IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & SICHALE, JJ.A)

CRIMINAL CASE NO. 43 OF 2015

BETWEEN

SAMUEL KARANJA WANJIRU…………………………..APPELLANT

VERSUS

REPUBLIC……………………………..………………RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi Ogola & Kamau JJ. Dated 12th November, 2013

in

HC. CR. A. No 277 of 2009)

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JUDGMENT OF THE COURT

[1] Samuel Karanja Wanjiru, appellant was charged before the Chief Magistrates' Court at Thika with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The appellant was tried, convicted and sentenced to death. His appeal before the High Court was unsuccessful; it was dismissed, with the result that both the conviction and sentence were upheld. This is a second appeal and that being so, this Court 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 their findings. See **Chemangong -vs- R** [1984] KLR 611. In **Kaingo -vs- R** (1982) KLR 213 at p. 219 this Court said:-

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at 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 C/O Karanja - vs- R (1956) 17 EACA 146)."

[2] The memorandum of appeal raises a total of 6 grounds of appeal but during the hearing of the appeal, Mr. Wandugi learned counsel for the appellant broke them down to three legal issues. That is identification of the appellant, which counsel submitted was not conclusive; that it was the appellant who committed the offence in light of the evidence on record; there was no description given to the police; that it remains a mystery how the complainant was able to identify the appellant 10 days later merely by meeting with him; the trial magistrate shifted the burden of proof by expecting the appellant to exonerate himself; that he did have a twin brother who resembled him, and who perhaps committed the offence. The leaned trial magistrate was also faulted for making certain assumptions which are not supported by the evidence; failing to evaluate the evidence on the facts presented in court and to resolve the inconsistencies in the evidence; failure to consider the alibi defence which was plausible in the circumstances of the matter as argued by counsel for the appellant.

[3] On the part of the prosecution, Mr. Wanyonyi, learned senior principal prosecution counsel opposed this appeal; he submitted that the case was proved to the required standard; that the appellant was arrested by the complainant about one week after the robbery; when the complainant met with the appellant, he recognized him as the person who pretended to be an employee during the robbery; both courts below were satisfied there was no possibility of a mistaken identity. Regarding the inconsistency of the evidence of identification, counsel for the prosecution submitted that it was a minor issue as the stolen motor vehicle was not in issue; the description of the firearm that was used to threaten the complainant was given by a lay person who may not have known the difference between AK 47 and a pistol; moreover the complainant's memory on certain details may have faded as he was giving evidence one year after the event. Counsel for the prosecution asked us to dismiss the appeal.

0. A brief background of the matter will suffice to put this judgment in perspective. The evidence against the appellant was given by two witnesses, that is the complainant and the police officer who received the complaint. There are no investigations that were carried out as the appellant was arrested by the complainant and was taken to the police station, after which PW2 merely preferred the charges.

0. This is how the whole case played out before the trial court. On 7th July, 2008, in Thika, Samuel Mburu Macharia PW1, testified that he used to hire out his motor vehicle registration no KYU 746 to transport goods. At about 4pm on the material day he was approached by a customer who requested him to transport for him some iron sheets from Thika Town to a place called Gatuanyaga. They agreed on the charges, but when they reached another place called Gatitutu, the said customer requested PW1 to pick his employer who loaded some fencing poles in the same vehicle. The customer guided PW1 to a place in Gatuanyaga area, where there was a house under construction. They found another person at the site, who pretended to direct PW1 on how to park the vehicle so that they could offload the goods.

[6] As PW1 was turning the vehicle, the person who claimed to be the employer of the customer pouched on him, holding him by the neck, the one who pretended to be the customer came round and stopped the engine of the vehicle; the person whom they found at the site drew a pistol and they all started beating PW1. They robbed him of Kshs. 5,000/= and the motor vehicle which they drove away after tying PW1 with ropes, and thereafter abandoning him in some thicket. PW1 said he managed to

untie himself after a while and made a report at Thika police station. The motor vehicle was never recovered and the police did not make any arrests until o n 15th July, 2007 (perhaps there is a mistake regarding the year) when PW1 said he saw the person who pretended to be the customer or employee during the robbery, on seeing him, he recognized him as one of the robbers. The person (appellant) was in the company of a girl and he appeared to be drunk. When PW1 confronted this person, (appellant) he started running away, PW1 said he gave chase and with the help of some people they arrested the appellant and took him to a police post where he was locked up and later was transferred to Thika police station where PW1 had reported the incident.

0. At Thika police station, PC Maina Muchiri PW2 testified that on the 7th July 2008, he received a complaint from PW1 of how he was robbed of motor vehicle pick up registration no KYB 788. On 17th July 2008, PW1 with members of public brought a person to the police station, who he suspected had participated in robbing him. PW2 re-arrested the appellant and charged him with the offence of robbery with violence. The particulars of the charge stated as follows:-

"On 7th July 2008, at Gatuanyaga village in Thika District within central province jointly with others not before court being armed with an offensive weapon namely AK 47 riffle, robbed of Stanley Mburu Macharia of his Toyota Hilux Pick UP KYB 788, cash Kshs. 5000/ =, one mobile phone Nokia 1600 all valued at Kshs. 510,000/= and immediately after such robbery used physical violence on the said Stanley Mburu Macharia."

[8] After considering the above scanty evidence by the two prosecution witnesses, the learned trial magistrate was satisfied; the appellant had a case to answer and placed him on his defence. In his defence, the appellant gave unsworn evidence; he gave a chronology of how he was arrested on 17th July 2008, near December Hotel, by a person who stopped him and asked him whether he was the one who had leased his pick up on the 7th and later stole it. The appellant denied having been the one, and an augment ensued and upon the intervention by members of the public, the appellant was taken to a nearby police post where he was locked up for 2 days before he was transferred to Thika police station, and he was charged with the offence of robbery with violence. The appellant denied the offence and stated that on the day and time he was alleged to have committed the offence, he was working on his farm at Kiahuhia Estate, where he was watering his crops and therefore he was not at the scene of crime.

0. Being convinced that the prosecution had proved its case; the trial court convicted the appellant for the offence of robbery with violence and sentenced him to death. Aggrieved with the said decision, the appellant filed an appeal in the High Court. The High Court, **(*E. Ogola & J. Kamau JJ.*)** vide a judgment dated 12th November, 2013 upheld the conviction and confirmed the sentence meted out by the trial court. That decision is what has provoked this second appeal.

0. We have considered the record of appeal, the grounds of appeal, able submissions by counsel and the law. Counsel for the appellant, in his address to us argued that the circumstances under which the appellant was arrested were not safe to sustain a conviction that is free from error. Counsel for the appellant argued that the appellant was convicted based on evidence by a single identifying witness. The issue of identification is a legal one, and it will

definitely lead us to the question of whether the appellant was positively identified as one of the perpetrator(s) of the offence of robbery that took place at Gituanyaga area within Thika on the material day.

[11] It is evident the conviction of the appellant for the offence of robbery with violence was based on the evidence of PW1 because PW2 did not witness the offence, nor did he carry out any investigations. He merely re- arrested the appellant after he was brought to the police station by PW1. The appellant was solely identified by the complainant several days after the robbery when they met and the appellant and said he was able to recognize him. There is no evidence of how he was able to recognize the appellant, either by physical features, or by way of speech. These details are lacking in evidence. What is captured in evidence was what PW1 said during cross-examination;-

"**I found police officers who helped but they did not trace the people. I then wrote a statement. I saw the person who robbed me. We had sat with the person for more than 1 hour. The person I saw was drunk. I did not write that in the statement. The police did not ask me whether the person was brown or black. I did not give any description. I was robbed of 5,600/= and a phone. I arrested you after 10 days. I did not find you with anything that had been stolen. ..**"

[12] It is not clear from the evidence how PW1 was able to recognize the appellant. As stated above PW1 did not adduce evidence of how he was able to recognize the appellant, was it by physical appearance, certain features or speech; this was further compounded by the fact that there was no description given to the police; in this regard, we are persuaded the evidence of identification was not free from error. This is the kind of evidence that required corroboration to rule out mistaken identity. It was PW1 who arrested the appellant; bearing in mind he had not given prior description of his assailant to the police, that could be used to rule out the possibility of mistaken identity and failure by the police to carry out any investigations in the matter, lends credence to the submissions by counsel for the appellant that, there was a possibility of mistaken identity. We reiterate the well settled principle of law that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested.

[13] In this case reliance was placed on evidence of a sole identifying witness to convict the appellant. Although the learned trial magistrate was aware of such dangers and duly warned herself, the law required the evidence of PW1 to be weighed with the greatest care. It is not enough just to reiterate a warning, the two courts below were mandated to rule out a possibility of an error and to satisfy themselves that in all circumstances, it was safe to act on such evidence of identification, particularly considering the arrest was effected by the complainant 10 days after the robbery and there was no description given of the assailant and no investigations were carried out. Both courts below did not establish whether the identification based on recognition was free from error; even if PW1 said he was with the appellant for 1 hour, what in particular stuck in his mind about the appellant" In **Wamunga vs. Republic** (1989) KLR 424, this Court held,

"... it is trite law that where the only evidence against a defendant is evidence of 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] To compound matters more; while the learned trial magistrate was evaluating the evidence, she made the following observations which counsel for the appellant contends, and rightly so, amounted to shifting the burden of proof.

"Therefore unless the accused can say he had an identical twin (sic**) I believe that the complainant was able to identify him that evening and that is why he saw him ten days later (**sic**) he was able to recognized him and had have him arrested."**

The learned trial magistrate was also faulted for conjuring up explanations to justify conclusions that were not borne out of evidence such as the following remarks that she made in the judgment;-

" I have no reason to doubt the robbers were armed (sic) **the complainant saw one saw one of them had a gun which I believe was used to threaten him to silence... During the period I believe there was no intimidation they were communicating as friends would communicate so I believe it was possible for him to keep in his memory their physical appearance..."**

[15] With tremendous respect to the two courts below, those conclusions were predicated on the wrong premise. It is obvious to us the learned trial magistrate read more from the evidence than what was adduced before her which went as far as filling the gaps that the evidence of PW1 left hanging. See the case of **BHATT V R** [1957] E.A P 332 where it was said;-

"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if at the close of the prosecution, the case is merely one;-

"Which on full consideration might possibly be thought sufficient to sustain a conviction""

"This is perilously suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case;

Nor can we agree that the question whether there is a case to answer depends only on whether there is;-

"Some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence."

[16] The last issue was the contention that there were several inconsistencies that went beyond what is curable under the provisions of **section 382** of the Criminal Procedure Code. It is common ground that the particulars of the charge indicated the appellant was armed with an AK 47 riffle, while PW1 said one of the robbers was armed with a pistol. The other inconsistency was in regard to the registration of the motor vehicle that was described in the charge sheet as KYB 788 while PW1 described the same vehicle as KYU 746. These inconsistencies were well reconciled as the two courts below found the ingredients of robbery with violence were satisfied in that the assailants were more than two; moreover, even if the

assailants were not armed with dangerous weapons, the offence was committed. Secondly the complainant was also robbed of money and mobile phone; thus even if the motor vehicle can be discounted; PW1 was nonetheless robbed of other items. We have also taken the general guidance of the applicable tests in determining the weight to attach to discrepancies arising from the evidence in criminal matters as articulated in the case of **Joseph Maina Mwangi -vs- R.** Criminal Appeal No. 73 of 1993 wherein this Court held:-

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code *viz* whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.,,

[17] Although the last ground of appeal fails, we have indicated there is merit in the other two grounds of appeal which adequately demonstrate the evidence of identification against the appellant was not safe to sustain a conviction. Accordingly, the appeal is allowed, the conviction is quashed and the death sentence meted against the appellant is set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 9th Day of December, 2016.

ALNASHIR VISRAM

JUDGE OF APPEAL

M.K. KOOME

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

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