**Okuru v Republic**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 10 November 2006

**Case Number:** 112/05

**Before:** Githinji, Waki and Onyango-Otieno JJA

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Appellate jurisdiction – Credibility of witnesses – When the court can interfere with a finding on*

*credibility.*

*[2] Evidence – Identification of witnesses – Standard of proof required before identification evidence is*

*allowed.*

**Editor’s Summary**

The appellant was convicted of one count of robbery with violence contrary to section 296(2) of the Penal Code and was sentenced to the mandatory death sentence. His first appeal to the Superior Court was dismissed. The trial magistrate recognised that the prosecution case was dependent on the identification of the appellant by the complainant and her daughter. After evaluating the evidence, the trial magistrate was satisfied that the two witnesses were credible; that the prevailing circumstances at the material time were conducive to a proper identification and that the two witnesses in fact identified the appellant. The Superior Court reviewed the evidence and was satisfied that the appellant was positively identified by the two. The appellant further appealed on the ground that the judge erred in law by upholding that the purported identification by recognition was positive and conclusive without observing that the circumstances that prevailed were not conclusive to enable a proper identification.

**Held** – It is recognised that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. Thus where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. It is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken. (*Kiarie v Republic* [1984] KLR 739 followed). Although recognition is more reliable than identification of a stranger, such evidence of recognition should be tested carefully seeing that mistaken recognition of close relatives and friends are sometimes made. (*Anjononi and others v Republic* [1980] KLR 59; *Wamunguni v R* [1989] KLR 424 followed). The two courts below found the two witnesses to be credible. The Court of Appeal can only disturb the finding on the credibility of the witness if it is satisfied that no reasonable tribunal would make such a finding. (*Ogol v Murithi* [1985] 359 followed). The Superior Court subjected the evidence to a fresh exhaustive examination and came to the same conclusion as the trial court that the two witnesses were credible and that they recognised the appellant as one of the two robbers who entered into the house. The court is therefore satisfied that the evidence of the recognition of the appellant by the two witnesses was free from any possibility of error and that the appellant was properly convicted.

Appeal dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

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*Anjononi and others v Republic* [1980] KLR 59

*Kiarie v Republic* [1984] KLR 739 – **F**

*Ogol v Murithi* [1985] EA 359 – **F**

*Wamunguni v*