are people I knew and I easily recognized two but I was too afraid to say anything. In fact one is my friend who we drink with at Kabatini and I would know his voice anywhere even if he were to hide. He is the second accused in the dock. His name is Babu....."

5. The thugs then proceeded to the house of G's other son, DGN, PW6. He heard his name being called and on checking through the window, he saw his mother tied with a rope and in a group of strangers. The thugs ordered him to open the door; he opened and the thugs beat him all over with rungus; they poured paraffin while threatening to burn him; they ransacked his house looking for money. PW6 was not able to identify any of the attackers.

6. The police visited the scene the same night with tracker dogs; the dogs lost scent and the police were not able to arrest the thugs on that day. On 16th October 2004, some suspects were arrested by members of public. Chief Inspector Patrick Odume (PW7) re-arrested the suspects. He conducted an identification parade where the appellants were picked up by the complainants.

7. The four appellants, Peter Mburu Mwangi, John Babu Osochi, Perminus Karanja Mwangi and John Kahuhi were charged with three counts of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***. They pleaded not guilty. The prosecution called seven witnesses who gave evidence in support of the charge. After the appellants were found to have a case to answer they were put on their defence. They all denied having anything to do with the offences they were charged with. The 1st appellant alluded to a quarrel he had had with PW1on the material day when his cows strayed and destroyed her shamba; that PW1 threatened him that she would ensure he sleeps on a cold floor and urinate in a bucket; that PW1 merely implicated him with the heinous act.

8. The 2nd appellant gave a defence of alibi. He claimed he was away in Kakamega having travelled on 9th October, 2004 and returned to Nakuru on 12th October, 2004. He produced bus tickets as exhibits. The 3rd appellant denied the offence and gave a chronology of things he did on the material night; that he was busy slaughtering chicken for sale on the 10th October, 2004. On that day he was delivering chicken to customers throughout the day. The 4th appellant similarly stated that on the material

date he was in Nairobi where he used to work as an electrician. He travelled to Bahati on 10th October 2004 to visit his wife when he was arrested. The 4th appellant called a witness, Ernest Ngigi who testified that he was the one who called the 4th appellant on 15th October 2014, informing him that his wife was sick. However when the 4th appellant arrived to see his wife he was immediately arrested.

9. The trial magistrate convicted the appellants and sentenced them to death. Aggrieved with the conviction and sentence, they lodged a first appeal to the High Court. The appeal on conviction was dismissed but the High Court varied the death sentence and substituted with 25 years in jail from the date of conviction. The High Court judgment provoked this second appeal. By dint of the provisions of ***Section 361*** of the ***Criminal Procedure Code***, only matters of law fall for our consideration.

10. At the hearing of this appeal, the 1st and 4th appellants were represented by learned counsel, Mr. Ngare while the 2nd and 3rd appellants were represented by learned counsel, Mr. Maragia.

11. Counsel for the 1st and 4th appellants relied on one ground of appeal and argued that the learned Judges erred in law in making the finding *to wit:*

"that if the complainants and prosecution witnesses knew the appellants and failed to take the earliest opportunity to give the names of the appellants to the police or let the police know the fact that they knew the appellants, that such omission would not be fatal."

12. Elaborating the ground of appeal, Mr. Ngare submitted that although the complainants knew the appellants as neighbours, they did not give the names of the suspects to the police. It was submitted that the learned Judges erroneously found that failure to give the names or description of the suspects to the police was not fatal. Counsel submitted that the 1st appellant was linked to the offence by PW1 who was a neighbour; that PW3 who is also a neighbour testified that he recognized the 1st appellant by voice. It was submitted that it was inconceivable that both PW1 and PW3 being neighbours to the 1st and 4th appellants were not able to give the names or description of the appellants to the police; that PW7, Chief Inspector Patrick Odume visited the scene of crime the same night shortly after the report had been made and neither PW1, PW2, PW3 nor PW4 stated that the attackers were known to them or that indeed the suspects were their neighbours. Counsel submitted that when the identification parade was conducted, neither PW1, PW2 nor PW3 indicated that they knew the appellants who were their neighbours.

13. Counsel submitted that the 4th appellant was linked to the offence by PW1. That while PW1 identified the 4th appellant at the parade, the said witness never indicated that prior to the incident she knew the appellant; PW3 who participated in the parade did not identify the 1st, 2nd or 4th appellants although they were neighbours; PW3 only identified the 3rd appellant; PW3 admitted in cross-examination that he did not tell the police immediately they came that he was able to identify one of the robbers. It was submitted that the learned Judges erred in coining up a theory as to what happens when a robbery with violence is committed; that the erroneous theory developed by the Judges is captured in the judgment wherein it is stated that the first priority is to get the injured to hospital for treatment and the 2nd priority, if they are not sure, is for the victims to think who may have perpetrated the robbery upon them. Counsel submitted that the theory propounded by the learned Judges is not a principle of law; that a victim is not required to sit and think who may have perpetrated the offence; that the High Court became apologist on behalf of the witnesses. Counsel submitted that PW1 testified that during the robbery she was shocked and not confused; the implication is that PW1 should have given the names or proper description of the attackers; that PW1, PW2, PW3 and PW4 missed three opportunities to give

the names or description of the attackers to the police; that the first missed opportunity was when the police visited the scene, the second missed opportunity was when PW1, PW2, PW3 and PW4 recorded their statements and never gave the names of the appellants who they knew as neighbours; the third opportunity was during the identification parade when PW1 failed to identify the 2nd and 3rd appellants while PW3 failed to identify the 2nd, 3rd and 4th appellants.

14. Counsel for the 1st and 4th appellants filed a list of authorities in support of his submissions. The case of ***Simiyu & another – v – R (2005) 1 KLR 192*** was cited to reiterate the principle that there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises. The case of ***R – v- Alexander Mutwiri Rutere alias Sanda & others – H.C.CR.C No. 15 of 2001*** was cited in support of the submission that if a witness is known to an accused but no name is given to the police, then a subsequent giving of the name is either an afterthought or the evidence given is not reliable. Counsel submitted that the learned Judges of the High Court erred in not following the decision in ***Simiyu & another – v – R (2005) 1 KLR 192*** and ***Lesaran – v- R (1988) KLR 783***.

15. Mr. Maragia for the 2nd and 3rd appellants, urged us to allow the appeal noting that only PW2 and PW4 identified the 2nd appellant; that PW1 and PW3 knew the 2nd appellant but did not identify him when the identification parade was conducted; that all the four appellants were put in one parade and PW1 did not identify the 2nd and 3rd appellants although she knew them; that what is unconvincing is that PW1 testified in court that the 2nd and 3rd appellants were at the scene of crime and that the attackers were masked; how is it possible that PW1 recognized masked attackers and failed to give their names or description to the police" Counsel faulted the identification parade stating that in paragraph (f) of the Police Force Standing Rules, the minimum number of persons in a parade should be eight (8) which is seven persons plus one suspect; that in the present case, it was wrong for the police to put all four suspects in a one parade.

16. The State through the Senior Assistant Director of Public Prosecution, Mr. Omutelema, conceded to the appeal and agreed with the reasons advanced by counsel for the appellants. In addition, the State submitted that the learned Judges erred in not considering the testimony of PW7. the investigating officer who arrived at the scene of crime immediately and none of the victims told him or mentioned that they recognized or knew any of the suspects; that tracker dogs were immediately used and if the victims had told the investigating officer that they recognized or knew the attackers, he would not have wasted time and resources deploying tracker dogs. The State also concurred with the appellants submission that the identification parade conducted was superfluous emphasizing that if the victims knew the attackers, there was no need to conduct an identification parade; that the parade as conducted was flawed to the extent that all the 4 (four) suspects were placed in the same parade and this was irregular; the State further submitted that doubt as to the identification of the appellants exists because PW6, a son to PW1 was not able to identify any of the appellants.

17. We have considered the ground of appeal as raised in the supplementary memo of appeal and noted the submissions by counsel for the appellants and the State. Although the State conceded to the appeal, we are duty bound to examine if an error of law occurred relating to the High Court's finding that the appellants were properly identified as the perpetrators of the crime. This is a second appeal and main point of law is the issue of identification of each of the appellants. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. (See also ***Chemagong –v- Republic (1984) KLR 213*** at page 219).

18. Three critical factors are relevant in this appeal; first what is the legal consequences of the

failure by PW1, PW2, PW3 and PW4 to give the names or description of the appellants to the police or to indicate the names or description of the appellants in their statements yet they knew the appellants; second, what is the legal consequence of failure to give names or description of a suspect at the earliest opportunity and third, whether the identification parade that was conducted was proper considering that all four accused persons were put in one parade.

19. The High Court in considering the issue of failure to give the names of suspects at the earliest opportunity expressed as follows:

"It cannot be either an absolute rule of law, evidence or precedent that in order for the evidence of the complainant to be free from the possibility of error, that the complainant or victim must mention the name or names of suspects in the first instance when reporting the incident to the police or other authority such as the local headman, elder or chief. In our view, the effect of non-disclosure or failure to name the suspects in the first instance must be weighed against the entire evidence of the complainants or victims vis-à-vis that of the defence or the accused."

20. In ***Wamunga –v- Republic*** **(1989) KLR 424** it was stated that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

21. In the instant case, PW7, Chief Inspector of Patrick Odume testified as follows:

"I remember the night of 10th and 11th October 2004. I was woken up by police officers in the report office. They told me there was a robbery at Kabatini near the saw mill. I ran out, took a police tracking dog and police officers Maina (now deceased), PC Mburu and PC driver Ruto. We went to the scene within Kabatini area. It was the home of one Gladys and we found her in her home. We questioned her. She reported that she was asleep in her house when she heard knocks at her door with voices telling her to open or they kill her. She opened. They were a gang of five people who entered the house. They beat her and stole from her money…They showed us the route the thieves had escaped through. We set the dog on the track. He tracked their scent up to a village called Thayu and then lost it. We came back and recorded that report at the police station and we continued with our investigations. On 12th October 2004, I received a report that two of the robbers had been seen at Kabatini Trading Centre. I went to the scene with PC driver Ruto and PC Maina. We did not find them. The informer then directed us to their houses. We went and found the 1st and 2nd accused in the house of the 2nd accused. We arrested them and took them to Bahati Police Station. Time was about 4.15 pm. We searched this house and confiscated radios that we found there that had no documents. However, the complainants were not able to identify their stolen items amongst them. On 16th October 2004, PC Ledude was at the report office when he received a phone call from members of the public to the effect that they had arrested two more robbers at Kabatini Centre. I took the driver and PC Maina and took the station car… Members of the public were there with the suspects who had been tied and were sitting around. The suspects were the 3rd and 4th accused persons. I re-arrested them and took them to Bahati Police Station. I then looked for the complainants. They came on 20th October 2004 and I conducted an identification parade. PC Maina was the investigating officer. I called all the four accused persons from the cells and put them together with other people so that their total came to eleven (11). I explained to them I was conducting an identification parade and they were free to change their position or even clothes….The complainants whom I summoned were five and I kept them outside the police station compound. The other people who were part of the parade were inmates. The investigating officer was not at the scene and I was with another police officer. After

arranging the suspects, the officer went out and called Gladys Muthoni. She came and I asked her to check amongst the 11 persons in the parade and see if she could identify any of them as amongst those who attacked her. She identified the 1st and 4th accused persons by touching… I then called the 2nd complainant John Kibe, he identified the 1st accused by touching. Then I called the 3rd complainant, he observed the persons in the parade and was able to identify the 3rd accused only. I then called the 4th complainant Mosses Nderitu. He went round and was able to identify the 2nd accused. The four accused persons identified at the parade are the ones before court. In cross-examination, PW 7 stated "that parades are conducted for those people who could not be identified at the time the robbery took place. If the complainants told me that they knew you or were able to identify you, I wouldn't have conducted any parade…."

22. From the testimony of PW7 and the statements given to the police by PW1, PW2, PW3 and PW4, none of these witnesses gave the names or description of the suspects to the police. PW1, PW2, PW3 and PW4 all claimed to have recognized the appellants but did not give their names or any description. (**See *Charles Gitonga Stephen – v- R eKLR 2006*).** In the case of ***George Bundi M'Rimberia – v- R Criminal Appeal No. 352 of 2006*****,** it was stated that a more serious aspect arises when a witness fails to mention the name of an assailant at the earliest opportunity as this can weaken the evidence. It is our considered view that failure by PW1, PW2, PW3 and PW4 to give or mention in their statements the names of the appellants weakened their testimony. Being persons known to them, these prosecution witnesses should have given the names or description of the appellants as was stated in the cases of ***Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987*** and ***Juma Ngondia – v- R, Criminal Appeal No. 13 of 1983*** and ***Peter Njogu Kihika & Another – v- R Criminal Appeal No. 141 of 1986***.

23. In ***Lesarau – v- R, 1988 KLR 783***, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In ***R – v- Turnbull (1976) 3 All ER 551,*** Lord Widgery CJ observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. In ***R – v- Alexander Mutwiri Rutere alias Sanda & 8 others (supra),*** the High Court observed that

"PW1 and PW2 and several other witnesses claimed they gave the names of the attackers whom they claimed to know before the incident to the police; the Police Occurrence Book did not have any entry of the names of the attackers, … a reasonable conclusion is that the names of the accused persons were not given because they were not known by the witnesses who therefore lied before the trial court."

24. In ***Simiyu & another – v- R, {2005} 1 KLR 192 at 195***, this Court faced with facts similar to the instant case expressed itself as follows:

"*If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them" In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See R – v- Kabogo s/o Wagunyu 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no*

exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe…. Though the prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification…. In the circumstances, we have no doubt that the appellants' convictions are both unsafe and unsatisfactory."

Further, this Court in ***James Omondi Onyango –v- R – Criminal Appeal No. 27 of 2012***, observed as follows:-

"If indeed Otieno and Odongo had recognized the appellant at the scene as they alleged in their evidence, why was the name not given to the police when Otieno reported the matter the next morning""

25. On our part, we are persuaded by the High Court dicta in ***R – v- Alexander Mutwiri Rutere alias Sanda & 8 others (supra)*** and we apply the decision in ***Simiyu & another – v- R (supra)*** and ***James Omondi Onyango –v- R (supra)*** to the facts of this case. The failure by the High Court to consider quality of the evidence of identification of each of the appellants; failure to weigh that the complainants knew the appellants prior to the alleged incident yet no name or description of the appellants was given to the police by PW1, PW2, PW3 and PW4 leads to our finding that the learned Judges erred in law in re-evaluating the quality of evidence on identification; the Judges erred in that there was no exhaustive appraisal of the evidence tending to determine whether each appellant was connected with the commission of the offences. We find that the identification evidence was not proper and safe.

26. From the evidence of PW7 we note that all the four appellants were put in one identification parade; although this is irregular there is no evidence on record to demonstrate prejudice to any of the appellants. It is advisable that each suspect should be placed in his own identification parade.

27. In totality and guided by the decision in ***Simiyu & another – v- R*** (*supra*) and ***James Omondi Onyango –v- R (supra)*** we hold that the conviction of each of the appellants is unsafe and unsatisfactory. We hereby set aside the conviction and sentence meted upon each of the appellants. We order that Peter Mburu Mwangi, John Babu Osochi, Perminus Karanja Mwangi and John Kahuhi be and are hereby set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 27th day of November, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO- ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR