REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & KIAGE JJA)

CRIMINAL APPEAL NO. 155 OF 2014

BETWEEN

SAMUEL WAMBUA MUTHOKA.....APPELLANT

VERSUS

REPUBLIC..... DEFENDANT

(*Appeal from the conviction and sentence in High Court Criminal Appeal No. 128 of 2008 at*

Nairobi (L. Achode & Mumbi Ngugi, JJ) Dated 10th December, 2013

in H.C.CR. A. NO. 719 OF 2010)

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JUDGMENT OF THE COURT

The appellant, **Samuel Wambua Muthoka** was arraigned before the Chief Magistrates' Court at Kibera with the offence of Robbery with violence contrary to **section 296 (2)** of the Penal Code, in that on the 6th day of April, 2009 at Upper Matasia in Kajiado North District, within the Rift Valley Province (as it was then called) jointly with another not before Court, while armed with dangerous weapons, namely swords, robbed **Moses Njogu Ndirangu** of (1) a 14 inch T.V. Sony, (2) a DVD Sony, (3) JVC Video 4 Nokia 1011 (5) Nokia 1200 (6) 15Kg gas cylinder (7) gas cooker (8) heater (9) 5kg maize floor (10) 3 litres oil (11) 2kg sugar (12) cash Kshs. 7,500/=, all valued at Ksh.

51,600, and at or immediately before or immediately after the time of such robbery, assaulted the said **Moses Njogu Ndirangu (Moses).** The appellant denied the charge prompting a trial in which the prosecution called three (3) witnesses in support of its case, while the appellant who gave sworn evidence was the sole defence witness.

The background to the appeal is that **Moses** had rented out premises to the appellant for a period variously stated by him as ranging from two- to four (2-4) months. The appellant had fallen into rental arrears. On the previous Sunday, **Moses** told him to vacate the premises. On the evening of the Monday next, the appellant called out to **Moses** who was watching T.V. in his sitting room to open for him. **Moses** recognized the appellant's voice and opened for him only to be met by a stranger who entered first,

followed by the appellant 2-3 minutes later. Both accosted and robbed **Moses** of the items enumerated in the charge sheet.

Moses never raised any alarm after the robbers left. Instead, when he heard footsteps outside his house, he called out the appellant's name. The appellant responded. **Moses** told the appellant to come in to untie him as his hands and legs had been tied by robbers and a sofa set placed on his head over a towel he had earlier been covered with. When the appellant told **Moses** that the door was locked from outside, **Moses** told the appellant to break the door, which the appellant did, came in and untied **Moses. Moses** tried to solicit help from neighbours but none came to his aid. The next day he was escorted to the police station by a neighbor called **Kirika,** and filed a report of robbery with violence against the appellant. Police visited the appellant's house, broke into it, but recovered nothing belonging to **Moses.** The appellant was arrested 4-5 days after the robbery as **Moses** was allegedly still investigating the matter.

The learned trial Magistrate (**Mrs. Kasera** (SRM) after analyzing the evidence before her, found the prosecution case proved to the required threshold of proof beyond reasonable doubt, and on that account found the appellant guilty as charged, convicted him and sentenced him to the only sentence known to law for this offence, namely–death. The appellant was aggrieved and he appealed to the High Court raising various complaints against the trial court's decision. In the impugned judgment dated the 10th day of December, 2013 the High Court (**Mumbi Ngugi and L. Achode,** JJ) found no merit in the said appeal and dismissed it in its entirety.

The appellant is now before us on a second appeal raising six supplementary grounds of appeal having abandoned the earlier grounds. It is his complaint that the learned judges of the High Court erred in law:-

> ***1. by failing to appreciate the law as it appertains to the evidence of identification and recognition.***
>
> ***2. by failing to address themselves to the appellant's contention that identification of the appellant by a single witness occasioned miscarriage of justice.***
>
> ***3. by failing to exhibit an independent mind when considering the appeal.***
>
> ***4. by failing to re-evaluate the entire evidence with much accuracy per the law.***
>
> ***5. by failing to resolve adequately the inconsistencies and contradictions in favour of the appellant.***
>
> ***6. by failing to adequately analyse the appellants defence.***

Mrs. Nyamogo instructed by the firm of **E.B. Nyamogo & Co. Advocates** for the appellant, submitted that it was not clear from the record as to how long the appellant had stayed with **Moses** or how often they engaged in any conversation for **Moses** to register and recognize the appellant's voice during the robbery; that **Moses** must have been apprehensive if not confused and afraid after a stranger walked in armed with a sword instead, of the anticipated appellant, and could not therefore have recognized the appellant when he came in 2-3 minutes later wearing a cap and goggles pulled over his face and trying to hide as put by **Moses** during the robbery; a room that was dark, as that is why the torch was used and that the possibility of **Moses** fixing the appellant because he (appellant) used to visit him was not ruled out.

Mrs. Nyamogo continued to submit that the first appellate court abdicated its role as it failed to appreciate that if the appellant had been one of the robbers who had just robbed **Moses,** he could not have responded to **Moses'** distress call; that it also failed to identify and reconcile numerous inconsistencies and contradictions in the prosecution case which were not only prejudicial to the appellant but were also fatal to the prosecution's case; that it also failed to appreciate the threshold for accepting and acting on the evidence of a single identifying witness as no warning was administered either by the trial court or the 1st appellate court on the dangers of receiving and acting on such evidence in the absence of corroboration.

As for the uncalled witnesses, **Mrs. Nyamogo** submitted that **Mr. Kirika** who escorted **Moses** to the police station the day after the robbery was a crucial witness and ought to have been tendered to tell the Court as to whether **Moses** named the appellant as one of the robbers at the earliest opportunity.

To buttress the above submissions, **Mrs. Nyamogo** cited the case of **Moses Mwangi Kanyeki versus Republic [2015] eKLR**; and **Duncan Muchui versus Republic Nyeri CRA No. 19 of 2011** both on the principles that guide the Court on the acceptance and acting on evidence of visual identification/recognition and voice recognition as a basis for founding a conviction against an accused person.

Turning to the appellants defence, **Mrs. Nyamogo** submitted that had the two courts below properly analyzed the appellant's defence in totality with the prosecution's evidence, they would have arrived at the only plausible conclusion, that the prosecution evidence did not point to the appellant as the person who had jointly with another robbed **Moses.**

In response to the appellant's submissions, **Miss Maina** for the respondent submitted that there was no mistaken identity of the appellant as **Moses** had lived with him for about three months; that the two used to interact often as the appellant used to supply **Moses** with milk and also used to assist him with house hold chores; and that is how he registered the appellant's voice and recognized it and opened the door for him, only to be attacked and robbed. Further that the lights were on and that is why **Moses** was able to register the clothes appellant wore on the light of the robbery, which were the same ones he wore in court on the day of the trial. In **Miss Maina's** view, the appellant could not have heard **Moses'** distress call if he had not been hovering around after the robbery. The prompt response to **Mosess'** distress call, was nothing but a purported cover up.

Turning to the role of the first appellate Court, **Miss Maina** submitted that the learned Judges of the first appellate Court, discharged their mandate properly as they re-evaluated the evidence on the record, applied principles of law correctly to that re-evaluation and arrived at concurrent findings as that of the trial Court, which findings in her view, were based on sound evidence on the record and should not be disturbed.

As for the alleged existence of inconsistencies, discrepancies and contradictions in the prosecution's case if any, **Miss. Maina** submitted that none existed on the record, and if any existed, then these were immaterial and did not go to the root of the prosecution case which was cogent and unshaken by the defence.

This is a second appeal. By dint of section 361 of the Criminal Procedure Code, this Court is restricted to address itself on matters of law only. As this Court has stated many times before in a long line of its own decisions and those of its predecessor, it 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 making those findings. See **Karingo versus Republic [1982] KLR 213.**

We have considered the record in light of the rival submissions set out above, and in our view, three issues fall for our determination namely:-

> *(1) Whether the first appellate court discharged its mandate properly.*
>
> *(2) Whether the prosecution case consisted of inconsistencies, discrepancies and contradictions which were never reconciled by the two courts below; and,*
>
> *(3) Whether the identification of the appellant at the scene of robbery was mistaken.*

In response to the 1st issue, the role of a first appellate court as has been repeatedly restated by the Court in numerous of its decisions is to re-evaluate, re-appraise and re-analyze the evidence tendered before the trial court, apply the law to the said evidence, and to make its own conclusions on the matter, while

bearing in mind that it neither saw nor heard witnesses and to make due allowance for that. See **Okeno versus Republic [1972] EA.32.**

The approach the learned Judges of the first appellate Court took in determining the appellant's complaints before them was to set out the offence the appellant faced at the trial; give a summary of the evidence tendered by either side during the trial; set out the appellant's complaints against the learned trial magistrate's findings; take into consideration the submissions of either side on the appeal before them; and then identified three issues for determination namely, compliance with **section 151** of the CPC; the weight of the prosecution evidence; and, lastly, the weight of the appellant's defence.

With regard to compliance with **section 151** of the Criminal Procedure Code, the learned judges correctly observed that when **Moses** was recalled to identify exhibits, he was neither sworn nor reminded that he was still on oath, but ruled that the failure to so comply by the trial Court occasioned no miscarriage of justice as the complainant was still bound by the oath he had taken earlier on when he took the witness stand in the first instance.

With regard to visual identification of the appellant at the scene of the robbery, the learned judges had this to say:-

> ***"We take the view that the totality of the evidence pointed to the appellant as one of the two assailants who robbed the complainant. The interaction between him and the complainant for a period of three months was in our view sufficient for the complainant to know his voice and to recognize it without error. We also note that initially, at the time, the robbery was taking place in the complainant's house, the lights were on and the complainant was able to see the appellant."***

As for lack of consideration or otherwise of the appellant's defence, the learned judges had this to say:-

> ***"We have looked at the Court record in this regard and find no basis for impugning the finding of the trial court. In her judgment, the trial magistrate took into account the defence by the accused that he did not commit the offence; that on the material day he heard the complainant call his name, went to his house and found the door locked; that he broke the door as instructed by the complainant, and that he cut the rope that the complainant hands and legs were tied with. We cannot find a basis for faulting the finding of the trial magistrate that the prosecution had proved its case against the appellant beyond reasonable doubt."***

On voice recognition, the learned Judges applied the principle of law set out in the case of **Libambula versus Republic [2003] KLR 683,** to the facts on the record and arrived at the conclusion that the appellant had been recognized by voice and placed at the scene of the robbery.

It is the above findings that the appellant has invited us to fault.The approach we take on visual identification is as was succinctly stated by **Lord Widgery C.J** in the case of **R. versus Turnbull [1976] 3 ALLER E.R 549 at pg 552** and as approved by the Court in a long line of cases. See **Wamunga versus Republic [1989] KLR 424** for the principle that evidence of recognition is one of the best evidence when a court is dealing with the identification of an accused person in connection with the offence charged. It is more reliable than identification of a stranger. But even when a witness purports to recognize a familiar face, the Court needs to be cautious that mistakes in the recognition of close relatives and friends are sometimes made.

The tests to be applied before receiving and acting on the evidence of recognition were set by the Court in the case of **Paul Etole & Another versus Republic CRA 24 of 2000** namely, for the Court to warn itself of the special need for caution before convicting an accused person on such evidence. Second, the court ought to examine closely the circumstances in which the identification by each witness came to be made; and thirdly, it should remind itself of any specific weaknesses that may be noted in the identification evidence.

It is not in dispute that the robbery occurred at night and that **Moses** was a single identifying witness. In

Abdallah Bin Wendo versus Republic 20 EA CA. 166 at page 168 the predecessor of the Court laid down the principle that subject to certain well known exceptions, a fact may be proved by the testimony of a single witness. The parameters and the tests to be applied before reception and acting on such evidence by a court of law were set out by the court in the case of **Maitanyi versus Republic [1986] KLR 198** as follows:-

> *1. A fact may be proved by the testimony of a single witness but there is need to test with the greatest care such testimony in order to determine whether such a witness was able to make a true impression and description of the suspect.*
>
> *2. The factors to be inquired into are the nature of the light available, its size and its position relative to the suspect.*
>
> *3. The court must warn itself of the danger of relying on the evidence of a single identifying witness, which warning must be administered before a decision to act on such evidence is made and not thereafter.*
>
> *4. Failure to undertake an inquiry as specified in numbers 1 and 2 above is an error of law which operates to vitiate such evidence which evidence should not in the circumstances be relied upon to support a conviction.*
>
> *5. Greater care and caution needs to be exercised especially in circumstances where it is known that conditions favouring correct identification were difficult. In such circumstances the court is obligated to identify some other evidence whether it be circumstantial or direct, pointing to guilt from which a judge can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.*
>
> *6. There is also the necessity for the court to note that in every case in which there is a question as to the identity of the accused, there is the need for the court to inquire as to whether the identifying witness gave either the names or the description of the assailants to the person or persons who came to the scene of the attack at the earliest opportunity. See* ***Simiyu & Another versus Republic [2005] 1 KLR 192.***

With regard to lack of administration of a warning on the dangers of acting on the evidence of a single identifying witness to found a conviction, we have no hesitation in agreeing with **Mrs. Nyamogo's** submissions that the two courts below did not administer the necessary warning of the dangers of acting on the evidence of a single identifying witness, and then give reasons as to why they found it safe to act on such evidence to found and affirm a conviction against the appellant. In terms of the principle in **Maitanyi versus Republic** (supra), failure to exercise such a caution on the part of the trial and first appellate courts vitiated the evidence tendered making it unreliable and unsafe to use it as a basis for a conviction.

As for the conduct of both the appellant and the complainant, we agree with **Mrs. Nyamogo's** submission that the two courts below misapprehended the facts on this aspect of the prosecution's case as to why **Moses** instead of raising an alarm to attract neighbours to come to his aid, turned to the appellant for help yet he (appellant) had allegedly jointly with another robbed him shortly and injured him in the process. In the circumstances, he was expected to be apprehensive of further harm by the appellant. Further, the fact that it took the police to break into the appellant's house in his absence to see if they could recover any of the items that had been robbed from the complainant the previous night, and the fact that the appellant was arrested four- five (4-5) days after the robbery because the complainant was still investigating the robbery should have raised a doubt in the mind of the two courts below as to the guilt of the appellant. It should have been clear to the learned Judges that **Moses** only suspected the appellant to be one of the robbers. The position in law is that suspicion, however strong cannot form a basis for a conviction against an accused person. See the case of **Joan Chebichi Sawe versus Republic [2003] eKLR**

The two courts below also misapplied the facts on the identification by the appellant by way of his

physical features when there was clear testimony that he wore a cap and goggles covering his face. It was not also clear how the two courts below arrived at the conclusion as to how **Moses** identified the appellant as the person who pulled him (**Moses)** on the floor in the dark and flashed him with a torch before pouring water on him without uttering a word to **Moses** whose face was covered with a towel. In addition, we ask how **Moses** was able to identify the appellant through the type of clothing he wore on the night of the robbery with no peculiar mark on it to remove it from an otherwise common item. It is our view that when the above additional factors are considered in totality with the other aspects of failure of the two courts below to warn themselves of the dangers of acting on the evidence of a single identifying witness, it is a further reason for entertaining a doubt as to the appellant's involvement in the commission of the robbery against **Moses.**

Turning to the issue of identification through voice, the position on the law with regard to voice identification is as was stated by the Court in the case of **Karani versus Republic [1985] KLR 2990** and as restated in the case of **Libambula versus Republic (supra)** wherein the Court held *inter alia* that:-

> ***"Normally evidence of voice identification is receivable and admissible evidence and it can depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused persons' voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it."***

From the learned Judges' reasoning, when they elected to accept and act on the evidence on the appellant's voice recognition, they failed to heed the caution that is inbuilt in the above principle, namely, "**depending on the circumstances.**" It is our view that, the appeal before them called for a careful scrutiny of the evidence on the record as already outlined above. Had the learned Judges considered the peculiar circumstances already outlined above, we have no doubt in our minds that they would definitely have had doubts in the prosecution's case as already highlighted above by us.

Mrs. Nyamogo also raised the issue of alleged unreconciled discrepancies, inconsistencies and contradictions as regards the location of the injury inflicted on **Moses** during the robbery with the doctor saying it was on the right arm, while **Moses** said it was on the left; the length of the appellants stay in the complainant's plot which ranged from two to four (2-4) months which **Mrs. Nyamogo** submitted were fatal to the prosecution's case. The position in law on such alleged existence of inconsistencies, contradictions and discrepancies in the prosecution case is as was stated in the case of **Njuki &4 others versus Republic [2002] 1KLR 771** namely, that where such allegations are raised, the obligation of the Court is to determine as to whether the said discrepancies, contradictions and inconsistence are of such a nature as would create a doubt as to the guilt of the accused. Where they do not, then they are curable under **section 382** of the Criminal Procedure Code.

Applying these principles to the alleged discrepancies, inconsistencies and contradictions identified by **Mrs. Nyamogo**, it is our finding that these were inconsequential to a finding of guilt against the appellant. It would not have mattered as to which part of his body the injury was inflicted in the cause of the robbery. Second, the length of the period of stay by the appellant was also inconsequential. What was consequential to the prosecution case was the issue as to whether the length of the stay established by the prosecution case as the correct length of stay was sufficient to afford **Moses** an opportunity to register both the appearance and the voice of the appellant to be sufficiently safe to be relied upon to found a conviction for the offence of robbery, where circumstance of the case would have warranted such a finding.

Turning to the weight to be attached to the defence of the appellant, which in effect was an *alibi defence,* it ought to have been weighed against the totality of the prosecution case. Had the two courts below properly done so, they would have arrived at the only plausible conclusion to which we ourselves have arrived, that it stood unassailable in the light of the doubts and suspicion created in the prosecution case as already outlined above. It was therefore erroneously rejected by the two courts below

In the result, we find merit in the appeal. It is allowed. The appellant is ordered to be set at liberty

forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2017

R.N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR