Case Number:	Criminal Appeal 89 of 1990
Date Delivered:	21 Oct 1992
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Johnson Evan Gicheru, Abdul Majid Cockar, John Mwangi Gachuhi
Citation:	Peter Leo Baraza v Republic [1992] eKLR
Advocates:	Mr Akhaabi for the Appellant Mrs Njogu for the Respondent
Case Summary:	**Peter Leo Baraza *v* Republic** **Court of Appeal, at Nairobi October 21, 1992** **Gachuhi, Gicheru & Cockar JJ A** **Criminal Appeal No 89 of 1990** (An Appeal from the High Court of Kenya at Nairobi (Potter & Mbaluto, JJ) dated the 27th day of July, 1990 in HCCrA No 1995 of 1988) ***Criminal Practice and Procedure*** *– evidence of identification – accused convicted on the basis of visual identification evidence without proper warning – whether conviction safe.* ***Criminal Practice and Procedure*** *– evidence – court's duty to critically analyse the evidence – mere recital of evidence not enough.* ***Criminal Practice and Procedure*** *– defence – duty of the Court to consider the defence put forward by the accused – section 169(1) Criminal Procedure Code.*

The appellant was tried and convicted of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. His first appeal against conviction was dismissed by the High Court hence the second appeal.

During the first appeal the appellant contended that the trial magistrate erred in holding that he was properly identified as one of the perpetrators of the crime charge without considering his defence. The appellant complained that the entire prosecution case depended on the alleged evidence of identification and having disputed his presence at the complainant's home on the night of the attack his defence ought to have been considered critically and mere recital of the evidence adduced before the trial court could not support a bald statement that the prosecution had proved the case against him beyond reasonable doubt without first making any specific finding on such evidence.

The appellant further faulted the first appellate court arguing that it was wrong in upholding his conviction.

Held:

1. Where an appellant is convicted on the basis of visual identification, the trial magistrate or Judge should, before convicting in reliance on the correctness of identification, warn himself of the special need for caution and must give reason for such need bringing out in his own way the possibility that a mistaken witness can be a convincing one.

2. It is not enough merely to recite the evidence adduced before the trial court and without a critical consideration of the same proceed to hold that the prosecution had proved their case against the appellant beyond reasonable doubt.

3. However weak the defence put forward by an accused person may be, there is need for it to be considered and valid reasons for the court's decision on it must be spelt out as is required by section 169(1) of the Criminal Procedure Code.

4. The appellant's defence disputed his

	identification in regard to commission of the offence. Nothing was said about this defence by the trial magistrate. Without its consideration and findings made on it, the issue of the appellant's correct identification remained unresolved. *Appeal allowed.* **Cases** 1. *R v Turnbull & others* [1977] QB 224; [1976] 3 All ER 549 2. *R v Keane* (1977) 65 Cr App Rep 247 3. *Macharia v Republic* [1975] EA 193 4. *Ndege, Maragwa v Republic* Criminal Appeal No 156 of 1964 5. *Ali Abdulla Shivazi & another v Reginam* (1956) 23 EACA 550 6. *Attorney-General v David Marakaru* [1960] EA 484 7. *The Glannibanta* (1876) 1PD 283 8. *Coghlan v Cumberland* [1898] 1 Ch 704 **Statutes** 1. Penal Code (cap 63) section 296(2) 2. Criminal Procedure Code (cap 75) section 169(1) **Advocates** *Mr Akhaabi* for the Appellant *Mrs Njogu* for the Respondent
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-

Case Outcome:	Appeal allowed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Gicheru & Cockar JJ A)

CRIMINAL APPEAL NO 89 OF 1990

BETWEEN

PETER LEO BARAZA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An Appeal from the High Court of Kenya at Nairobi (Potter & Mbaluto, JJ) dated the 27th day of July, 1990

in

HCCrA No 1995 of 1988)

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JUDGMENT

Peter Leo Baraza, the appellant, was on 30th September, 1988 convicted and sentenced to death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code by the Senior Resident Magistrate's Court at Bungoma. His first appeal against conviction to the High Court of Kenya at Nairobi was on 27th July, 1990 dismissed. Hence, the present second appeal to this Court.

On the night of 16th/17th January, 1986, Penina Omwony Mangala, the complainant, was woken up by a group of people who told her that they were policemen. She flashed her torch through the window pane of her bedroom window and, according to her, she saw two people whom she knew. One of them was the appellant. The appellant lived about 100 or 150 metres away from her home. She had known him before.

From her testimony, this group of people was armed with *pangas* and hoes. A member of the group told her that the police were looking for Ugandan women. The group had, therefore, come to her because she had a bar where she employed Ugandan women. She then opened the back door to her house and let in this group of people.

Inside the house was a lighted optimus lamp. The appellant then told her that he and his group of people had been hired to kill her. However, if she had a lot of money her life would be spared. The complainant said that she had no money in the house. Immediately thereafter, the appellant cut her with a *panga* at the back of her head while the other members of the group were beating her on her back with the flat sides of the *pangas* they were armed with. As this was going on, Lorna Arwa Barasa, the complainant's sister, who was in the house for the night, pleaded with the invaders not to kill the complainant. She gave them Shs 1,380/=. Thereafter , the complainant and her sister were led by this group of people towards

Trailer Inn which was owned by the complainant and was situated about two and half kilometers from her house.

Enroute to Trailer Inn, the complaint's neighbours followed behind. Owing to the beatings that the complainant was being subjected to by her attackers, she lost her strength and fell down on the road leading to the Inn. On so falling, the appellant cut her on the upper part of her right ankle. Soon thereafter, her neighbours arrived where she had fallen and the appellant left her. About 10 paces from her, the appellant and three others seriously assaulted one of the complainant's neighbours, Ernest Barasa Omala (PW2). Subsequently, the police arrived at the scene and the attackers disappeared. The complainant and PW2 were then taken to hospital.

According to PW2, amongst his assailants was the appellant whom he had known before and had recognized him in the light of his three-cells torch which he flashed in front of him as he walked. He was cut about six times on the head. He became unconscious and regained consciousness two days later at Kakamega General Hospital.

Evidence of the complainant's sister, PW6, was that after the complainant opened the door to the group of people mentioned above, there was light of a lantern lamp in the complainant's house. Indeed, according to her, while the complainant went to open the door for these people, she went to where the lamp was and raised its wick to give more light. She emphasized to the trial Court that she knew the difference between a lantern lamp and an optimus lamp. To her, on the material night, the light in the complaint's house was from a hurricane lamp. It was by this light that she was able to see the appellant whom she had not known or seen before that night.

The appellant's sworn evidence at his trial was that he knew the complainant who was his neighbour since 1974. On the night in question, he heard screams from the complainant's home at about 11.20 pm. Thereafter, he and other villagers followed the people who had attacked the complainant's home and who were heading towards the complainant's Trailer Inn. As they followed from behind, other villagers confronted these attackers from the opposite direction. Seeing that they were outnumbered, the attackers cut up the complainant, left her on the side of the road and then disappeared. Together with his village-mates, he remained with the complainant where she lay until police arrived and took her away together with PW2 who had also been injured on the head and was lying about 10 metres ahead of the complainant. After remaining at the scene for some time, the police told them to go home and sleep while they (police) continued with their investigations. He went back to his house and slept. On 21st January, 1986 he was arrested when he visited his niece who was in custody at Busia Police Station. According to him, before the material night, he had serious differences with the complainant arising from his having assisted the police in 1984 to trace some blankets, which were recovered from her resulting in her arrest and being charged. That created a big rift between them.

Regarding his relationship with PW2 whom he had known since his youth, the appellant testified that this witness had ganged up with his sister who was married to the appellant's brother and had killed his (appellant's) wife.

The appellant denied having been to the complainant's home on the night of 16th / 7th January, 1986. He also denied having cut her on the head and on the leg. Likewise, he denied having cut PW2 with a *panga* on that night.

In his judgment, the trial magistrate recited the evidence adduced before him. He then observed that the prosecution had proved the case against the appellant beyond reasonable doubt as he had been properly identified in the complainant's house by the complainant and her sister, and by PW2 when the

latter was attacked on the road leading to the complainant's Trailer Inn. From that identification, the trial magistrate found the appellant guilty of the offence with which he was charged and accordingly convicted him.

Amongst the appellant's complaints to the first Appellate Court was the error by the trial magistrate in holding that he was properly identified as one of the perpetrators of the crime for which he was charged without considering his defence. His argument before that Court was that the entire prosecution case against him was dependent on the alleged evidence of identification. Having disputed his presence at the complainant's home on the night of 16th/7th, January, 1986 and having explained his presence on the road leading to the complainant's Trailer Inn in his defence, the same should have been considered and a finding made as to its acceptability or otherwise. To the appellant, mere recital of the evidence adduced before the trial Court could not, in the circumstances of the case before it, support a bald statement that the prosecution had proved the case against him beyond reasonable doubt without first making any specific findings on such evidence.

To this, the first Appellate Judges in their judgment made the following observation:

"But on our own consideration of the record, this is one of those cases where to accept the evidence given by the prosecution witnesses necessarily negatives the defence put forward by the appellant, and to accept that evidence as the learned trial magistrate clearly did is in fact to deal with that defence."

They further said that:

"It would indeed have been better for the learned trial magistrate to deal specifically with these points, but on the particular facts of this case, and on our own consideration of the record, no injustice has resulted, and we do not think that this appeal should succeed on this point".

Before this Court, the appellant's complaints are that the first Appellate Judges were wrong in law in holding that the prosecution case before the trial Court was proved to the required standard; that they erred in law in failing to hold that the trial Court's failure to deal with his defence occasioned him injustice; and that both the trial magistrate and the first Appellate Judges were in error in holding that his identification was proper notwithstanding the circumstances surrounding the commission of the offence for which he was charged.

Mr Akhaabi, counsel for the appellant, contended before us that there were misdirections and non-directions by the two lower courts in regard to the identification of the appellant. These consisted of the trial magistrate's holding that the appellant was properly identified despite the non-consideration of his defence which disputed his alleged identification; and the glossing over this issue by the first Appellate Judges. According to counsel, the judgment of the trial magistrate failed to resolve the issue concerning the appellant's correct identification; and in the absence of specific consideration of his defence, the first Appellate Judges were in error in giving a specious treatment to the said issue. To counsel, therefore, had the two courts below given this issue adequate consideration in view of the appellant's explanation regarding his presence at the scene on the road leading to the complainant's Trailer Inn and in the light of his defence, may be the result of his trial and or first appeal would have been different.

Supporting the decisions of the two lower courts, Mrs Njogu, counsel for the respondent, argued that the case against the appellant was more of recognition than identification of a stranger. To her therefore, the appellant had been properly convicted by the trial magistrate and the decision of the first Appellate Judges upholding that conviction was proper.

This appeal turns on the correct visual identification of the appellant as one of the perpetrators of the offence for which he was convicted and sentenced to death by the trial magistrate. In a case such as the one where the appellant was convicted as aforementioned, the trial magistrate or Judge should, before convicting in reliance on the correctness of identification, warn himself of the special need for caution and must give reason for such need bringing out in his own way the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. At the heart of it all is the quality of the identification evidence. If its quality is good and remains good at the close of the defence case, the danger of a mistaken identification is lessened; but the poorer the quality the greater the danger. In assessing the quality of any such evidence, the trial magistrate or Judge has a duty to use his own experience of the administration of justice. That experience, if extensive, would help him to detect the specious, the irrelevant and what is intended to deceive. See the case of Re*gina v Turnbull and another,* [1977] 1 QB 224. The underlying principle is the special need for caution when the issue turns on visual identification evidence; and the practice has to be the exercise of care which not only contains a warning but also exposes the weaknesses and dangers of such evidence both in general and in the circumstances of the particular case. See the case of Pe*ter Paul Keane v Regina (1*977) 65 Cr App R (CA) 247. To do this, it is not enough merely to recite the evidence adduced before the trial Court and without a critical consideration of the same proceed to hold as the trial magistrate did in the case before him that the prosecution had proved their case against the appellant beyond reasonable doubt. That inadequacy is not cured, as the first Appellate Judges thought, by a mere observation that the record of the trial Court was such that to accept the evidence given by the prosecution witnesses necessarily negatived the defence put forward by the appellant, and that the acceptance of that evidence amounted to dealing with that defence.

However weak the defence put forward by an accused person may be, there is need for it to be considered and valid reasons for the court's decision on it must be spelt out as is required by section 169(1) of the Criminal Procedure Code. See the case of *Macharia v Republic* [1975] EA 193 at page 195 letters H and I. Indeed, in every case, no single piece of evidence should be weighed except in relation to all the rest of the evidence. See the case of *Ndege Maragwa v Republic* EACA Criminal Appeal No 156 of 1964 (unreported). No doubt in some cases, the guilt of the accused person may be so apparent that no other verdict than that of guilty is reasonably possible. On the other hand, if there has been no evaluation of the conflicting evidence and necessary findings of fact do not appear on the record, the conviction will not stand. A decision would, however, be erroneous in law if it is one to which no reasonable Court could come to. See the cases of *Regina v Ali Abdulla Shirazi and Another* (1956) 23 EACA 550 at page 551 and *The Attorney-General v David Murakaru* [1960] EA 484 at page 488 letter D.

Uneasy with the non-consideration of the appellant's defence starkly before them, the first Appellate Judges, notwithstanding their earlier observation, *supra,* noted that it would have been better if the trial magistrate specifically dealt with the points raised in that defence but that on their own consideration of the record, no injustice had resulted. It is not apparent from their record what consideration they accorded the appellant's defence nor do their findings on it appear thereon.

Parties to the cause are entitled, on questions of fact as well as questions of law, to demand the decision of the first appellate court. That Court must appreciate its role of reconsidering the materials before the trial magistrate or Judge, besides considering such other materials as it may have decided to admit, and cannot shun its responsibility of weighing conflicting evidence and drawing its own inferences and conclusions, always bearing in mind that it has neither seen nor heard the witnesses, and must therefore make due allowance in that regard. See the cases of *The Glannibanta (*1896) 1 PD 283 and *Goghlan v Cumberland* (1898) 1 CH 704.

As outlined above, the prosecution evidence before the Court of first instance concerned the appellant's

visual identification as one of the participants in the commission of the offence for which he was convicted as is mentioned above. The appellant's defence disputed his identification in regard to the commission of the said offence. Nothing was said about this defence by the trial magistrate. The first Appellate Judges only gave it a trifling treatment. Without its consideration and findings made on it, the issue of the appellant's correct identification remained unresolved, since that defence conflicted with the prosecution case in that connection.

In the judgments of the trial magistrate, and the first Appellate Judges, there is an absence of warning of the special need for caution when the issue of conviction such as the appellant's turned on visual identification evidence. Indeed, in the two judgments, there is lack of exposure of the weaknesses and dangers of such evidence both in general and in the circumstances of the case the subject-matter of the said judgments. In that particular case, the evaluation of the conflicting identification evidence of both the prosecution and the appellant, and the findings thereon would have achieved this. Neither the trial magistrate nor the first Appellate Judges discharged this obligation. Had either of the two lower courts carried out their respective duties in this regard, we cannot, from the record of the said Courts, say, as Mr Akhaabi rightly pointed out, that the result of the appellant's trial or first appeal would have been the same. We think therefore that the appellant's complaints before us are not without merit. His conviction is unsustainable.

Accordingly, we allow the appeal, quash the conviction and set aside the sentence. The appellant will be set at liberty forthwith unless otherwise lawfully held in custody.

Those then are the orders of the Court.

Dated and delivered at Nairobi this 21st day of October, 1992

J.M GACHUHI

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR