**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT MERU)**

**(CORAM: NAMBUYE, KIAGE & SICHALE, JJ.A)**

**CRIMINAL APPEAL NO. 74 OF 2014**

**BETWEEN**

**BONIFACE GITONGA ALIAS MUNAA APPELLANT**

**AND**

**REPUBLIC ……..…....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Meru (Musyoka, J.) dated 3rd December, 2013* **in H.C.CR.A No. 182 of 2010)**

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**JUDGMENT OF THE COURT**

The complainant, Jericah Arambu (Jericah) was viciously attacked and robbed on the night of 3rd and 4th July, 2009 at around 2:00 a.m. in her one roomed house at Kabaone Market while in the company of her three minor grandchildren. As a result of the attack she lost her left eye and several teeth.

The prosecution's evidence was that on the material night while Jericah was attending to her sick grandchild, she heard whispers outside her house followed by three loud bangs on her door which ultimately gave way. Immediately, she switched on her torch, pointed it towards the door and saw three robbers entering. It was her evidence that she was able to recognize the appellant and two of his accomplices who were known to her prior to the incident.

The appellant ordered her to stand up while they ransacked the house and stole Kshs. 27,000/= which was under the mattress. Thereafter, the robbers proceeded to inflict severe injuries on her which included cuts on her head and face and a stab wound on her left cheek using a panga and an axe. They fled and left her bleeding from her wounds. Meanwhile, PW2, Emelda Kagwiria (Emelda), who was in the adjacent house heard the commotion and was able to recognize the appellant's voice when he demanded for money from Jericah. After the assailants left Emelda and Jericah screamed and neighbours came to the scene.

Subsequently, the appellant and his co-accused were arrested and charged with the offence of robbery

with violence contrary to ***Section 296(2)*** of the ***Penal Code***. The particulars of the offence were that on the night of 3rd and 4th July, 2009 at Kabaone Market in Meru Central within the then Eastern Province the appellant jointly with others not before court robbed Jericah of cash Kshs. 27,000/= and immediately after such robbery used actual violence on her.

In his defence, the appellant gave a sworn statement and called one witness, Jamleck Mutethia, who also had been charged with an unrelated offence of robbery with violence. He denied attacking Jericah and maintained that the charge against him was fabricated following a physical altercation between him and Jericah's son. He gave a defence of alibi to the effect that on 3rd July, 2009 at around 8:00 a.m. he left for Mulika which was about 10 km from Kabaone to saw timber. He was in the company of Mutembei, Gakira, Musa and others; they worked up to 6:00 p.m. and spent the night in a lodging; he travelled back the following morning to Kabaone where he was arrested.

Upon considering the aforementioned evidence, the trial court acquitted the appellant's co-accused and found that the prosecution had established that the appellant was one of the attackers but had failed to prove the theft of Kshs. 27,000/= on the material day. Hence the trial court convicted the appellant of a lesser offence of causing grievous harm contrary to ***Section 234*** of the ***Criminal Procedure Code*** and sentenced him to life imprisonment. Aggrieved with that decision, the appellant preferred an appeal to the High Court which was dismissed. Unrelenting the appellant has filed this second appeal based on his home made grounds as well as supplementary grounds of appeal filed by his counsel.

Mrs. J.K. Ntarangwi, learned counsel for the appellant, faulted the learned Judge for not properly re-evaluating the identification evidence. She argued that even in a case of recognition, as in this case, the two courts below had a duty to test it carefully. In her view, the recognition evidence was not sufficient to warrant the appellant's conviction because the complainant never gave evidence of how long she observed the assailants in order to recognize the appellant. All she said is that she pointed her torch towards the door and switched it off once the assailants entered the house. Further, she did not testify whether any light from the robbers' torches fell on them as they ransacked the house. She submitted that despite the complainant indicating she gave the names of her attackers, they were never recorded in the occurrence book. She also submitted that the trial court correctly discounted the evidence of PW3, a child of tender years.

Citing this Court decision in **JUMMANE MOHAMED HASSAN –VS- R** – Mombasa Criminal Appeal No. 238 of 2004 (unreported) Mrs. Ntarangwi submitted that the fact that only the appellant's co-accused were acquitted despite Jericah's allegations that she recognized the appellant and his co-accused during the incident exhibited the trial court's discrimination towards the appellant.

She also faulted the learned Judge for not properly testing the evidence of voice recognition. According to her, Jericah never testified that the appellant demanded money from her despite Emelda alleging she recognized his voice when he demanded money from the complainant.

She argued that the learned Judge failed to consider that the trial court had shifted the burden to prove alibi to the appellant contrary to the law. Mrs. Ntarangwi urged this Court to look into the sentence issued against the appellant which as we understand she claims is excessive in the circumstances. According to her the two courts below did not take into account the principles of sentencing.

Mr. M. K. Mungai, Prosecution Counsel, in supporting the appellant's conviction, submitted that the main issue was that he was placed at the scene by Jericah and Emelda. According to him, Jericah did not have to repeat the words the appellant said to her during the incident because she visually identified him. The fact that the said witnesses' referred to the appellant as 'Muna' meant they knew him well.

Further, the fact that Jericah gave the name of the appellant to Emelda, and her son who came first to the scene clearly showed she had positively recognized him. Mr. Mungai submitted the earliest opportunity she had to report to the police is when they visited her in hospital the following day. He maintained that the sentence issued was legal and there was no basis for interference by this Court.

We have considered the record of appeal, submissions by counsel and the law. This being a second appeal and by dint of ***Section 361*** of the ***Criminal Procedure Code***, we are restricted to address ourselves on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **MWITA –VS- R** [2004] 2 KLR 60.

The evidence against the appellant was that of recognition. Evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In the oft-cited case of **R -VS- TURNBULL &OTHERS** (1976) 3 All ER 549, Lord Widgery C.J. stated:-

***"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance"***

***……***

***Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

In this case it was Jericah's evidence that she was able to recognize the appellant and his co-accused during the incident. However, the appellant's co-accused were acquitted while he was convicted on the evidence of recognition. Was this discriminatory to the appellant as alleged" In **PETER NGIGE WERU –VS- R** - Criminal Appeal No. 51 of 2000 this Court held,

***"Where one witness purports to identify two people under very similar circumstances and purported identification of one is rejected, then it would require very special circumstances to accept his identification of the other person."***

We note that in the appellant's case as opposed to his co-accused, PW1's recognition evidence was corroborated by PW2 who testified that she heard the appellant's voice when he demanded money from PW1. In **KARANI –VS- R (1985)** KLR 290, this Court held at page 293:

***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."***

From the record it is clear that both Jericah and Emelda shared a common wall and hence the latter could hear what was going on in the former's house. Emelda testified that she knew the appellant very well because she used to interact with him on numerous occasions and was therefore familiar with his voice. Her evidence was uncontroverted. We concur with the two courts below that the voice recognition was positive and free from error.

On the issue of alibi it is indeed the law that there is no burden cast on an accused person to prove one and the burden lies with the prosecution throughout to negate the alibi. See **KIBALE –VS-UGANDA**[1999] 1 EA 148. In **SAIDI –VS- R** [1963] EA 6:

***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."***

The trial court treated the evidence by Jamleck with caution and found that there was no evidence in support of the appellant's alibi. From the foregoing evidence we find that the appellant was positively placed at the scene by the evidence of Jericah and Emelda. Consequently, we find that the trial court in dealing with that aspect rightly weighed the alibi defence against the prosecution evidence and ended up finding that alibi defence was bound to founder. See the decision of this Court in the case of **WANG'OMBE –VS- R** (1980) KLR 149.

Last but not least the appellant was convicted for the offence of grievous harm under ***Section 234*** of the ***Penal Code*** which attracts a sentence of life imprisonment. As noted herein, the appellant's counsel did not challenge the sentence of life imprisonment issued as illegal but argued that it was harsh and excessive. Second appeals to this Court are on points of law only and the severity of sentence is expressly a matter of fact. It is clear that an appeal against the severity of the sentence as opposed to legality of sentence is not maintainable. See ***Section 361 (1) (a)*** of the ***Criminal Procedure Code*** and **PAUL TANUI –VS- R** (2010) eKLR.

The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed.

***Dated and delivered at Meru this 17th day of December, 2015.***

***R.N. NAMBUYE***

***……***

***JUDGE OF APPEAL***

***P.O. KIAGE***

***……***

***JUDGE OF APPEAL***

***FATUMA SICHALE***

***……***

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**