



IN THE COURT OF APPEAL

AT NYERI

SITTING AT NAKURU

CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

CRIMINAL APPEAL NO. 10 OF 2011

BETWEEN

ZAKAYO KARIUKI KAMAU..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at

Nakuru (Ouko, Emukule, JJ.) dated 10th December, 2010).

in

(H. C. CR. A. No. 275 of 2009)

JUDGMENT OF THE COURT

The appellant ZAKAYO KARIUKI was arraigned before the Principal Magistrate's court at Nyahururu vide Criminal Case No. 1109 of 2008 with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that on the 29th day of May 2008 at 7.30 pm along Subukia Nyahururu Road, Mwereri junction, Subukia Location, Nakuru North District of the Rift Valley Province, jointly with others not before court, being armed with a dangerous weapon namely *pangas* and *rungus* robbed James Kariuki Chege a motor vehicle registration KAP 632Q make Nissan *Matatu*, cash money Kshs 500/-, a mobile phone make Nokia 1108, badge and P.S.V licence all valued at Kshs 504,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said James Kariuki Chege.

The appellant denied the charge prompting a trial in which the prosecution called four (4) witnesses to prove its case while the appellant was the only witness for the defence.

The brief facts are that on the 29th day of May 2008 at about 7.30 pm James Kariuki Chege (PW1) (James) and his unnamed son were in motor vehicle registration number KAP 632 Q escorting home its official driver David Mwangi Njugi, PW2, (David) after winding up the days work.

On reaching Mwireri, James who was driving with David in the passenger seat stopped the vehicle for David to alight. As soon as David stepped out of the vehicle he was confronted by a group of people who ordered him back into the vehicle. One of the three came to the driver's side and ordered James to switch off the engine which James did. This person robbed him of his mobile phone Nokia 1108, Kshs 800/=, PSV license and a conductor's badge. After the robbery one of the robbers whom James identified as the appellant commanded him to restart the vehicle but James told the robber that it could not start because of the low battery. The two went to the front (James and the robber on his side) to start the vehicle. The appellant allegedly snatched a cap from James and used it to cover his face but James alleges to have seen his face with the help of the head lights. One of the robbers however jump started the vehicle. As it took off the robbers realized they had left one of their own behind, applied emergency brakes causing the sliding door to jam. According to James one of the robbers got out and pulled off the jammed door and threw it away, while according to David the door fell off on its own and was not picked. The vehicle slowed down as it turned into Mwangaza junction. That is when James got a chance to jump out and disappeared into a nearby farm. He reported the matter to the Police Station at Bahati on the same night. He came to the scene that same night in the company of policemen and found the vehicle abandoned.

On the following day, 30th May 2008, James spotted the appellant in Subukia Town. He mobilized his fellow drivers and touts who assisted him apprehend the appellant and escorted him to Subukia Police Station. According to David, he was at Subukia Town where the vehicle was being repaired. An unnamed person alerted them that he had seen the appellant in town. Drivers and touts apprehended the appellant and escorted him to the Police Station.

The version of PW IV, PC George Satia (George) is that on the 30th May 2008 at 10.00 pm he was in a vehicle driving from Nakuru in the company of P.C Margaret Wachira when he heard chanting from a crowd that had blocked the road saying '*choma yeye, choma yeye*'. He quickly parked the vehicle he was driving on the side. The complainant, meaning James, was one of the crowd. He told George that they had caught one of the robbers who had robbed them. George rescued the appellant and escorted him to the Police Station.

When cross examined James admitted knowing the appellant as a neighbour but never took police to the appellant's home on the night of the robbery. David on the other hand never mentioned knowing the appellant as a local resident at Subukia save that he never identified any of the robbers. When cross examined, George stated that James' phone was never robbed from him as he had hidden it in the vehicle; that James had described the appellant to him (George) as short and dark although James' statement stated that he knew him as Kariuki; that James was present when the appellant was being apprehended; also maintained that he found the appellant almost being lynched and lastly that nothing incriminating against the appellant was either recovered from the vehicle nor from his (appellant's) phone. After the appellant's arrest, George caused the motor vehicle to be photographed by PW3 P.C Daniel Kiragu (Daniel) who produced the photographs as exhibits.

The appellant gave unsworn evidence denying the offence. It is his version that on 30th May 2008, he was at Subukia Trading Centre waiting for any tractor for hire to come by. At 10.30 am he saw the complainant in the company of two police officers and two touts approach and they apprehended him. The complainant never uttered a word but the two policemen invited him to accompany them to the Police Station where he was eventually charged with an offence he knew nothing about. It was his assertion that the offence was a fabrication following a grudge between him and James' family following the appellant hitting James' sister with a bicycle he was riding way back in 2004.

At the conclusion of the trial, the learned trial magistrate M. T. Kariuki, Ag Senior Resident Magistrate, found the appellant guilty of the offence charged and sentenced him to the only sentence known to law for this offence - death.

The appellant was aggrieved. He appealed against that decision to the High Court vide Criminal Appeal number 275 of 2009 raising four (4) home made grounds of appeal. The appeal was heard and dismissed in judgment dated the 10th day of December 2010 delivered by D. K. Maraga J. (as he then was) and M. J. Anyara Emukule J.

The appellant was once again aggrieved. He is now before us on a second appeal. He had initially raised seven (7) homemade grounds of appeal. Learned counsel on record for him Ombati J. abandoned four (4) leaving only three to proceed to trial. These are that the learned Judges of the High Court erred in law and fact:-

"- When they upheld both the conviction and sentence by relying on the evidence of identification/recognition yet failed to find that there wasn't any as there wasn't any first report incriminating the appellant in the commission of the crime.

- When they upheld conviction and sentence by relying on a single testimony yet failed to find that the trial magistrate did not warn himself of the dangers of relying on a single testimony.

- That the rejection of his defence was in violation of Section 169 (i) CPC."

In a brief submission to the Court, learned counsel Mr. Ombati urged us to allow the appeal basically on the grounds that the appellant's defence was not considered by both courts below and had these courts done so, they would have found the prosecution case ousted.

Second that the circumstances displayed by the facts on the record were not conducive to positive identification of the appellant. The evidence was therefore unreliable and should not have been relied upon to support a conviction.

To buttress his argument, Mr. Ombati relied on the case of **Norman Ambich Miero & Henry Kisinja Anjili versus Republic Nairobi Criminal Appeal No. 279/2005** in which the Court approved the principles of law on identification by a single witness as enunciated in the cases of **R. versus Turnbull & others [1976] 3 ALL ER 549** and as approved in the case of **Wamunga versus R [1989] KLR 424.**

In response to the appellant's submissions, K. F. Nyakira the learned prosecution counsel on the other hand urged us to affirm the concurrent findings of the two courts below because: first the facts on the record demonstrate clearly that the appellant's defence was considered and dismissed. Second, they concede the prosecution case rested on the evidence of a single witness, but such evidence was properly received and acted upon as the two courts below warned themselves of the dangers of acting on such evidence in support of a conviction, at the end of which they were satisfied that it was safe to act on it to found a conviction as it was evidence of recognition through the motor vehicle head lights after it had been jump started.

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, 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 the findings. See **Mwita versus Republic [2004] 2 KLR.** In **Karingo versus Republic [1982] KLR 213** at P. 219 this court said:-

"A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja versus Republic [1950] 17 EACA 146."

In obedience to the above mandate, we have revisited the record on our own and considered it in the light of the rival arguments set out above as well as the principles of law and case law relied upon by the appellant. In our view the issues that fall for our determination are those contained in the three grounds of appeal submitted upon by both sides.

1. With regard to the evaluation or otherwise of the appellant's defence, we find that the learned trial magistrate analyzed the appellant's defence of fabrication on account of the alleged grudge but discounted

it because it could only have held if there had been demonstration of existence of a conspiracy involving PWII David and PWIV George. With respect, we find the learned magistrate fell into error as neither the two witnesses (David and George) identified the appellant in connection with the alleged robbery or the grudge. There was evidence of arrest which was contradictory as will be demonstrated shortly. As for the first appellate court judges we found that the judgment is clear that they indeed reevaluated the appellant's defence but made no findings on its plausibility or otherwise.

In our view, we find that the evidence of a grudge should not have been brushed aside by both courts below in the manner done. When considered in the light of the unreconciled inconsistencies and discrepancies in the prosecution case which we shall highlight shortly, it tends to cast doubts as to the appellant's involvement in the commission of the offence. First, James failed to give any reason as to why he failed to lead the police to the appellant's home that same night or the next day since he had allegedly recognized him in connection with the robbery. When asked about it, James simply said he had not. We find this a rather strange attitude from a person who felt aggrieved by the robbery that had been committed against him and who was keen on pursuing justice against the robbers after reporting to police soon after the incident.

Second, James alleged that his mobile phone was one of the items robbed from him. It is in fact listed in the charge sheet as one of the items robbed. James never mentioned that he had two mobile phones on him on the material day. In contrast, he told George that he had hidden his mobile phone in the vehicle and in fact George recovered it from the vehicle. Mystery therefore surrounds the phone that was robbed from James and where it had come from.

Third, according to James when the sliding door jammed after one of the robbers applied emergency brakes, James said it was forcefully removed by one of the robbers and thrown away while David who was in fact seated in the vehicle said that it fell off on its own.

Fourth, on the day of the arrest, James said that he is the one who spotted the appellant at Subukia Town and mobilized his co-workers (drivers & touts) to assist in the apprehension of the appellant and escorted him to the Police Station, while David said it was an unnamed person who alerted them of the presence of the appellant in town. They mobilized drivers and touts who arrested him and then escorted him to the Police Station. According to David the incident must have occurred during the day as he mentions the vehicle being repaired. David does not mention the involvement of James in the arrest. The two versions contradict the version of George who said the arrest was at 10.00 pm and that he rescued the appellant from a crowd which wanted to lynch him, a matter not alluded to by both James and David. All the above created doubt in the appellant's commission of the offence charged.

As for the evidence of identification/recognition of the appellant in connection with the commission of the offence, it rests solely on the single testimony of James. We agree the two courts below were alive to the principles of law applicable for the reception of such evidence and the threshold to be met before acting on it to found a connection. The only issue we have to resolve is whether as submitted by the appellant, this evidence did not meet that threshold and should not therefore have been acted upon by the learned trial magistrate to found a conviction and the first appellate court to affirm.

The learned trial magistrate had this to say:-

"In the circumstances the court is dealing with the evidence of a single identifying witness.

In the circumstances, the court must warn itself of the danger of relying on the evidence of a single identifying witness while considering the evidence before making a decision.

From the case of Maitanyi versus Republic it was held inter alia that when testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions of the identification and whether the witness was able to make a true impression and description of the suspect.

In the present case the complainant says that he saw the accused when he stood in front of the motor vehicle whose headlamps were on. He recognized him as his neighbour at home and a former classmate in school.

The accused while cross-examining the complainant did not at all shake his evidence that he had recognized him. The accused in his defence also confirmed that he knew the complainant well enough since he was his neighbour at home."

Turning to the findings of the first appellate judges, it is evident from their analysis of the evidence on this aspect that they accepted James' evidence that he knew the appellant very well because first, they are neighbours in the village; second, they had been schoolmates; third, James gave appellant's name when he made the report of the incident on the first instance. James was categorical that he saw the appellant with the help of the front head lights which illuminated him.

In arriving at the conclusion that the threshold on admission of James' evidence had been met, the learned judges had this to say:-

".....Section 143 of the Evidence Act, (Cap 80, Laws of Kenya) provides that no particular number of witnesses is, in the absence of any provision of law to the contrary, required for the proof of any fact, In other words, even one witness may proof (sic) a fact in issue, in this case recognition of the appellant.

Whereas this is so, the court's have laid out elaborate safeguards so as to reduce any chances of any person being sentenced on the evidence of a single witness. For example in the case of ABDALLA bin WENDO vs. R [1953] 20 EACA 166, the Court of Appeal held that when testing the evidence of a single witness, a careful inquiry ought to be made into the nature of the light available, the conditions of identification and whether the witness was able to make a true impression and description of the suspect"

In the **Norman Ambich Miero & another case** (supra) this Court went further to state thus:-

"The principles that guide the Court when determining the issue of identification were clearly enunciated by the English Court of Appeal in the case of R V Turnbull & Others [1976] 3 ALL ER 549. For instance, a court must consider such factors as the distance between the witness and the suspect when he had him under observation. The length of time the witness saw the suspect, and the lapse of time between the date of the offence and the time the witness identified the suspect to the police."

According to the testimony of James, the first encounter with the robbers was not from his side. It was from the side of David who was in the passenger seat. It is after David had been commanded to go back into the vehicle that the robbers went to James' side. There was no mention that any lights were on inside the vehicle. We have no doubt that this explains why David was unable to identify any of the robbers. James stated that when he was told by the robbers to start the vehicle and he told them it could not start because the battery was low and they decided to go to the front, that is the time he recognized the appellant. It is not clear how he was able to do that since the vehicle lights must have been directed to the front where the vehicle was headed to and not on the side. Second, it is not clear how the vehicle battery which is said to have been too low to start the engine, could have supported the lighting system.

James went on further to add that the appellant snatched a cap from him to disguise himself. This means that by this time the appellant was already conscious that James could recognize him, hence the need to hide his exposure.

It is clear from James' evidence that it is not the appellant who jump started the vehicle. There is no mention as to the exact spot the appellant was standing in order to make him easily identifiable by James. The above gaps in the prosecution evidence coupled with the fact that James never led police to the appellant's home either on the day of the incident or the next day tends to raise a doubt as to the positive

identification of the appellant in connection with the commission of the offence charged.

In **Wamunga versus Republic [1989] KLR 424**, the Court held:-

"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."

In view of the unreconciled inconsistencies, contradictions and discrepancies outlined above, which we find incurable under **Section 382** of the **Criminal Procedure Code**, coupled with the doubts raised in the alleged recognition of the appellant, we find it unsafe to act on the above evidence as a basis for the conviction of the appellant. We find and hold that the offence was not proved beyond reasonable doubt.

In the result we find merit in this appeal. We allow it, quash the conviction of the appellant and set aside the sentence imposed by the trial court. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

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