REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 308 OF 2013

DAVID KYALO JUSTUS……APELLANT

VERSUS

REPUBLIC……RESPONDENT

(An appeal from conviction and sentence in Criminal Case No. 2278 of 2009 of the Chief Magistrates' Court at Thika, , Hon. M. A. Gitonga, (SPM) delivered on 25th November 2010)

JUDGMENT

1. The Appellant was charged alongside Dickson Muthini Mwangangi and Boniface Makau Ndeto 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 6th and 7th May 2009, at Kangonde Location in Masinga District within Eastern Province, jointly with others not before court, while being armed with dangerous weapons, to wit, axes, *rungus* and *pangas* they robbed Daniel Mwanzia of two DVD players, four mobile phones and cash,Kshs. 57,000 all valued at Ksh. 89,700/= and immediately before the time of such robbery used actual violence to the said Daniel Mwanzia Mbulo. At the close of the trial, the Appellant, who was the 3rd accused was convicted and sentenced to death while the 1st and 2nd accused persons were acquitted.

2. Dissatisfied, the Appellant has appealed to this Court on four grounds listed in the amended Memorandum of Appeal, as follows: Firstly, that the trial Magistrate erred by relying wholly on the evidence of identification by recognition yet failed to find that the same was not affirmatively supported by the provisions of Section 137(d) of the Criminal Procedure Code. Secondly, that the trial Court made a finding on the basis of defective charges; thirdly, that the trial Magistrate shifted the burden of proof to the Appellant and fourthly, the trial Court failed to consider the Appellant's defence without good reasons.

3. On the ground of identification, the Appellant faulted the trial Court's reliance on the evidence of **PW2** and **PW3**, a husband and his wife, when the source of light was not reliable to aid positive identification and where the condition of lighting was not described by the victims. The Appellant submitted that the said identification was not supported by cogent evidence and prompt first report noting that **PW3** who was not injured during the incident did not record her statement soon after the incident.

4. The Appellant also challenged his arrest, questioning why the police were not led to his home by PW3 to effect immediate arrest, which was not effected until 11th may 2009. The Appellant termed the naming of the Appellant as one of the attackers by **PW3** as misleading because it was not in the first report. Citing his defence, the Appellant submitted that he was not arrested even

after visiting **PW2** after the robbery incident during which visit, **PW2** indicated that he did not know his attacker. The Appellant also noted that the witness statements were recorded after the arrest and further that none of them described for how long **PW2** was attacked, the position and size of the moon. This, submitted the Appellant, coupled with the failure to promptly name and arrest the assailants establishes doubts as to the possibility of positive identification.

5. Opposing the Appeal, Mr. Naulikha for the State submitted that even if the incident happened at 11.00 pm, there was no issue of mistaken identity for the reason that the witnesses who identified the appellant were the victims of the incident and the Appellant was well-known to them. The learned State Counsel submitted that **PW3** was close to the Appellant and was able to positively identify him. He added that there was bright moonlight to enable positive identification.

6. The second ground was with respect to the charge sheet. The Appellant submitted that the charges of the offence of robbery with violence should be derived from Section 295 as read with 296(2) of the Penal Code as opposed to Section 296(2) which only describes the penalty and not the offence. Mr. Naulikha dismissed this assertion and noted that even if there were any defects, they were not prejudicial to the Appellant who understood the charges he was facing and conducted his defence accordingly.

7. The ingredients of and the penalty for the offence of robbery with violence are set out by **Section 296(2)** of the **Penal Code** which reads:

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

Therefore, it is not true as submitted by the Appellant that the charges as drafted were defective. Section 295 provides for the offence of robbery which is distinct from the offence of robbery with violence. This ground therefore fails and is dismissed.

8. It is the Appellant's submissions that the trial Court in dismissing his defence of alibi shifted the burden of proof to the Appellant. The Appellant challenged the prosecution for failing to verify the alibi pursuant to Sections 212 and 302 of the Criminal Procedure Code. He noted that being in custody, he could not be in a position to access persons who would support his alibi. The Appellant faulted the trial Court's evaluation of the evidence as partial and not exhaustive in reaching a finding of his guilt.

9. In response, learned Counsel for the State submitted that the Appellant's assertion was not factual for the reason that a perusal of the record shows that the Court clearly considered the evidence of both prosecution and the defence, applied the law and made its findings. The learned State Counsel added that the defence was considered against the prosecution evidence which was strong and overwhelming to displace the defence. He submitted that the ingredients of the offence were met and that the evidence adduced was consistent, overwhelming, credible and corroborative in all material terms.

10. The identification of the Appellant hinged on the testimonies of **PW2** and **PW3**. The arrest of the accused persons, according to the testimony of **PW5** were made on the information given by witnesses who said they could recognize the robbers who were known to them. On the identification of the Appellant, **PW1** acknowledged that he did not see him when cross-examined by the Appellant. Although during cross-examination by the 2nd accused, **PW1** stated that he was able to identify three of the attackers, he reiterated in re-examination, that he identified only the 1st and 2nd accused persons.

11. **PW2** on his part stated that he identified the Appellant as the person who accosted and injured him when he went out to answer the distress call of his sons. He testified that he saw him well

since there was moonlight. It is however, not clear from his evidence if the witness mentioned the name of the Appellant when he recorded his statement with the police. In cross-examination, **PW2** reiterated that the Appellant who was next to him restrained him from going to his son's house. **PW3** on her part stated that she was *able to identify the 3rd accused a*s the one who attacked her husband. She added that she was very close and could see him well in the bright moonlight and the Appellant was well-known to her.Further, **PW3** stated that she named the Appellant in her statement to the police.

12. The trial Court addressed itself to the circumstances under which the accused persons were identified. Even after assuring itself that the identification was by recognition and therefore more reliable, the trial Court cautioned itself of the conditions as being unfavourable for identification thus: The Court addressed itself thus:

> ***"Of course it is clear that the hour the attack took place was late in the night. Being night time the conditions for identification could not have been favourable if indeed the complainant was using the moonlight to see…"***

13. The Court dismissed the identification of the 1st and 2nd accused persons. However, with respect to the Appellant, the court reasoned he was identified by two persons even if it was at night. In her words:

> ***"As for the 3rd accused, the 2nd witness (PW2) said he saw the 3rd accused using moonlight. That he recognized the 3rd accused, as he is the one who cut him. PW3 also said she recognized the 3rd accused as the one who cut her husband. She said she was close and there was moonlight…"***

14. With such conditions of identification, it is important that the trial Court cautions itself as to the possibility of mistaken identity even when the identification is by recognition. We find that the trial Court did correctly warn itself to this extent. However, with respect to the condition of lighting, it is important that the Court makes a finding as to the brightness of the light that can support proper identification. The court noted there was moonlight. The fact the Appellant was identified by 2 persons rendered credence to the identity of the person in otherwise difficult circumstances.

15. However, there is also the issue of the defence raised by the Appellant, a consideration of which will address the 3rd and 4th grounds. The Appellant directed us to the remarks of the trial Court while considering the defence of the Appellant. He stated that the Court's evaluation of the evidence was partial. The Appellant in his defence stated he had previously been in a fight with **PW2**. He also mentioned having been in conflict with one Corporal Chesiro who was involved in his arrest. While the trial Court did consider the defence raised by the 1st and 2nd accused persons, she did not address herself to this line of defence raised by the Appellant. The Appellant had also testified that on the material day and night, he had travelled to Nairobi, to attend an interview at Tusky's Supermarket and spent the night at his father's house in Nairobi.

16. Further, with respect to the alibi raised by the Appellant, the Court noted that the Appellant ***"… called no witness to defend his alibi."*** further on, the Court added "***his defence was also hanging since he did not call any witness to satisfy the Court that indeed he was in Nairobi on the material night."*** The Court, therefore found the prosecution had made its case against the 3rd accused.

17. On the issue of the burden of proof, the age-old pinnacle is that the burden remains in the prosecution to prove the allegations made against the accused person. The burden only shifts in certain circumstances recognized by the law. By reasoning as above, the trial Court indeed shifted the burden of proof to the Appellant, thereby acting against the law.

18. In the case of ***Wangombe v Republic*** **[1976-80] 1KLR 1683,** the Court of Appeal addressed itself to the treatment of defence of alibi by a court trying a case. In this case, the appellant who was facing a charge of robbery with violence, made an unsworn statement in court in which he raised an alibi, and did not call any witness. The Court reasoned thus;

> ***"The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however, punctilious the prosecution or the police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue.***

Citing Udo Udoma, CJ in ***Ssentale v Uganda*****, 1968 EA 365,** the Court added,

> "***if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it****."*

19. It was not the duty of the Appellant to call his witnesses to support his defence. The duty of the court, in this case was to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the Appellant. As the Court in ***Wangombe v Republic***(Supra), added,

> ***"To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers. They do not have to pendantize. What other approach is there? Judicial officers are not clairvoyant."***

20. In our judgment, the trial Court in taking the approach on the Appellant's defence failed to address itself to the veracity of that defence before determining that the prosecution had met its obligation to the required standard. Indeed, the statement by the Appellant that he went to the Appellant's home on the day following the robbery, at which point he was not arrested, bears some credence as it is in line with **PW2**'s statement that he did see the Appellant after the robbery incident. It is therefore not possible to say, without a doubt, that the defence of the Appellant was not plausible. Although the defence of alibi was raised for the first time during trial, over a year since the incident took place, the duty of displacing that defence nevertheless lay on the prosecution to to verify it. Indeed, the law affords the prosecution such an opportunity under **Section 212** of the **Criminal Procedure Code** that:

> ***"If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter."***

While the evidence of identification of the Appellant by **PW2** and **PW3** may have sufficed, we are cautious to find that the prosecution satisfied the standard of proof in light of the Appellant's defence which the trial Court, respectfully, did not exhaustively weigh against the prosecution evidence to make a finding that it was displaced by it.

21. Lastly, we address ourselves to an issue that was not raised by any of the parties but which we must address since it is an important matter of law. This case was heard over a period of slightly over one year, by two Magistrates. Hon. G.L. Nzioka, then Senior Principal Magistrate partly heard the matter and recorded the evidence of **PW1** and **PW2** on 23rd July 2009 and carried on the matter until 16th October 2009. The record shows that the matter was taken over by Hon. M. R. Gitonga Senior Principal Magistrate on 18th November 2009,. The learned Magistrate heard the matter to its conclusion, and wrote the judgment that was read by Hon. B.A. Owino, Senior Resident Magistrate on 25th November 2010.

22. In light of the above, there was a crucial omission on the part of the learned Magistrate who took over the hearing of the case as required by **Section 200(3)** of the **Criminal Procedure Code** which requires that:

> ***"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

23. From the record, it is apparent that the learned Magistrate did not direct herself to this mandatory requirement of the law. The Appellant was not represented by Counsel, the more reason why the trial Court ought to have informed the accused of this right. This is a mandatory requirement that if not complied with, can vitiate a trial. The Court of Appeal in the case of ***Njenga v Republic*****, [1984] KLR 605,** was faced with a similar issue and stated that,

> ***"In a case depending on visual recognition, where the principal witness is heard by one magistrate and the second identifying witness by another, we think it essential that the requirements of subsection (3) should be observed, as it is for the protection of an accused person…we cannot be sure that if the second magistrate had seen and heard both identifying witnesses, he would necessarily have convicted. We cannot say that the failure caused no prejudice to the appellant…"***

24. We take a similar view. In the alternative, the trial Court could have started the matter afresh since the case had not proceeded over a lengthy period of time. One of the recourses available to us in such circumstances would have been to order a retrial. However, in light of other issues highlighted above, a retrial is not feasible.
25. We therefore find that the Appeal must succeed. The conviction is hereby quashed and the sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

SIGNED, DATED and DELIVERED in open court this 27th day of November, 2013.

A. MBOGHOLI MSAGHA **RADIDO STEPHEN**

JUDGE **JUDGE**