**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJA)**

**CRIMINAL APPEAL NO. 431 OF 2010**

**BETWEEN**

**SIMON KIMANI MWANGI.....APPELLANT**

**AND**

**REPUBLIC.....….....….....….RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nakuru (Emukule, Ouko, JJ.) dated 29th October, 2010*

**in**

**H. C. Cr. A. No. 131 of 2008)**

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**JUDGMENT OF THE COURT**

1. The appellant, **Simon Kimani Mwangi** was convicted by Nyahururu Senior Resident Magistrate, **T. M. Matheka**, on one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and was sentenced to death. The prosecution called six witnesses to prove as alleged in the charge sheet that on the 24th February 2007 at Karagita Trading Centre in Naivasha, he jointly with others not before the court while armed with dangerous weapons namely a hammer, robbed Paul Kimani Njuguna of motor vehicle Reg No. KAV 560T, a Toyota Dyna, a driving licence, national identity card and voter's card all valued at Sh. 1 million and used violence on Paul Kimani Njuguna (Paul).There was an alternative count of handling stolen property contrary to **Section 322(2)** of the **Penal Code** but no finding was made thereon after conviction of the appellant on the main charge. His first appeal to the High Court was dismissed, hence this second and final appeal.
2. The concurrent findings of fact made by the two courts below were fairly straight forward. Paul was employed as a driver of Toyota Dyna Reg No. KAV 560T in the hardware business owned by **Kamau Mbugua Nga'ang'a** (PW3) (Kamau) and his wife **Edith Nyambura Kamau** (PW2) (Edith) in Karagita trading centre . On the 24th February 2007, at about 4pm, Paul was instructed by Edith to deliver some 5 bags of cement for a customer within Karagita area. He drove with the customer to a building site where the customer directed him and found someone else who the

customer said was his *'fundi'*. Paul opened the door of the vehicle to alight and allow the cement to be offloaded, but the *'fundi'* who held a hammer held him and hit him on the elbow. The customer joined in and held him and pulled him to his side and both beat him and forced him to lie under the dashboard. The *'fundi'* jumped into the vehicle and drove off to Kayole Estate along the Nairobi/Naivasha road where they abandoned Paul after robbing him of his cell phone, driving licence, identity card and voters card. Soon thereafter he got help and called his employer who reported the matter to the police and investigations commenced.

3. Four days later on 28th February 2007, information was received by CID police officers in Nyahururu that a motor vehicle had been seen driving into a certain homestead in Kirima village but never left. It was also reported that a suspicious fire had been seen inside the compound. A contingent of police officers, among them **PC Herman Maina Muriuki (**PW5), headed to the homestead at 4.30pm and found a woman with a one week old baby. She identified herself as the wife of the appellant. They also found within the compound numerous motor vehicle parts covered with goat manure, others covered with dry leaves, some on top of a toilet roof, while others were in a room within the house. Photographs of those items were taken by scenes of crime personnel and were produced in evidence by **PC Daniel Kiragu** (PW6). The team of officers also found a file containing documens bearing the names of Kamau Mbugua Ng'ang'a (PW3), as well as a driving licence, identity card and a voter's card all bearing the name of Paul (PW1). Outside the compound was parked a Toyota Hiace *matatu* Reg No. KAM 391P with no engine. It belonged to the appellant. The officers decided to lie in wait for the owner of the homestead and took positions outside the home.
4. At about 7.30pm, the appellant arrived on a bicycle and the officers followed him into the home. When he saw the officers' vehicle he jumped off his bicycle but was arrested and taken to his house. Asked about the motor vehicle parts, the appellant said he had bought them from a Ugandan. He was also asked about the driving licence and he said it belonged to his brother who lives in Kakamega. Among the vehicle parts was a door which bore the telephone number of the owner. The police called the number and were directed to Kamau who travelled to Nyahururu and found a dismantled shell of his vehicle KAV 560T. He identified several motor vehicle parts belonging to the vehicle including the engine, as well as several documents found in the vehicle bearing his name and that of his driver, Paul.
5. On 5th March 2007 an identification parade was held at Nyahururu by **IP Kinyua Ringera** (PW4) and Paul was invited to see if he could identify any of the two people who attacked him . He was able to identify the appellant as the *'fundi'* who held the hammer and hit him before driving off with his vehicle. Paul was also able to identify the dismantled vehicle parts as well as his documents. The appellant was then charged with the offence.
6. In his sworn defence, the appellant blamed his woes on a former business partner, one Njuguna Karugu, with whom he had an acrimonious parting of ways and became enemies. According to him, it was Njuguna who directed the police to his home and conspired with them to plant false charges on him. On the 24th February 2007 when the offence was supposed to have been committed, he testified, he was away at a funeral of his cousin in Njabini and had photographs and *matatu* tickets to show for it. He had left his own *matatu* with his driver who did not use it because the TLB licence had expired and he did not have the money to renew it. On 28th February 2007 he went to borrow money for the TLB licence from a butcher friend and promised to sell his cow to him. The butcher's employee, **John Nderitu Mutahi** (DW1) was told to accompany him to bring the said cow and they left. On the way home, he was informed by a shop keeper that the police were at his home looking for him and he borrowed the shop keeper's bicycle to rush there. On arrival, he was arrested by the police who collected several documents and drove out his *matatu* which was in working condition but had no petrol. He faulted the identification parade witness, Paul, for failure to point out any special feature about his appearance when he had an obvious bold head and a gap in his teeth. As for the motor vehicle parts purportedly recovered from his home, he denied that there were any vehicle parts in his home and blamed the police and Njuguna for the frame up. His witness, (DW1) who said he was a remandee awaiting trial, supported the appellant's story that they were together when they arrived home and the appellant was arrested. He overheard the police officers ask the appellant about Njuguna Karugu before taking him into the house and driving out his *matatu* vehicle which had no fuel and had to be towed away instead. He later saw the same vehicle in a garage and informed the appellant who was in police custody.

The suggestion was that the police removed the *matatu* engine after the arrest of the appellant to build the case that the stolen vehicle was meant to supply another engine for the *matatu*.

7. Both courts below believed the prosecution evidence and dismissed the *alibi* defence put forward by the appellant. Before us, he has put forward seven grounds of appeal drawn up by learned counsel for him **Mr. Maragia Ogaro** after abandoning all other previous memoranda filed by the appellant in person and by his erstwhile advocate. They may be summarized, thus:-

***The first appellate court erred in law in failing to:***

***1. note that the circumstances obtaining at the scene was not conducive of a favorable identification of the appellant hence the evidence of PW1 could not be exclusively be relied upon as cogent***

***2. warn itself of the dangers of relying upon the evidence of a single identifying witness being PW1 before making it a basis for conviction.***

***3. appreciate the fact that that sufficient description as given to police when the matter was initially reported by the complainant***

***4. note that the identification parade was not conducted within the confines of the Force Standing Orders and the court further erred in subjectively analyzing that piece of evidence.***

***5. shifting (sic) the burden to the accused to prove the defence of alibi by delving into theories on and for reasons why the Office of the DPP ought to have the rules changed.***

***6. note that the trial was a nullity given the fact that section 200 (3) of the Criminal Procedure Code Cap 75 laws of Kenya despite the fact that the court indicated having complied with the section.***

***7. note that the essentials of the doctrine of recent possession had not been sufficiently proved."***

8. The grounds are on matters of law which is the mandate open to this Court on a second appeal. See **Section 361** of the **Criminal Procedure Code (CPC)**. As is normally put, this Court will respect the concurrent findings of fact made by the two courts below and only interfere with them if they are bad in law. They would be bad in law if they were based on no evidence at all or were based on a perverted appreciation of the evidence on record or no tribunal properly directing its mind to the evidence would make such findings. See ***Christopher Nyoike Kangethe v Republic [2010] eKLR.***
9. In his submissions before us, **Mr. Maragia** condensed the grounds into four by combining grounds 1 to 4 relating to identification and urging the rest *seriatim*. Ground 6 has constitutional implications and dire consequences of rendering the trial a nullity if it is upheld. For that reason we must examine it *in limine*. The matter was neither raised nor considered by the High Court but it is a jurisdictional issue which may be raised at any stage of the proceedings. Mr. Maragia contended that there was a breach of the provisions of **Section 200** of the **CPC** since the trial was conducted by two different Magistrates. One magistrate heard all the six witnesses of the prosecution and made a Ruling that the appellant had a case to answer at the close of the prosecution case, but was transferred thereafter. The succeeding Magistrate proceeded to hear the defence case and write the judgement. In counsel's view, the succeeding Magistrate failed to explain to the appellant his rights under **Section 200** before proceeding with the trial and was therefore in breach of the appellant's fair trial rights. In his submission, compliance with the section is mandatory and can only be demonstrated by recording the explanation made to the accused person. The only consequence for the breach was to declare the trial a nullity. In support of those submissions he cited the case of ***David Kimani Njuguna V. Republic Cr.App. No. 294 of 2010*** (UR).

10. In response to those submissions, learned **Senior Assistant Director of Public Prosecutions, Mr. Andrew Omutelema** found no substance in the contention, observing that there was evidence on record to show that the succeeding trial Magistrate referred to **Section 200** and conversed with the appellant before the appellant made a choice to proceed with the case from where the previous Magistrate left it. It was not necessary to refer to the recall of witnesses because the appellant did not require them.
11. It is indeed true as contended by Mr. Maragia that the provisions of **Section 200** of the **CPC** go to the fair trial rights of an accused person and a trial that proceeds in breach of it is a nullity. This Court has in many previous decisions reiterated that position and the decision relied on by Mr. Maragia refers to several of those decisions. **Section 200 (3)** which is relevant in this matter states as follows:

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

12. After reviewing previous authorities, this Court in the **David Njuguna case (supra)** stated thus:

> ***"All of these decisions declare that the provisions of Section 200 (3) are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or Magistrate complies with it out of a statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity."***

That position still holds true. Does it apply in this appeal?

13. We have re-examined the record and it is evident that the succeeding trial Magistrate was aware of the provisions of **Section 200(3)** and expressly referred to it in her judgment ,thus:-

> ***"This matter was wholly heard by Mr. Mungai Ag. Senior Principal Magistrate (as he then was) and upon complying with Section 200 of the Criminal Procedure Code the accused chose that the case proceeds from where it had stopped. Thus I only heard the defence."***

14. Such compliance is borne out by the proceedings themselves which we may reproduce:-

> ***"1.4.04. Before T. M. Matheka SRM***
>
> ***OP Makapila Prosecutor***
>
> ***Court clerk Wanyoike***
>
> ***Accused Present***
>
> ***Court - Case for hearing today.***
>
> ***Section 200 of the CPC complied with.***
>
> ***Accused states in Kiswahili:-***
>
> ***I pray that may case proceed from where it had stopped.***
>
> ***T. MATHEKA***
>
> ***S.R.M***

***Order. Case to proceed.***

***Order. Section 211 CPC complie(si)c. I will make a sworn statement. I will call one witness. He is in prison. His name is John Nderitu Mutahi.***

***T. MATHEKA***

***S.R.M***

***Order. Accused to give his statement of defence. The witness will be produced next time.***

***T. MATHEKA***

***S.R.M"***

15. The proceedings show that the trial court was aware of the provisions of both **Sections 200** and **211** of the **CPC** and recorded that she had complied with them. It may well have been prudent for the Magistrate to record the manner of compliance in the exact words or in the manner of 'question & answer' in order to put the matter beyond doubt. But **Section 197 (1)(b)** of the **CPC** provides that *"evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative. Provided that the magistrate may take down or cause to be taken down any particular question and answer"*. It is sufficiently evident from the record that the address in relation to the two sections was made by the Magistrate directly to the appellant who responded and the response was recorded. It is a far cry from cases where the succeeding Magistrate simply says nothing about **Section 200(3)** and simply proceeds with the trial or where, as in the ***David Njuguna case (supra),*** the accused is represented by counsel, and is ignored in preference for a consent of counsel to proceed with the trial from where the previous Magistrate left it. We are of the view that this case is distinguishable, and that there was substantial compliance with the section. There was therefore no breach of the appellant's fair trial rights. That ground of appeal fails.
16. On the issue of identification, Mr. Maragia submitted that reliance was made on a single witness of identification, Paul, but his evidence was not weighed with care. Counsel observed that the attack on Paul at the scene of the robbery was sudden and brief, and there was no conversation between him and his attacker. It was not in evidence that Paul gave any description of his attacker to the police in his first report either. In his view, the police must have known about the appellant's identity from photographs found in the appellant's house and shown to Paul. It was therefore of little moment, in counsel's submission, that Paul purported to identify the appellant in an identification parade. The parade itself was not properly organized since it comprised members who were short and others tall contrary to the guidelines in the Force Standing Orders. There was also evidence that Paul was shown to the appellant at the police station before the parade was conducted. The identification of the appellant was therefore doubtful and he should have been given the benefit of doubt, concluded counsel.
17. In response, Mr. Omutelema conceded that there was no description of the appellant given in the first report but submitted that the robbery took place in broad daylight and Paul had a good look at the so called *'fundi'* who walked towards him to attack him at the scene. Paul was not seriously injured or shocked. As for the identification parade, the SADPP submitted that it complied with the Force Standing Orders as explained by the parade officer, PW4, who added that the appellant signed to confirm that he was satisfied with the conduct of the parade. In particular, the SADPP ruled out the suggestion that Paul was shown to the appellant before the parade, since the evidence on record confirmed otherwise. Finally, he submitted that the identification evidence did not stand alone as it was supported by other circumstantial evidence of recovery of the stolen items.
18. The trial court which heard and saw Paul testify before it was satisfied that he told the truth when he said he saw his attacker well at the scene in broad daylight and was able to identify him later in an identification parade. The High Court revisited that issue when the appellant complained that Paul was ***"shocked and did not therefore have the necessary concentration for facial observation of the person who posed as a 'fundi'".*** The court made the following finding:-

***"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 of Kayole within Karagita area of Naivasha District".***

19. The High Court also expressed itself on the identification parade and found as follows:-

***"There was indeed a statement by PW1 that he was shown the suspect in an identification parade - but I(sic) 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 he 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."***

20. We have carefully re-examined the record and have no reason to differ with the High Court as the findings are based on sound evidence and reasoning. The circumstances surrounding the attack on Paul were not stressful and it was in broad daylight. The identification parade also substantially complied with the Force Standing Orders, Cap 46, and we have no reason to trash it. The complaint about the statement by Paul that ***'I was shown the suspect in an identification parade'*** was certainly taken out of context since Paul in the same breath emphatically stated:-

***"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."***

The ground of appeal on identification also falls by the wayside.

21. Finally on the recovery of the stolen items and the conclusion that the appellant was in recent possession of them, Mr. Maragia submitted that the appellant was not arrested within the homestead where the recoveries were made and there was no proof that it was his homestead. The police should have waited for him to enter the homestead before arresting him, which they did not, and thereby lost the opportunity to confirm that he was the owner. Only the purported wife of the appellant is said to have stated that the home was the appellant's but she was not called as a witness. As for the recovered items, counsel submitted, they were not recovered in possession of the appellant and the recovery was not recent.

22. With respect, we cannot take this submission seriously. The police officer, PW5, who participated in the recovery of the stolen items and the arrest of the appellant testified that they lay in ambush for the appellant outside his home and when he arrived they followed him up to the home and arrested him as he jumped out of his bicycle. The appellant confirmed the home was his before being taken inside his house. In his own sworn evidence, the appellant confirmed that he had been informed that the police were at his home looking for him and that is why he borrowed a bicycle to rush there. He further testified:-

> ***"I borrowed his bicycle so that I would rush home. Within 30 minutes we got to my gate. Before entry - there was a motor vehicle which had lights on at the gate about 7.30 pm. There was another motor vehicle in the homestead. We entered the homestead. Police officers appeared from the sides. They ordered us to stop. We stopped. They asked who was the owner of the home. I said I was the one. They arrested me and handcuffed me."***

23.His own witness further testified as follows:-

> ***"His friend told him that some officers had been looking for him around 3.00 pm. He was surprised. He borrowed a bicycle so we would rush home. He carried me as pillion passenger. We got there towards 7.00 pm - 7.30 pm. We saw motor vehicle parked with lights on - we passed about 3 metres from the gate we found police landcruiser. We went into the home. We were ordered to stop. We put up our arms. Accused identified himself as the owner of the home. We were pushed into the compound."***

24.The complaint that the appellant did not own the homestead where the recoveries were made is without merit and we reject it. The recoveries were made barely nine days after the robbery and in the nature of the items recovered, it was a recent recovery. Some of the items were personal documents bearing the names of the complainant and Paul, and his explanation was total denial that they were recovered in his possession. We agree with the two courts below that the evidence of recovery was cogent and irresistibly connected the appellant with the offence charged. With such findings, the *alibi* defence of the appellant dissipates.

25. The upshot is that this appeal has no merit and we order that it be and is hereby dismissed.

***Dated and delivered at Nakuru this 14th day of April, 2016.***

***P. N. WAKI***

**……**

***JUDGE OF APPEAL***

***R. N. NAMBUYE***

**…….....…**

***JUDGE OF APPEAL***

***P. O. KIAGE***

**……**

***JUDGE OF APPEAL***

*I certify that this is a true*

*copy of the original*

***DEPUTY REGISTRAR***