**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)

***East Africa***

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

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

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

*Wamunguni v R* [1989] KLR 424 – **F**

**Judgment**

**Githinji, Waki and Onyango-Otieno JJA:** The appellant Enos Mbanja Okuru was convicted by Senior

Principal Magistrate Nairobi 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.

Page 261 of [2006] 2 EA 259 (CAK)

The complainant Margaret Wahu (PW1) (Wahu) was asleep in her house at Mutuini near Karen on

the night of 12 November 2000. Her daughter Elizabeth Njoki (Njoki) (PW2) was also asleep in a

separate room in the same house. The complainant’s son Geoffrey Muigai Waweru (Waweru) was asleep

in a nearby house in the same compound.

At about 10:30pm Njoki heard noise from the road. She woke up and peeped through the window. She

saw four people enter the compound. The 4 people had torches which had lighted the compound. There

was also moonlight. The 4 people banged the door and called the complainant to open the door saying

that they were police officers and were looking for a thief. Wahu also looked outside through the window

and saw the 4 people. The door of the house was kicked open and two people entered into the house.

They kicked open the door to Njoki’s bedroom and entered into the bedroom. They were armed with

pangas and knives. One of the two people whom Njoki identified as the appellant pulled the other person

away when he saw Njoki saying that she was not the one and that they were looking for her mother. The

appellant and the other person proceeded to the bedroom of Wahu, broke the door open and entered into

the bedroom. The lamp was on and the two people had torches. The two people stole a TV set, a bicycle

and KShs 12 000 from Wahu’s bedroom. Wahu recognised the person who took the TV set, bicycle and

money as Enos, the appellant, who was her former tenant. The appellant slapped Wahu telling her not to

look at him. After the robbers left, Wahu screamed saying that she had identified Enos. Waweru and

neighbours pursued the robbers towards the forest but they did not catch up with them. Waweru and the

members of the public went to the appellant’s home. They found him just entering into his house and

arrested him. The appellant was taken to Wahu’s house and later to Mutuini Police Post.

The appellant raised a defence of alibi at the trial. He stated that he was asleep in his house at the

material time and that he was awakened at midnight by people who asked him to give them their TV set,

radio and bicycle.

The trial magistrate recognised that the prosecution case was dependent on the identification of the

appellant by Wahu and Njoki. 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, she disbelieved the

appellant. The trial magistrate said in part:

“I find the testimony of these witnesses very consistent and corroborative and credible.”

And later:

“I do not believe the defence by accused person. There was no evidence even to remotely suggest that the

complainant had a grudge against the accused person.

I find that the accused’s defence has not cast any doubt on the prosecution case. I find that the

circumstances prevailing at the time he was identified by complainant and PW2 were conducive to a proper

identification.”

The Superior Court reviewed the evidence and concluded:

“Having reviewed the evidence adduced before the trial court, we are satisfied that the appellant was

positively identified by PW1 and PW2 who we find to be credible witnesses.”

Page 262 of [2006] 2 EA 259 (CAK)

The main ground of appeal states:

“(1) That the learned Appellate 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.”

The conviction of the appellant was dependent of the evidence of identification (recognition) by two

witnesses at night. It is recognised that evidence of visual identification in criminal cases can cause

miscarriage of justice if it is not carefully tested. In *Kiarie v Republic* [1984] KLR 739, this Court said

that where the evidence relied on to implicate an accused person is entirely of identification that evidence

should be watertight to justify a conviction. In the same case, the Court stated that it is possible for a

witness to be honest but mistaken and a number of witnesses to be all mistaken.

Lastly, 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. (See *Anjononi and others v Republic* [1980] KLR 59 at 60, *Wamunguni v Republic*

[1989] KLR 424.

In this case, the two courts below found Wahu and Njoki to be credible witnesses. This Court can

only disturb that finding on the credibility of the witnesses if it is satisfied that no reasonable tribunal

would make such a finding (see *Ogol v Murithi* [1985] KLR 359. Wahu testified that when the appellant

was taking the goods from her bedroom, the person behind him had shone torchlight on him. She testified

in part:

“It was the accused who took them. When he was taking them the person behind him show (*sic*) his lights on

him. I saw him. He then slapped me on the face and told me not to look at him. He is called Enos. He is my

tenant in the rooms nearby. They were armed with pangas and a small knife. He called me ‘cucu’ and told me

if I do not give them money he would kill me. The other thug was lighting torch for him so that he could

remove the TV from the carton.”

Wahu testified that she had no grudge with the appellant and that she had detained the appellant’s goods

for failure to pay rent for 3 months.

Similarly, Njoki testified that she knew the appellant before. She said:

“I knew Enos before. He used to be our tenant some time back. He was our tenant some time back. He was

our friend. He used to visit us.”

The evidence of Wahu that she screamed mentioning the name of appellant after the robbers left was

supported by the evidence of Njoki and Waweru. It is Waweru who led the members of the public to the

house of the appellant. The appellant did not, in his defence at the trial deny either that the two witnesses

knew him before or that he used to be a tenant of Wahu.

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.

On our part, we are 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.

Page 263 of [2006] 2 EA 259 (CAK)

In the result, we dismiss the appeal.

For the appellant:

*Information not available*

For the respondent:

*Information not available*

**Otieno**