REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 175 OF 2013

ERICK INDIMULI SIAYA ……..……..……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case no. 3818 of 2011 in the Chief Magistrates' Court at Kibera delivered on 6th September, 2013 by Hon. H. Wachira, P.M).

JUDGMENT

Erick Indimuli Siaya was charged alongside another namely, Kennedy Mangwari Lugongo with the first count of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence was that on 15th September, 2011, at Shell Petrol Station, Parkroad Nairobi, within Nairobi County, jointly with others not before court while armed with a dangerous weapon namely a pistol, robbed Bhavna Patel of Kshs. 1,200,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Bhavna Patel.

In count II, they were charged with conspiracy to commit a felony contrary to **Section 317 of the Penal Code**. It was alleged that on 15th September, 2011 at Shell Petrol Station, Parkroad Nairobi, within Nairobi jointly with others not before court with intent to steal, conspired to commit a felony namely, robbery with violence. After the trial, Kennedy Mangwari Lugongo who was the 2nd accused was acquitted of both counts. The Appellant who was the 1st accused was convicted for the charge of robbery with violence and was sentenced to death. He was aggrieved by both the conviction and the sentence. He preferred this appeal. In a Petition of Appeal, dated and filed on 20th September, 2013 by Kiluki and Kayika, advocates for the Appellant, twenty grounds of appeal were listed. However, the same can be condensed into the following:

a. That the Appellant was convicted on insufficient evidence of identification in that the circumstances of identification at the time of robbery were not conducive.
b. That the learned magistrate erred in convicting the Appellant on the basis of CCTV footage and a single unclear photograph which was illegally extracted in the absence of an independent expert witness. Moreover, the testimony of the witness who produced it was not corroborated.
c. That the prosecution did not prove the elements of the offence of robbery with violence as required by the law.
d. That the learned magistrate failed to properly consider the Appellant's alibi defence which if he had, would have arrived at an acquittal verdict.

Learned counsel for the Appellant at the time of the hearing M/s Masaviru and Ketto Advocates filed written submissions dated 17th June, 2015. In brief, they submitted that the learned magistrate erred in law and fact by convicting the Appellant while relying on identification by PW1 and 2 of the Appellant who were not credible witnesses in the absence of independent corroborative testimonies of an expert witness.

According to the counsel, the learned magistrate heavily based the conviction on adduction of some photographs of the Appellant that were processed from a CCTV footage. According to the counsel, the production of the photographs was against the provisions of **Section 78 of the Evidence Act** which provide that the photographs ought to have been produced by an expert and that a certificate specified under the provision ought to have accompanied the photographs. Furthermore, the witness who produced the photographic evidence was not a gazetted officer appointed under the First Schedule of the Evidence Act. The evidence, according to the Counsel, did not also comply with **Section 106(B)(4) of the Evidence Act** which provides that it ought to have been accompanied by a statement describing the manner in which it was taken and produced in court.

Counsel for the Appellant also took issue with the fact that the prosecution witnesses having not properly identified the Appellant, an identification parade ought to have been conducted. The failure to do so meant that the already weak existing identification evidence could not secure a conviction. Counsel submitted that PW2 who was a supervisor at Shell Petrol Station car wash in Parkroad pointed at the Appellant as the culprit because he had painted the premise. Unfortunately, his statement was a retraction from an earlier testimony that he did not know that the Appellant had been employed to paint the premises. That contradiction ought to have been resolved in the favour of the Appellant.

It was the submission of the counsel that the learned trial magistrate erred in not giving regard to the alibi defence of the Appellant. It was also the counsel's submission that the prosecution had failed to dislodge the Appellant's alibi defence which is a requirement in law as was held in the case of **KIARIE VS REPUBLIC [1984] @KLR, 739.**

Learned state counsel Mr. Muriithi conceded to the appeal. First, on the grounds that, during the production of the photographic evidence, the prosecution did not comply with Sections 78 and 106 (B)(4) of the Evidence Act, and second, that the photographs processed from the CCTV footage were not similar.

This being the first appeal, the duty of this court is to re-evaluate the evidence afresh and come up with its own findings but must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **KARIUKI KARANJA VS REPUBLIC [1986] @KLR, 109.** It then behoves this court to give a summary of the evidence tendered before the magistrates' court.

The case for the prosecution was that **PW1, Bhavna Patel** who was the complainant worked at the Shell Petrol Station at Parkroad as the manager. On 15th September, 2012 he reported to the office about 8.10 a.m. His first duty was to reconcile the accounts for the night in the presence of both the night and day shift employees. He also involves all the staff in the counting of the money after which he distributed to the day shift workers the cash float. The money was being counted in the safe room. On completing this task, he left the staff counting the money, and dashed back to his house to check on a one month old baby. He left one, Erica in-charge of the petrol station. He returned after 10 minutes. His supervisor was one Kennedy (2nd accused). While the money was being counted, the safe room was locked with a grill door from the outside and a glass door from the inside. His supervisor who was not in the team that was counting money knocked on the grill door and he(PW1) opened the glass door to enable him talk to him. Kennedy was accompanied by two men and a woman who he said were from Shell Engineering Company and had come to inspect the paint works at the Petrol Station. They were all wearing yellow caps and blue dust coats. One of them was carrying a book and a pen. PW1 ushered them into the office and they inspected the paint work which they were satisfied with. They requested him to open his bosses' office but he told them he did not have the keys to the office. That is when one of them pushed him against his boss' office door and started beating him while the other two went into the safe room where the money was being counted. The one who confronted him was left guarding him. The staff members were ordered

to lie down and the thugs stole the money which they put in a bag. After the robbers left, PW1 went into the safe room and ordered the staff to rise up. Incidentally, the robbers had left with the office door lock and PW1 was not able to leave the office immediately. He informed Kennedy through the grill door that the people he had ushered into the Petrol Station were robbers and had stolen the money the staff were counting which was to Kshs.1,200,000/=. Kennedy attempted to follow the robbers who were on foot but to no avail. Erica then raised the proprietor of the station one, Satish Kumar who later arrived at the scene. The latter together with PW1 viewed the CCTV footage and PW1 was able to recognize one of the robbers as a person who had previously painted the Petrol Station. He happened to be the Appellant herein. Kennedy was arrested about three or four days later while still on duty. It was alleged he conspired with the attackers to commit the robbery. He had worked at the Petrol Station for many years.

PW2, George Mwangi was a supervisor at the Shell Petrol Station car wash. His evidence was that at the time of the robbery, he saw two men and a lady in blue dust coats and yellow helmets talking to one Kennedy Mangwari Lugongo(2nd accused). They accompanied Kennedy to the car wash wherein Kennedy asked PW2 to show them around the car wash, tyre centre and the drainage so that they could assess the need for painting. After leaving the car wash area, and after a short while, he heard PW1 shouting while calling the words "thieves, thieves". He ran away from the scene but was later joined by Kennedy and started pursuing the thieves but without success. His testimony was that the Appellant was one of the robbers.

PW3, Joseph Odhiambo Onyango was a pump attendant at the Petrol Station where he had worked for five years. He was in the day shift and was also assigned the duty of counting money by PW1. He corroborated the evidence of PW1 in its entirety. However, he finished his cash calculations earlier than other staff members whom he left behind in the safe office still counting money. Shortly after he had left the strong room, he heard PW1 shouting that thieves had stolen money. His evidence was that he was not able to see any of the robbers.

PW4, Satish Kumar was the proprietor and Director of Shell Petrol Station, Parkroad. He was called at about 9.00 a.m. by the staff and informed about the robbery. His evidence was that after viewing the CCTV camera footage, together with PW1, they were able to recognize one of the robbers as a person who had earlier painted the Petrol Station. They traced him to Lavington Shell Petrol Station where he was working. That is when he was arrested by the police.

PW5, Charles Omondi Obiero a pump attendant at the Petrol Station was one of the victims of the robbery. Unfortunately his testimony was that he was not able to identify any of the robbers.

PW6, Police Corporal Gilbert Atalia was the investigating officer. He summed up the evidence of the other prosecution witnesses. He testified that he only printed two images from the CCTV cameras. He downloaded the images into a CD. Later, he received information that one of the persons seen in the CCTV footage had been involved in the painting of the Petrol Station. He traced him at the Lavington Shell Petrol Station where he arrested him. That was the Appellant herein. His investigations revealed that the Appellant together with the Petrol Station supervisor, one Kennedy Magali Lugongo had conspired to commit the offence of robbery with violence. They were accordingly charged with the two offences.

The Appellant gave a sworn statement of defence. He denied committing the offences, adding that he was framed up. His further defence was that none of the prosecution witnesses identified him as one of the robbers including his co-accused who is said to have led the robbers to where the money was stolen. Although he was charged mainly on ground that he was identified in the CCTV footage, none of the images from the footage matched his appearance. He stated that the prosecution pushed their witnesses to testify that they had identified him in the footage. He urged the court to set him free.

After analyzing the evidence and the respective submissions, we narrow down our issues for determination to be, whether the prosecution's evidence on identification was safe to warrant a conviction, whether the trial court properly evaluated the Appellants alibi defence and whether on the whole, the prosecution proved its case beyond all reasonable doubt.

We have no doubt in our minds that a robbery did occur at Shell Petrol Station Parkroad. The prosecution witnesses who were at the petrol station being PW1, 2, 3 and 5 confirmed about the incident. The CCTV footage produced in court did also show the robbers in helmets and dust coats get into the Petrol Station offices, one of them slapping PW1 and thereafter the others emptying the money into a gunny bag and leaving. Definitely, it was not a smooth incident for the witnesses as they were ordered to lie down as the robbers stole the money. Actual violence by slapping and shoving was used on PW1. What the prosecution required to prove was whether the robbery was committed by the Appellant in company of others.

The prosecution secured a conviction based on the fact that PW1and 4 purportedly recognized one of the images on the CCTV camera as belonging to the Appellant who they said had painted the Petrol Station. The trial magistrate in addition upheld the evidence of PW2 who testified that he identified one of the robbers when he was taking them round to inspect the car wash before they entered into the office. PW6 had also matched the images processed from the CCTV cameras to the person of the Appellant. According to the learned trial magistrate, the evidence of the three witnesses on identification was sufficient in proving that the Appellant was one of the robbers. He noted that at the time PW2 was taking the robbers round the car wash, he was not under any threat and had sufficient time to identify them. There was no dispute that the Appellant had painted the Petrol Station building prior to his arrest. It is also not disputed that the entire petrol station building was covered with CCTV cameras. That is how the robbery was captured on seven CCTV cameras. They were then downloaded into a CD and thereafter 2 photographs were extracted. It is the production of both the CD and the photographs that is questioned by the Appellant. According to his counsel, they were both not admissible under Sections 78(1) and 106B of the Evidence Act. Section 78(1) of the Evidence Act provides as follows:

> ***"(1) In criminal proceedings a certificate in the form in the schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.***
>
> ***(2) The court may presume that the signature to any such certificate is genuine.***
>
> ***(3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it."***

Our understanding of the above provision is that photographic evidence may be admissible in criminal cases on condition that the photographic prints or enlargement have been prepared by an officer appointed by the Director of Public Prosecutions(hitherto by the Attorney General). The officer shall then be required to prepare a certificate to the effect that he produced the prints and enlargements from the exact film or any other annex where they were exposed. The certificate shall accompany the photographs at the time of production.

In the instant case unfortunately, the production of the photographs by PW6 was not accompanied by a certificate prepared by him pursuant to **Section 78(1) of the Evidence Act**. Furthermore, there was no evidence that PW6 was an appointed officer by the Director of Public Prosecutions specified under the said provision. In that respect, we hold that the photographs were not admissible in evidence and that it was an error on the part of the trial magistrate to admit them as evidence. A similar scenario was replicated in **John Kibii Langat vs Republic [2005] @KLR** in which a court of concurrent jurisdiction allowed the appeal for want of production of a certificate under **Section 78 of the Evidence Act.**

With regard to compliance with **Section 106B of the Evidence Act**, counsel for the Appellant once again submitted that the production of the CD into which the activities of the robbery were uploaded, was not accompanied by a certificate as provided therein. We wish to point out that Section 106B deals with production of electronic evidence and outlines how such evidence should be taken, preserved and finally adduced in court. For our purposes, we shall only refer to the relevant sub-sections. **Section 106B(1)**

provides as under:

> ***"Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to an computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible."***

The provision clearly states that any information stored in a computer device and thereafter uploaded or copied on any optical or electro-magnetic media may be admissible as evidence without necessarily producing the original. Accordingly, the CD produced by PW6 was, prima facie, properly admitted in court. However, that production ought to have complied with Section 106B(4)(a) and (d) of the Evidence Act which provide as follows:

> ***"In any proceedings where it is desired to give statement in evidence by virtue of this section, a certificate doing any of the following***
>
> a. ***Identifying the electronic record containing the statement and describing the manner in which it was produced;***
>
> d. ***Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate).***

It is vivid from the above provisions that electronic evidence can only be deemed as admissible if it is accompanied by a certificate under **Section 106 B(4).** Such certificate must be prepared by a person who is competent in the management of the electronic devise, in this case, the CCTV cameras. He must as well outline in his statement the manner in which he extracted the information from the cameras. Unfortunately, for PW6, he did not state in court that he was a person occupying a responsible position in respect to the operation of the device (CCTV camera) or the management of the production of the information extracted there from. He also did not produce a certificate prescribed under the provision. The mere fact that he watched the photographs in the presence of PW1 and 4 did not, per se, render them admissible. We once again hold that it was an error on the part of the trial magistrate to admit both the CD and the photographs as evidence.

More interestingly is that the learned trial magistrate held that the photographs so extracted from the CCTV cameras were the images of the Appellant. We have had the advantage of scrutinizing them. They bear images of two totally different persons. In the first photograph (Exhibit P3(a) is a young man with an ordinary jacket with stripes on the sleeves. Inside the jacket is a shirt. He is holding something like a long blade. He is also wearing a helmet whose colour is not clear. The second photograph (Exhibit) P(3) appears to be a much older man with a yellow helmet and his face is covered with a moustache. Next to the neck appears to be protruding a shirt collar. The rest of the body is covered by a dust coat. It is common sense that one person cannot bear two images. PW1, 4 and 6 were categorical that the images were those of the Appellant, but that cannot be true because the two images are for two different persons. Besides, the learned trial magistrate failed to point out the reasons as to why he linked the images to the likeness of the Appellant. In that regard, it is our view that the two photographs could not be used as a tool to positively identify the Appellant.

We wish to emphasize that the evidence of PW1, 2 and 4 could not persuade the court in founding a conviction. PW1 and 2 saw the robbers on the material date of the robbery. It is PW1 who opened for them into the office and safe room where the robbery took place. PW2 on the other hand took the robbers round the car wash, tyre center and drainage system to inspect the paint works. None described the physical appearances of the persons each came into contact with. In that respect, PW1 could not then purport to identify the Appellant through the CCTV photographs whereas he had not stated that one of the

persons seen on the CCTV camera had been engaged to paint the Petrol Station. In the same spirit, PW2 not having described to the police the robbers he had seen at the Petrol Station, could also not purport to identify the Appellant on seeing him in court. The physical description of a suspect at the first instance when a report is made to the police is more convincing and more reliable when thereafter the complainant alludes that he would be in a position to identify a robber or the attacker in any other forum. That way the evidence of a complainant is treated as credible in holding that positive identification would be used to found a conviction. For the aforestated reasons, it is our view that an identification parade would not have served any purpose. The same is conducted where a robbery takes place in difficult circumstances of identification but a complainant at initial report describes the appearance of a suspect. It is in the identification parade that a complainant is given an opportunity to further identify the suspect so as to clear any doubts that the person he saw during the robbery is truly the person who attacked him. In the present case, such a scenario does not obtain. Accordingly, we think that it was unsafe for the trial magistrate to have convicted the Appellant based on his observation that there was positive identification.

Finally the Appellant's counsel admitted that the trial court did not properly scrutinize the Appellant's alibi defence. In the case of **Kiarie vs Republic [1984] KLR, 739,** the Court of Appeal seating at Nairobi held that:

> "***An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge dos 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 purported 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."***

The Appellant gave a sworn statement of defence in which he denied committing the offence. From our earlier observations in this judgment, he was right in stating that none of the prosecution witnesses identified him and that the investigating officer by coincidence was pushed into charging him merely because he had painted the complainant's petrol station. We candidly observe that the learned magistrate shifted the burden of proof on the Appellant as the court wondered why he did not give sufficient reasons to convince it that he was framed. But our view is that the Appellant's alibi defence raised reasonable doubt that he was not at the scene of crime at the time of the robbery. It was then upon the prosecution to dislodge his defence that indeed he was at the scene and participated in the robbery. Given our finding that he was not properly identified, we are of the view that his alibi defence was credible in the circumstances.

In sum, we find that the prosecution did not prove its case beyond reasonable doubt. We quash the conviction and set aside the death sentence. We order that the Appellant be and is hereby set free unless otherwise lawfully held.

It is so ordered.

DATED and **DELIVERED** in Nairobi this **1st day** of **March, 2016**

L. KIMARU

JUDGE

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Masaviru for the Appellant*
2. *M/s Atina for the Respondent.*