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| Case Number: | Criminal Appeal 483 of 2010 |
| Date Delivered: | 10 Oct 2013 |
| Case Class: | Criminal |
| Court: | Court of Appeal at Nyeri |
| Case Action: | - |
| Judge: | Alnashir Ramazanali Magan Visram, Martha Karambu Koome, James Otieno Odek |
| Citation: | Stephen Kiberenge Alias Zakayo Muriithi & another v Republic [2013] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Nyeri |
| Docket Number: | - |
| History Docket Number: | H.C.Cr. A No. 166 & 169 Of 2005) |
| Case Outcome: | Dismissed |
| History County: | Nyeri |
| Representation By Advocates: | One party or some parties represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CRIMINAL APPEAL NO. 483 OF 2010**

**BETWEEN**

**STEPHEN KIBERENGE *alias* ZAKAYO MURIITHI..... 1ST APPELLANT**

**DAVID MUGUNA..... 2ND APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 29th May, 2008*

***in***

***H.C.CR. A NO. 166 & 169 OF 2005)***

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**JUDGMENT OF THE COURT**

1. ***Stephen Kiberenge alia Zakayo Muriithi*,** the 1st appellant and ***David Muguna***, the 2nd appellant were jointly charged with the offence of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***, Chapter 63 of the Laws of Kenya in the Senior Resident Magistrate's Court at Nanyuki. The particulars of the offence were that on 28th September, 2004 at Karuri Village, Ngusishi Location, in Meru Central District of the then Eastern Province, the appellants jointly with others not before the court while armed with dangerous weapons namely pangas, rungus and a spear robbed Samuel Gitonga Musa of cash, Kshs. 16,400/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Samuel Gitonga Musa.

2. The prosecution called a total of three witnesses in support of its case against the appellants. It was the prosecution's case that on 28th September, 2004 at around 11:00 p.m just as PW1, Samuel Gitonga Musa (Samuel) had just gone to bed when he heard the door to his house being hit. Immediately thereafter, the door was broken down and three robbers entered into his house leaving one robber outside. Samuel got out of bed and was able to recognize the appellants using the hurricane lamp that was on. He testified that the appellants were well known to him prior to the incident.

3. Samuel testified that the appellants were armed with pangas while the other robber who was in the house was armed with a spear gun. The robbers demanded from Samuel money he had earned from selling potatoes. Samuel denied having any money; the 1st appellant cut him on his jaw while the 2nd

appellant cut him on the face and his nose using the pangas they had. Thereafter, Samuel begun screaming and gave the 1st appellant Kshs. 16,400/= being the proceeds from the sale of potatoes. The robbers ran away when neighbours who had been attracted by Samuel's screams begun coming to the scene.

4. PW2, PC Benson Mongayo (PC Benson), while on duty at Timau Police Station received a report from members of the public on 29th September, 2004 that a person had been attacked by robbers at Karuri. Upon arriving at the scene PC Benson found Samuel unconscious and bleeding profusely from his face. Samuel was taken to Nanyuki Hospital where he was admitted. PC Benson testified that after Samuel regained consciousness he told him he had recognized two of the robbers as the appellants who were his neighbours. Samuel testified that he gave the names of the robbers to the police immediately he was able to.

5. PW3, Miricho Ndonge (Miricho), a clinical officer at Nanyuki hospital testified that Samuel had a cut wound on the forehead, fractured skull and that his right nostril was cut off. He assessed the degree of injury sustained by Samuel as grievous harm and produced a P3 form to that effect. PC Benson testified that Samuel led them to a house where they found the appellants. The appellants were arrested and charged with offence of robbery with violence.

6. In their defence the appellants gave sworn statements. The 1st appellant testified that on 27th November, 2004 he was arrested and taken to Timau Police Station where he was charged with robbery with violence. He stated that he was framed by Samuel because of differences that arose between them in a land dispute. He denied committing the offence. The 2nd appellant also denied committing the offence and stated that Samuel had framed him because of grudge he bore against him over a land dispute.

7. The trial court being convinced that the prosecution had proved its case convicted the appellants for the offence of robbery with violence and sentenced them to death. Aggrieved with the decision of the trial court the appellants appealed to the High Court which in its judgment dated 29th May, 2008 confirmed the conviction and sentence issued against the appellants. It is against the said decision of the High Court that this current appeal has been filed based on the following grounds:-

- ***The first appellate court erred in law in affirming the conviction of the appellants based on the evidence of a single identifying witness.***
- ***The first appellate court failed to consider and evaluate the evidence afresh as required in law.***
- ***The first appellate court erred in law as it failed to scrutinize the circumstances surrounding the identification of the appellants.***

8. Mr. J.W Ndegwa, learned counsel for the appellants submitted that the appeal is against both conviction and sentence. He submitted that the learned Judges (Kasango & Makhandia, JJ.) erred in relying on evidence of a single witness to confirm the appellants' conviction by the trial court. In arguing that the appellants' identification was not safe he stated that the complainant (Samuel) did not give the description of the appellants to the police in his initial report. Mr. Ndegwa relied on this Court's decision in the case of ***Mohamed Elibite Hibuy & Another -vs- Republic – Criminal Appeal No. 22 of 1996*** to stress that it was necessary for Samuel to have given the description of the appellants to the police to enable the trial court to test whether his observation was accurate and the consistency of his evidence

on recognition.

9. Mr. Ndegwa argued before us that the issue of the intensity of the light from the hurricane lamp was not interrogated both by the trial court and the High Court. He also stated that the two lower courts did not evaluate or consider when Samuel ignited the lamp to illuminate the room and the size of the room to establish if the recognition of the appellants was proper. He relied on the case of ***R-vs- Turnbull (1976) 3 ALL ER 549.*** Mr. Ndegwa submitted that from the foregoing the High Court failed to evaluate the evidence tendered before the trial court afresh as required by the law. He urged us to allow the appeal herein.

10. Mr. K.M. Lugadiru, Senior Public Prosecuting Counsel, in opposition to the appeal, submitted that the appellants' conviction and sentence were safe. He stated that the case was one of recognition. He argued that the attack took place for some considerable length of period thereby enabling Samuel to recognize the appellants using the light of the lamp in the house. He stated that the appellants were well known to Samuel prior to the incident. Mr. Lugadiru submitted that both the trial Court and the High Court warned themselves of the danger of relying on the evidence of a single identifying witness and carefully weighed the evidence of Samuel. He submitted that Samuel's evidence on recognition was safe and free from error because after he regained consciousness, he gave the names of the appellants to the police as some of the robbers who attacked him.

11. Mr. Lugadiru argued that the High Court evaluated the evidence tendered in the trial court as required by law and made concurrent findings of fact as the trial court. He urged us not to interfere with the said concurrent findings and to dismiss the appeal.

12. We have considered the grounds of appeal, the record of appeal, submissions by counsel and the law. This being a second appeal and by dint of ***Section 361(1)*** of the ***Criminal Procedure Code,*** Chapter 75, Laws of Kenya, this Court's jurisdiction is limited to matters of law only. In ***Chemagong -vs- Republic (1984) KLR 213*** at page 219 this Court held,

***" A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja -vs- Republic 17 EACA 146)."***

13. Both lower courts made concurrent findings of fact on the issue of recognition of the appellants. The issue that falls for our determination is whether the evidence of recognition was proper and safe to warrant the conviction of the appellants. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. In ***Wamunga -vs- Republic (1989) KLR 424,*** this Court held,

***" It is trite law that where the only evidence against a defendant is evidence on 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."***

14. Having perused the record we note that both lower courts correctly cautioned themselves on the danger of relying on the evidence of a single identifying witness in convicting the appellants. Both courts concluded that the evidence of recognition was sufficient to sustain the appellants' conviction.

15. Samuel testified that he was able to recognize the appellants when they entered his house because both of them being his neighbours were well known to him. Samuel gave evidence that he was able to recognize the appellants using the light from the hurricane lamp that was in the house. He testified that the 1st appellant cut him on his jaw while the 2nd appellant cut him on his face and nose using the pangas they were armed with. Samuel also gave evidence that it was the 1st appellant who took the money he had. He testified that after regaining consciousness, he informed the police that he had recognized the appellants as some of the attackers and gave their names. This fact was corroborated by PC Benson. Further, it was not in dispute that the appellants and Samuel were known to each other; and that Samuel led the police to the appellants' house where they were arrested.

16. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566,*** this Court held at page 1568,

***"This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."***

From the foregoing we are of the considered view that the recognition evidence tendered by Samuel was proper and safe. This is because firstly, Samuel had known the appellants for a long time prior to the attack. He was able to give a detailed account of what each appellant did during the incident; and after regaining consciousness he gave the names of the appellants, as some of the robbers who attacked him, in his initial report to the police. Secondly, we find that the circumstances that were prevailing on the day of the incident were such that there was no possibility of error on recognition of the appellants. Samuel testified that the robbery occurred just as he had entered his bed and that there was a hurricane lamp which enabled him to recognize the appellants. From the record we disagree with the appellants counsel's submission that the evidence tendered by the prosecution was to the effect that Samuel woke up to ignite the hurricane lamp during the robbery. From the record it is clear that the hurricane lamp was on when Samuel got into bed and when the robbery occurred. At no point was there evidence that Samuel turned on the lamp during the robbery.

17. On the issue of intensity of the light from the lamp we find that Samuel during cross examination gave evidence as to the intensity of the light by indicating that the lamp had enough light. We are of the considered view that the intensity of the light from the lamp was sufficient to enable Samuel to recognize the appellants when they entered the house and at close range as they attacked him. From the judgment of the High Court it is clear that the court considered the issue and made the following findings,

***"It should be noted that the appellants admitted having known the complainant for many years. On that fateful night the complainant had his hurricane lamp on in his house. He described the light that it emitted a bright. He was able to see both the appellants at close range as they attacked him. They both cut him a panga on his face. We therefore find that the reliance of the complainant's identification evidence to be safe and reliable."***

In ***Maitanyi -vs- Republic (1986) KLR 198***, this Court in, holding that an inquiry as to the nature of light is essential in testing the accuracy of evidence of identification held,

*"**The strange fact is that many witnesses do not properly identify another person even in daylight.... It is at least essential to ascertain the nature of light available. What sort of light, its size and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into.....'*** **See Wanjohi & Others -vs- Republic (1989) KLR 415."**

18. We further find that the case of ***Mohamed Elibite Hibuy & Another -vs- Republic (supra)*** which the appellants counsel relied on to submit that Samuel ought to have given the descriptions of the appellants to the police is distinguishable to this instant case. This is because the cited case involved identification of a stranger as opposed to recognition of a person known to a witness. We find that in identification of a stranger the witness ought to give the description of the attacker to the police to enable the court to test whether his/her observation skills are accurate and whether the evidence on identification is consistent with the description that was given. In case of recognition of an assailant known to witnesses prior to the incident in question, we are of the considered view that description of the assailant by his name is sufficient.

19. We have perused the record and find that the High Court did consider the appellants' evidence. In ***Okeno -vs- Republic [1972] E.A. 32*** this Court held:-

***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R. [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."***

We find that the High Court carried out its duty as the 1st appellate court correctly by re-evaluating the evidence tendered in the trial court and making its own conclusion.

20. Having expressed ourselves as above we find no reason to interfere with the concurrent findings of the two lower courts. Consequently, the appeal herein is dismissed.

***Dated and delivered at Nyeri this 10th day of October, 2013***.

***ALNASHIR VISRAM***

***.....***

***JUDGE OF APPEAL***

***M. K. KOOME***

***.....***

***JUDGE OF APPEAL***

***J. OTIENO – ODEK***

***.....***

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**