**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 131 OF 2008**

***(From original conviction and sentence in Criminal Case No. 729 of 2007 of the Principal Magistrate's Court at Nyahururu - T. Matheka {Ag. P.M.})***

SIMON KIMANI MWANGI……..…….…….....……..APPELLANT

**VERSUS**

REPUBLIC…….…….....RESPONDENT

**JUDGMENT**

The appellant herein was charged on two counts. **Count I** was **robbery with violence** contrary to **section 296(2)** of the **Penal Code**, *(Cap. 63, Laws of Kenya),* **Count II** - was the charge of **handling stolen property** contrary to **section 322(2)** of the **penal code**. The appellant was convicted on the first charge and was sentenced to the compulsory sentence of death as by law provided. The learned trial magistrate made no finding on Count II, which as we shall show in the course of the judgment; was irregular, but was not such an irregularity as would cause prejudice upon the appellant.

The appellant has appealed to this court on six grounds which may be summarized as -

(1) the trial magistrate relied upon the evidence of a single witness, and failed to warn herself of the danger of relying upon such evidence (ground 5),

(2) the conditions for the identification of the appellant were not favourable for positive identification, (ground 1),

(3) the identification parade was not conducted in conformity with Police Force Standing Orders (ground 2),

(4) the appellant's conviction was based upon the evidence of recovery of motor vehicle spares parts which was not proved beyond reasonable doubt, and contravened Section 21 of the Police Act (Cap 84, Laws of Kenya (ground 3),

(5) the learned trial magistrate shifted the burden of proof on the appellant (ground 4);

(6) the learned trial magistrate failed to consider the appellant's and defence witnesses' evidence.

It is our statutory duty as well as the mandate of precedent, as the first appellate court to examine and re-evaluate the evidence before the lower court, and make our own findings and draw our own conclusions.

Even before we examine the evidence of each of the witnesses, what clearly emerges from the evidence on record is that the appellant was the owner a matatu Hiace Toyota Registration No. KAM 391P which had broken down. He went scouting for a suitable engine which would fit the chassis of his matatu.

He designed a clever ruse on how to secure a motor vehicle which has an engine which could be compatible with his own Toyota Matatu. Having scouted for one in Naivasha Town he made up a credible and cheap enough order for five bags of cement *(whose total cost was only Kshs 3,100/= and therefore worth the risk),* which PW2 on orders of PW1, transported to a genuine construction site. PW1 was met at the site by a **"fundi"** who proceeded to hit him on the elbow with a hammer, and having been disabled on the elbow, PW1 could not put up much resistance. He was set upon with blows by the appellant and the **"fundi"** and pushed down on the floor of the cabin and driven around and was dumped at Kayole Estate on the Nairobi-Naivasha Highway, at a place convenient for the appellant and his accomplice to take off with lorry of PW3. That in essence is the summary of the evidence of PW1.

PW2 who is the wife of PW3 testified that as soon as PW1 arrived with 45 bags, he instructed him to unload 40 bags, and rush 5 bags in the lorry to the Appellant's site.

On his part, the appellant denies the charges against him, and in particular that he was any where near the site of the alleged robbery and if he was, he challenges his conviction on the grounds first set out, and on which we now advert our attention, following herein the grounds of the Petition of Appeal.

**Of the Sentence of a single witness**

**Section 143** of the **Evidence Act** *(Cap 80, Laws of Kenya)* provides that no number of witnesses shall, in the absence of any law to the contrary, be required for the proof of any fact.

There is no provision in either the Penal Code or the Criminal Procedure Code, that any fact be proved by more than one witness. All that is required to be proved for the charge of robbery with violence are the elements of that offence - as set out in **Section 296(2)** either -

(a) the offender is armed with a dangerous or offensive weapon, or instrument, or

(b) is in company with one or more other person or persons; or

(c) if, at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses other personal violence to any person;

As already stated, not only the appellant but also his accomplice used personal violence upon PW1 at and immediately they overpowered him, pushed him under the cabin, drove around, and dumped PW1 on a lonely place before taking off with his lorry.

It is indeed the evidence of a single witness. It is however credible evidence. His evidence that he was sent to deliver five (5) bags of cement to a construction site was corroborated by PW2 and that of his employer PW3. As the Appellant had stolen PW1's cell phone he sought help, and was able to immediately inform PW3 his employer that he had been assaulted and robbed of the lorry. PW1 and PW3 immediately reported the incident to the Police at Naivasha.

Four days later on 28th February 2007, PW5 testified that he received information that at Kirima Village where the borders of Shamat and Ol Kalou meet, there was a home where one motor vehicle was seen entering but never left, and that prior to that, there had been unexplained fire in the same shamba - in the home of one Simon Kimani Mwangi, alias Saimo the appellant, a former driver of a matatu known as **"Nuclear."**

PW5 testified that he, in the company of the D.C.I.O., Mr Tebeu his Deputy IP Mwongera and reinforcements from Ol Kalou Police Station went to the home of the Appellant and carried out a general

inspection of the homestead. On the left of the homestead as one enters, there was a goat-shed where they saw items covered in manure which upon inspection they found were parts of a motor vehicle. In the goat shed, they found other parts covered, with goat manure. They found it was a **chassis** of a motor vehicle. On the side near the fence, they found a piece of a chassis covered with dry leaves. At the shamba, the officers found other parts burnt with fire, and put on the roof of a toilet.

PW5 testified that upon entering the house, they found an engine of a motor vehicle and an engine block which was incomplete, and in another bigger room, the officers found many vehicle parts including - 2 doors, a gear box, 4 tyres, and that IP Kiilu took photographs of the items and the scene. These were produced later in evidence as exhibits in the course of the trial.

PW5 further testified that upon their general inspection of the house, IP Mwongera found one file in a box. It had registration number of a vehicle KAV 560T make Toyota Dyna on the cover of the file. They also found bank cards -

- 2 from KCB and bank plates in the name of Kamau Mbugua Nganga.

- AAR Health Services Card also in the name of PW3.

- 2 passport photos which did not belong to the appellant.

PW5 further testified that they also found a wallet with documents inside it including a driver's licence which enabled them to trace the suspect - the appellant, and a business card of one Mohammed Alfazar.

Lastly PW5 testified that outside the house, there was a Toyota Hiace matatu registration Number KAM 391 **which had no engine**. PW5 further testified that there were many officers including APs who took positions in the homestead while waiting for the appellant - PW5 also testified that the appellant arrived home riding a bicycle at about 7.30 p.m., jumped off the bicycle and -

"***we arrested him before he turned and left the home. I identified myself. He told me he was called Saimo (Simo) and he confirmed that the home was his. We took him to his house and interrogated him. He appeared drunk."***

Upon his interrogation, the appellant informed PW5 and other officers that the driving licence belonged to his brother living in Mombasa, and of the motor vehicle whose parts were found in the house, the appellant informed the officers that he had bought them from an Ugandan who was taking them to Uganda and that he wanted to use the engine 32 (type) in the Toyota Hiace Matatu.

All the Appellant's answers to PW5 turned out to be untrue. ***Firstly,*** the driving licence did not belong to the appellant's brother. It belonged to PW1, the driver of PW3. ***Secondly***the complete engine block belonged to Toyota Dyna KAV 560T the property of PW3. All this was established by PW5, upon interrogating PW3 who produced an Agreement for Sale of the motor vehicle with Hussein, the former owner. ***Thirdly*** PW5 established that the Bank cards and plates and AAR card and file were stolen from the Toyota Dyna together with the motor vehicle when the driver PW1 was robbed on 24th February 2007. The robbery had been reported to the Naivasha Police in OB No. 34 of that date. ***Fourthly*** the appellant was identified by PW1 in the identification parade conducted by PW4.

In summary, the evidence of PW1, directly connect the appellant with the ordering of cement. The evidence of PW2 connects with the appellant with the robbery violence of the motor vehicle Toyota Dyna registration number KAV 560T by the Appellant in the company of an accomplice who was not pursued and arrested and charged and therefore eluded the long arm of the law. The appellant's explanation that the driving licence found in his house belonged to a brother of his living in Kakamega, and that he bought a complete engine, block and other vehicle parts from an Ugandan proved to be a complete lie when PW3 recognized the driving licence as that of his driver PW1, and the complete engine corresponded with that of the stolen Toyota Dyna KAV 560T.

There was this evidence, not of one witness PW1, but several others, PW2, PW3 and PW5 which described not only the circumstances of the robbery with violence (PW1), but of all the circumstances directly connecting the appellant with the actual commission of the offence. It is therefore not correct to say that the appellant was convicted on the evidence of a single witness, or that the trial magistrate failed to warn herself of the danger of basing a conviction on the evidence of one or single witness.

This contention therefore fails.

**Of whether conditions of identification were favourable**

It was the appellant's contention that the conditions for his identification were not favourable for positive identification. The appellant attacked the evidence of PW1 that **"he was shocked, and did not expect the robbery,"** and **"did not therefore have the necessary concentration for facial observation of the person who posed as a fundi and could not have made a proper identification".**

To this submission Mr. Omutelema learned Principal State Counsel submitted that the robbery was committed on 24th February 2007, and on 28th April 2007, the appellant was found in possession of vehicle parts of the motor vehicle the subject of the robbery. The robbery was committed in broad day light. The appellant was identified at the Police Identification Parade conducted by PW4. The word **"shock"** has many meanings. According to the old Shorter English Dictionary on Historical Principles, 3rd Edn. Vol. II, the word **"shock"** in the context used by the appellant means -

***"a sudden and disturbing impression on the mind and feeling, usually one produced by some unwelcome occurrence or perception, or by violent and leading to occasion lasting depression or loss of composure."***

**"Shock"** is the element or result of **"surprise"** an unexpected occurrence, assailing or coming upon one unexpectedly or taking unaware. Neither **William Shakespeare** nor **John Milton** in their extensive writings, dramas, melodies, and tragedies, have suggested that the **"shock" "stops or obliterates the functions of the human memory. There is no medical evidence that it does so."**

When PW1 testified that it was the appellant's **"fundi"** who disabled him with a hit on the elbow, he describes what he saw, and felt. When PW1 testified that the appellant told him that the man standing by the construction site was his **"fundi"** presumably a mason - is a person one would expect at a construction site - PW1 saw and believed what the Appellant told him - that the second man was a **"fundi"**. When the Appellant joined the **"fundi"** in beating him up, PW1 felt pain - he was not seriously injured - he did not go to any hospital for treatment but he did not suddenly lose memory or become unable to remember the **"customer"** whom **"mama Njeri"** (PW1) had ordered him to deliver 5 bags at Kayole within Karagita area of Naivasha District.

In this regard also, the appellant contended that his identification by PW1 was in violation of Chapter 46, of the Force Standing Orders on Conduct of Parades. The Appellant contended that he was shown the witness before the parade was conducted.

There is indeed a statement by PW1 that he was shown the suspect in an identification parade - but I again - PW1 testified - **"At the identification parade, I was shown more than eight people. I identified the accused from his face. I did not mistake him - No one assisted me to identify him."**

PW4, who conducted the Identification Parade testified how he conducted the identification. He had arranged for eight participants, and the appellant elected the position between third and fourth participants and asked the appellant whether he had any witness to which answered in the negative and then called the witness called Paul Kimani (PW1). **"I had kept him outside the station when I was organizing the parade. He could not see the suspect."**

It is most unlikely that the witness (PW1) was shown the Appellant before the parade. The rendering of the translation that **"I was shown the suspect in an identification parade"** is in our view

no more than that the suspect would be among the participants in the parade, and he would be required to identify the suspect, and not this is or that the suspect in such position among the participants. For if it were so, without more the evidence of identification at the parade would be rendered almost valueless.

However, from the evidence of both PW1 himself and PW4 the officer who conducted the identification that the Appellant was satisfied with conduct of the parade, we are satisfied that the Appellant was identified by PW1 at the scene of the robbery, and also at the identification parade. However if we are wrong there was nonetheless direct/overwhelming evidence of identification.

We therefore find and hold that grounds 2 and 3 have no basis at all, and both fail.

**Of Whether the conviction of the Appellant was based on the evidence of recovery of a motor vehicle which was not proved beyond reasonable doubt, and contrary to Section 21 of the Police Act, Cap. 84, Laws of Kenya) (Ground 3).**

We commence our answer to this issue by reference to Section 21 of the Police Act, which Section provides inter alia of fingerprints of a suspects, which may later be destroyed if the person is not charged.

This ground is premised upon the evidence of IP Dominic Ndeto Nyau which was called by the prosecution before sentence when the appellant objected to the record being furnished before court that he had a previous conviction to which the appellant objected. The evidence showed that the Appellant had a previous conviction and sentence of five (5) months for the offence of handling stolen property in Nyahururu Principal Magistrate's Criminal Case No. 4644 of 2000.

Having been so charged, convicted and sentenced, the prosecution had every reason to have kept the appellant's previous record of conviction, and did not violate the provisions of Section 21 of the Police Act. This ground has therefore no basis and it fails accordingly.

**Of whether the learned trial magistrate shifted the burden proof upon the appellant, and whether the trial magistrate considered the appellant's evidence (grounds 4 & 5).**

Commencing with the latter contention of whether the learned trial magistrate took into account the appellant's evidence, it is necessary to consider the appellant's evidence in its entirety, that is to say, including that of his sole witness DW1.

In so far as the charge of which the appellant was convicted and sentenced, the evidence of DW1 was totally irrelevant. It was irrelevant because it consisted merely of stating that the appellant's matatu was driven by one of the officer who was allegedly present when the officers went to investigate and verify information of a vehicle having been driven into the appellant's home and had never been seen leaving. It was also irrelevant because it concerned with the events of 28th February 2007, and not the complaint that the appellant committed a robbery with violence on 24th February 2007. The learned trial magistrate was right in dismissing the said evidence and we need say no more about it.

Of the appellant's evidence, the learned trial magistrate correctly observed, and it is no more than an observation and not a finding of facts,
***"the accused said he was in a funeral. The cousin whose brother had died and who allegedly called to inform him of the date of the funeral was not availed to testify. Accused produced a photo - that bore a date stamp - surely considering the challenge that that stamp could have been fitted anywhere any time - the testimony of even one member of his family to confirm that the funeral was actually held on that day and that the accused was present was so crucial that this court cannot understand why the accused treated that fact with such casualness. This was his best shot at showing this court that he was away from the scene of the robbery and could not have committed the crime."***

The learned trial magistrate also observed in the course of her comprehensive judgment, that the appellant's driver who allegedly drove his matatu on 24th February 2007 did not testify. This is the same person from whom the appellant said he had received Shs 8,000/= which the Police allegedly took from

him. The trial court correctly observed that such a witness night have demonstrated that the motor vehicle for which the appellant was looking for an appropriate engine to revive was in good condition, and that the appellant had left it with him while he went for the funeral.

Having made these observations, the learned trial magistrate concluded, and we, with respect, agree with the Magistrate's conclusion, that the ***"accused's (appellant's) attempt to establish an alibi is besotted by many uncovered holes and does not in any way remove him from the scene of the robbery."***

It is of course understandable that the appellant would not wish, and did not call either his driver, or the cousin or other relative that he was at any funeral of a cousin's brother, for fear they might deny the appellant's claims, and therefore incriminate him more, but more importantly because it is not for the appellant to prove his innocence *(the law of the Constitution presumes his innocence),* but rather, it is the duty of the prosecution to prove its case, and demonstrate that the defence of alibi has no basis or is not tenable.

We note that under repealed provisions S.307(2) of the Criminal Procedure Code, an accused person who pleaded an alibi had to seek leave of court and to disclose the nature of his defence of alibi including the names of witnesses and addresses of any witnesses in support thereof. Today, precedent demands that it is for the prosecution to disprove that defence.

In brief the defence of alibi entails the proposition that by reason of the presence of the accused at a particular place or in a particular area at a particular time, he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of the alleged commission.

It is not quite clear what informed the repeal of the provisions requiring an accused to give notice of his plea or defence of alibi. It certainly made the work of the investigation officers more difficult and is inconsistent with the principle of equality arms in a trial where the accused is informed of every aspect of the case against him - he has access to all the witnesses statements - but he himself, is left at liberty to bamboozle the court that he was at a funeral of an undisclosed cousin, at an undisclosed location, and about the only thing the prosecution has certainty, the place and time of the commission of the crime. We think that this aspect of Criminal Procedure particularly with regard to capital offences needs a re-think by the Office of the Director of Public Prosecutions.

Adverting to the matters herein, the evidence of PW1, PW2 and PW3 is clear that it is the appellant who bought five bags of cement from the shop of PW1 and PW3, which PW2 transported to the appellant's alleged construction site, where the appellant and his **"fundi"** accomplice violently robbed PW2 of PW3's motor vehicle KAN 560T, and proceeded to have it dismantled for use, and probably sale of its various parts, having first blackened them with fire so as to hide their true colour, identity and origin.

The appellant's attempt failed as the long arm of the law caught up with him, and PW2 and PW3 were able to identify the various parts of the vehicle in particular the engine and chassis the possession of which the appellant was unable to give a plausible explanation.

All the grounds having failed, we uphold the learned trial magistrate's findings, conviction and sentence upon the appellant. We dismiss the appellant's Petition of Appeal as lacking merit both in fact and law.

There shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 29th day of October 2010**

**M. J. ANYARA EMUKULE**
**JUDGE**

**W. OUKO**
**JUDGE**