REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT NYAHURURU

CRIMINAL APPEAL NO.90 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.768 of 2013 by: Hon. A.P. Ndege – P.M.)

PHILIP MATHENGE MWANGI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant herein, **Philip Mathenge Mwangi** was convicted for the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code.

The particulars of the charge were that on 25/5/2015 at Kibathi Estate within Nyandarua, with another not before the court, while armed with an offensive weapon namely a pistol, robbed Douglas Kangethe Karanja of Kshs.15,000/= and immediately after the time of such robbery, threatened to shoot the said Douglas Kangethe. Upon conviction, he was sentenced to suffer death.

Being aggrieved by both conviction and sentence, he filed this appeal through the firm of Kinyua Njogu Advocates on 24/11/2012 based on grounds of appeal filed by the appellant on 4/3/2016 and a supplementary petition of appeal filed in court on 28/9/2017. In total the petition contains 19 grounds which can be collapsed into the following:

(1) That the identification of the applicant by PW1 was not full proof;

(2) That the court erred in placing weight on a jacket and cap found in the appellant's house;

(3) That the court erred in connecting motor cycle KMCY 287R to the commission of the offence yet it was not produced in court and was released to the appellant;

(4) That the court erred by finding that the appellant's alibi defence had been rebutted by the prosecution evidence;

(5) That the prosecution evidence was full of gaps, inconsistencies and contradictions to found a conviction;

(6) The trial court erred in finding that the prosecution had proved its case to the required standard.

Mr. Kinuya Njogu also filed submissions and several authorities on 8/1/2018 in support of the appeal. The appellant therefore prays that the appeal be allowed, conviction be quashed and sentence set aside.

The appeal was opposed by Mr. Mutembei, learned counsel for the State who made oral submissions.

This is a first appeal and therefore it is the duty of this court to examine all the evidence tendered before the trial court afresh, analyze it and make its own findings. (*See* ***Okeno v Republic (1972) EA 32***). In doing so, I must recap the evidence that was tendered in the trial court.

The prosecution called a total of four witnesses in support of their case. The complaint was **PW1 Douglas Kangethe Karanja**. He was in his shop on 25/5/2013 at 8.00 p.m. when preparing to close when a person entered enquiring about the price of ropes that were hanging at the door; that the person wore a black cap and navy blue jacket with dreadlocks, and tall. While bargaining over the price, another man who was short and brown entered the shop and pointed a pistol at him. He identified the short man as the appellant and that he wore a white cap and grey jacket; that the tall man who had come in first entered the shop, went to the drawer and collected the day's sales in a black paper; that he talked to them but they did not respond; that he was able to identify them using the electric bulb. He screamed after they left. He did not follow them but instead called the OCS Ol Jororok and Administration Police who rushed to the scene. Next morning when selling milk, a customer brought to him the white cap that one of the robbers wore and he took it to the Administration Police. While preparing to go to

church, Administration Police came to inform him that someone had gone to the Administration Police Camp looking for his motor cycle that had been detained there; that he went to the Administration Police Camp where he found a man and he was able to identify him as one of the robbers who were paraded in a line. They went to his house where a search was conducted where they recovered the cap and jacket that he had won during the robbery; they recovered Kshs.17,000/= from his bed and the police took it.

PW2 APC Samson Yaa of Kibathi Police Post received a call from the Assistant Chief, Mary Njoroge of Riverside Location who reported that Douglas Njoroge had been attacked and robbed at his shop. He proceeded to the scene with Philip Kioko and after hearing from PW1, they tried to trace the robbers by going the direction they went. On the way, they found a motor cycle KMCY 287R which they suspected may have been used in the attack. They took it to the Kibathi Administration Police Camp; that next day at 9.00 a.m., a young man went to the camp, introduced himself as Philip Mathenge and produced a log book for the motor cycle. Because they suspected that the motor cycle was involved in the robbery, they called PW1 who came and identified the said Philip as one of the robbers. They accompanied the appellant to his house, where they recovered a cap and jacket which the complainant confirmed are what one of the robbers wore. They handed him over to Ol Jororok Police Station. PW2 denied having recovered Kshs.17,000/= from the appelant's house.

PW3 Philip Kioko accompanied PW2 and his boss to the complainant's shop where there had been a robbery. They received the robbery report from PW1. They tried to trace the robbers' foot prints but failed to arrest any; that on the way back, they found an abandoned motor cycle next to a thicket whose owner was unknown KMCY 287R. They took it to station and next day, the appellant, came to claim it. They called the complainant who started by saying it was the appellant who robbed him; that they went to search the appellant's house where the complainant picked out a jacket and cap that appellant had won during the robbery. He denied recovering Kshs.17,000/= from the appellant's house.

PW4 PC Michael Mulei was the investigating officer in this case. He saw a robbery report from the complainant, booked at the station. He went to PW1's shop on 25/5/2013 while on patrol. On 26/5/2013, he got a call from the OCS and they went to Kibathi Administration Police Post where they found the appellant having been arrested by Administration Police officers. He received a jacket and cap which were recovered in the appellant's house; that some Kshs.17,000/= was recovered in the appellant's house but since it could not be connected to the robbery, it was returned to the appellant.

Upon closure of the prosecution case the appellant was placed in his defence and he testified on oath and called three witnesses.

The appellant denied the charge and stated that on 30/5/2013, he was at his place of work at Nyahururu near Salvation Army Church selling shoes; that when packing shoes at about 6.30 p.m., his friend Patrick Karanja (DW2) went there; that the said Patrick had come for a funeral on 24/5/2013, a Friday and he wanted to watch the final championship league and wanted to know where he could go and watch it; they went together at Sport View Club where they ate food, took alcohol; that the match started at 9.45 p.m. and then they waited for the trophy; that Karanja left him between 2.00 a.m. to 3.00 a.m. to go and sleep. He was a bit drunk and since he had a motor cycle, he waited to get better; that he had the motor cycle near the shoe stores. He left for his home at Runda Estate at 3.30 a.m.; that it had rained and since the road was muddy because of a trench that was being dug, the motor cycle got stuck in the mud. He was not able to push it and left it besides the road. Next morning, when he went to get the motor cycle, he did not get it. He asked some people around who informed him that the Administration Police took it away; that one shop keeper (DW3) informed him that it is him who called the Assistant Chief who took it away together with the police. He went to Kibathi police post and requested to be given the motor cycle but one of the officers said he appeared like the person with a pistol. He was handcuffed and taken to his house and PW1 was present. They searched his house and PW1 was asked if he could identify anything in the house and he said a jacket and cap are what the appellant had won at the time of the robbery; that the police took the jacket, cap and Kshs.17,000/=. He was handed over to Ol Jororok Police Station. He denied having seen PW1 before or on 25/5/2013. The cash was returned to the wife while the motor cycle was returned to him.

DW2 Patrick Karanja Njoroge recalled having been in Nyahururu on 25/5/2015; that he used to sell shoes with the appellant in Nyahururu but left for Kisii. On 25/5/2015 he went to see the appellant about 6.30 p.m. and together they went to watch UEFA Championships Final at Sports View Bar. They ate food, he went to look for a room, came back to the lodge and they started to watch the match at 9.35 p.m. upto 2.00 a.m. when he went to sleep after the celebration. He left for Nairobi next day. He denied having parted with the appellant except for about 30 minutes when he went to book his room.

DW3 Peter Ngundi recalled the 26/5/2013, while in his shop about 10.15 a.m., he saw a motor cycle on the road; that there had been a theft the previous night and so he called the Chief who came with Administration Police and took it away using another motor cycle. He confirmed that it had rained and the road was muddy; that later, the appellant came and asked for the motor cycle and he informed him that it had been taken away by the police and he followed.

DW3 said that he closed his business at 7.30 p.m. the previous day and did not leave the motor cycle there.

DW4 Peter Kariuki Ndungu recalled the 26/5/2013 about 6.00 a.m., he went to Runda where he was digging a trench next to the road and there was a motor cycle there. He knew it to belong to the appellant as he used to carry him on it. About 7.30a.m. the Chief and Administration Police officers came for the motor cycle. Later, the appellant came asking for his motor cycle and they directed him to the police and that he later passed with police while handcuffed. DW4 knew that the appellant sells second hand shoes.

I have considered the evidence tendered before the trial court, the grounds of appeal and submissions of counsel. The crucial issue for consideration is whether the appellant was properly indentified.

Whether PW1 identified the appellant:

There is only a single identifying witness in this case. The alleged robbery took place at night, about 8.00 p.m. The law of evidence of a single identifying witness under unfavourable conditions has been discussed in very many cases. The court must warn itself of the dangers of relying on such evidence and treat the said evidence with the greatest care before relying on it to found conviction. In his arguments, Mr. Njogu, counsel for the appellant relied on the decisions in ***John Maina Wachira and another v Republic CRA.37 and 39/2001*** and ***Republic***

v Mukawa and 2 others (1989) KLR 281. The two cases considered the case of ***Republic v Turnbull & Others (1973) 3 ALL ER 549*** where Lord Widgery laid down the test in dealing with such evidence when he said:

> ***"... 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? 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 the 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 his 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."***

Again, in ***Roria v Republic (1967) EA 583 (P584)***.

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness as LORD GARDNER L.C. said recently in the House of Lords in the course of debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.***
>
> ***`There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity.'"***

Mr. Njogu submitted that apart from PW1 saying that there was light from a bulb in the shop, he did not state the location of the bulb or the intensity of the light from the bulb and neither did the police officers PW2 & 3 who visited the shop after the robbery alluded to what light there was in the shop. Guided by the above authorities, the prosecution has to make an inquiry into the intensity of the light, its location in relation to where the robbers and complainant were and how long PW1 observed the robbers. The Magistrate said in his judgment at paragraph '32':

> ***"Though the evidence of the intensity of the light source was not given, since electricity light are in most cases bright and was therefore conducive for positive identification as alleged by the complainant."***

I agree with the counsel's submission that the trial court merely made an assumption that the light was bright because such bulbs are normally bright which was not correct. Even bulbs have different voltages 25 watts, 40 watts e.t.c. and it depends on where the light is in relation to where robbers were. That finding was made in error.

The trial court specifically found that the complainant sat in between the robbers for 10 – 15 minutes and was able to observe them. That however, cannot be gleaned from the evidence on record. It is only in cross examination that PW1 said that the robbers were in his shop for 10 – 15 minutes and that he was down by the time they were attacking him and sat between them. PW1 never explained at what stage he sat down and whether the robbers were standing while he sat and how he was able to see them. PW1 said that the taller robber went to the drawer to get money and they did nothing else nor did they speak to him apart from the taller robber saying that it is their day and they had come.

From the narration by PW1 of what transpired at the shop, it is unlikely that the robbers stayed there with him for 10 to 15 minutes. If he sat on the floor as they stood, they really were not on the same level to accord PW1 a good view of the robbers' faces. PW1 should have explained exactly how the robbery took place and how he was able to see the robbers. Without knowing how the intensity of the light, the location of the light, I find that PW1 did not demonstrate how he was able to identify the appellant and this court does not find the identification of the appellant to have been water tight.

Whether PW1 recognized the appellant:

Just like in cases of identification, where one alleges that he recognized a person, such evidence has to be treated with great care and there is a wealth of decided cases on that issue. In ***Wamunga v Republic (1989) KLR 424***

> ***"1. 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.***
>
> ***2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."***
>
> *Also see* ***Turnbull (Supra).***

PW1 told the court that he recognized the appellant even though the appellant did not utter a word to him. There is no evidence on record that PW1 had ever met the appellant there before or had ever talked to the appellant there before or PW1 did not allude to any specific incident when they met or talked or that he saw him frequently in the neighbourhood or elsewhere prior to this incident. In cross examination, PW1 said that he told his neighbours that he had identified or recognized those who robbed him; that they were people known to him. However, PW1 did not explain how he knew the appellant, where and when he had seen or met the appellant. It was not enough to just allege that he knew the appellant. In the end I do agree with the appellant's submission that the evidence on identification/recognition was so weak that it cannot stand alone as a basis for a conviction.

Whether there was corroboration:

In **Republic v Mukawa Supra**, the court held that a prosecution case substantially based on evidence of identification at night by a single identifying witness may need corroboration. In this case, the trial court found that the said evidence had been corroborated by the recovery of a cap and jacket in the appellant's house and the motor cycle that had been found abandoned.

As regards the motor cycle that was recovered near the complainant's shop, DW1 explained in his defence that he left it on the road because the road was muddy on that night and he could not manage to ride it home. Indeed DW3 & 4 corroborated the appellant's evidence that he went in search of the motor cycle the next morning and DW3 referred him to the police station. DW4 confirmed that he had been digging a trench where the motor cycle was left and that he knew it to belong to the appellant. PW1 told the court that the robbers came to his shop one after the other. He did not see where they came from. PW1 did not see the robbers with the motor cycle nor did any of the other witnesses. There was totally no link between the robbery at PW1's shop and the motor cycle. The appellant went in search of the motor cycle by himself. It is doubtful whether the appellant would have gone for it at the police station while he knew he was one of the robbers. In my view, the trial court erred in placing too much weight on the motor cycle yet it was not even an exhibit. It was returned to the appellant meaning it had no connection to this case.

As to whether the recovery of the cap and jacket corroborated PW1's testimony, PW1 testified that the shorter robber wore a white cap and a grey jacket. The white cap and said grey jacket were recovered in the appellant's house when PW2 & 3 went on a raid to the appellant's house and PW1 pointed to these items. By then, PW1 had not made any statement to the police describing the robbers and how they were dressed. The description he gave of a white cap and grey jacket was made after the arrest of the appellant and in my view, that evidence of recovery of cap and jacket cannot corroborate the evidence on identification of the appellant by PW1.

The appellant raised an alibi defence. Even where an accused raises an alibi defence, he does not assume any duty to prove the truth of the said alibi. The onus always remains on the prosecution to disprove the alibi and therefore prove its case to the required standard of beyond reasonable doubt. In the case of ***Kiarie v Republic (1984) KLR 739 (P.140)*** the court said:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge 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 judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."***

Further in ***Ssentale v Uganda (1968) EA 365*** *the court said:*

> ***"In Republic v Anthony Hugh Johnson (1962), 46 Cr. Ap. Rep. 55, and Leonard Aniseth v Republic, (1963) E.A. 206, it was stated as a matter of law that, although the court must of necessity examine an alibi when raised by way of a defence, it is to be distinguished from statutory defences such as insanity or diminished responsibility and analogous to a defence such as self-defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; and it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution."***

In his alibi, the appellant told the court that he left his place of work in company of DW2, went to watch a football match at Sports View and later went home about 3.30 a.m., on his motor cycle which he left along the muddy road. DW2 corroborated the appellant's alibi in all material particulars. These testimonies were not dislodged in cross-examination. Ordinarily, it is expected that an alibi be raised early in evidence to allow an opportunity for the prosecution to rebut it if necessary. In this case the alibi defence was raised late in the defence but the prosecution has a remedy under Section 212 Criminal Procedure Code whereby they can apply to call evidence to rebut the alibi. Section 212 Criminal Procedure Code provides:

> ***"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."***

The prosecution did not take advantage of the above provision to call for more evidence to rebut the alibi.

I have considered the trial court's judgment and I find that the court did not consider the appellant's alibi at all save for the court saying that the identification of PW1 displaced the alibi. That was not sufficient. The court should have considered the evidence of both the appellant and DW2 and analyzed it. The court did not do that. I find that the court misdirected itself in summarily dismissing the appellant's alibi.

After a careful consideration of all the grounds of appeal, I find that the identification of the appellant was not full proof or free from error. The alibi defence was not dislodged by the prosecution and therefore, the conviction was not well founded. I hereby quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully he*ld.*

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***5th*** day of ***July,*** 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut - Prosecution Counsel

Mr. Njogu – counsel for appellant

Soi - Court Assistant

Appellant - present