IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

CRIMINAL APPEAL NO. 145 OF 2011

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

BETWEEN

LENYESIO LEKUPE.....……....….....1ST APPELLANT

BERNARD LECHERENO.....2ND APPELLANT

AND

REPUBLIC.....…..……..…….. RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (Koome, Kimaru, JJ) dated on 15th day of March, 2007

IN

H.C.Cr.A. No. 384 OF 2002

****

JUDGMENT OF THE COURT

The appellants **LENYESIO LEKUPE** (Lenyesio) and **BERNARD LECHERENO** (Bernard) were jointly charged in the Chief Magistrates court at Nakuru 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 night of 15th and 16th December 2002 at Bondeni Estate in Nakuru District within the Rift Valley Province jointly with another not before court while armed with dangerous offensive weapons namely samburu swords *and rungus* robbed **ABDALLAH AZUBEDI SAID** (Abdallah) cash Kshs 600/=, one mobile phone make Nokia 3310 and a bunch of keys all valued at Kshs 12,600/= and at, or immediately before or immediately after the time of such robbery wounded the said Abdallah Azubedi Said.

The appellants denied the charge prompting a trial in which the prosecution called a total of seven (7) witnesses to prove their case. On the material date of 15th December, 2002 Abdallah (PW1) came home at around midnight. Erastus Etyang (PW2) opened the gate for him, while in the company of Bernard the 2nd appellant. When he got into the compound, both him and Erastus were attacked by the appellants. Abdallah was injured on the head. He raised an alarm. His neighbour Rannie PW3 responded to the distress call.

Rannie stated that while on her way to Abdallah's residence in response to his distress call, she met with the appellants who were hurriedly headed in the opposite direction. On arrival at Abdallah's house she found him bleeding profusely from a head injury. She together with John Warui Theuri (PW6) organized for a vehicle and took Abdallah to hospital for treatment. Dr Paul, PW7 later confirmed Abdallah's injuries and tendered a P3 in this regard.

The robbery was reported to Bondeni Police Station on the same night. It was received and booked by P. C Pascal. Investigations commenced leading to separate arrests of the appellants.

When called upon to defend themselves, the appellants gave sworn testimonies setting up *alibis* which were confirmed by their witnesses.

The learned trial magistrate **H. M. Nyagah** in a judgment dated the 11th May 2007 found the prosecution case proved to the required threshold, rejected the appellants' *alibis,* found them guilty of the offence charged, convicted them and sentenced them to death.

The appellants appealed to the High Court. The learned Judges M. J. Anyara Emukule J and W. Ouko J (as he then was) dismissed that appeal. They are now before us on a second appeal raising six supplementary grounds of appeal which may be summarized. The learned Judges erred in law:

- **in failing to note that the proceedings of the later trial court were invalid for failure to comply with the provisions of Section 200 of the Criminal Procedure Code Cap 75, Laws of Kenya**
- **in failing to note that the evidence of identification by recognition was not sufficiently buttressed by the testimonies of witnesses as to warrant the court arriving at a finding that it was enough to warrant a conviction.**
- **in failing to note that the prosecution had not discharged the mandate under Section 107 (1) of the Evidence Act Cap 80 Laws of Kenya**
- **in failing to note that the prosecution witnesses were wanting in their credibility and consistency and the reliance of the said evidence by the court occasioned miscarriage of justice.**
- **in failing to note that the court had not sufficiently taken into account the defence of alibi and in any event the superior court erroneously applied principles governing tendering of the evidence of alibi thus occasioning miscarriage of justice to the appellants.**
- **in failing to note that the appellants were witnesses of mistaken identity.**

In his submission, **Mr. Maragia Oyaro** learned counsel for the appellants urged us to allow the appeal on the grounds that the trial was flawed for failure to comply with the provisions of **Section 200** of the CPC; the evidence on identification was not water tight; assailants were simply described by tribe as Samburus which was not a sufficient description; several persons were arrested in connection with the attack but released because the complainant was not sure of who had attacked him; the circumstances displayed above indicate clearly that this was a case of mistaken identity. Turning to the appellants' *alibi*, **Mr. Maragia** urged that these were sustainable.

In response, **Mr. Omutelema** the learned Senior Assistant Director of Public Prosecutions urged us to dismiss the appeal on the ground that compliance with the provision of **Section 200** of the CPC was not necessary as the matter was heard *de novo* after consolidation of the charges and all witnesses were recalled to testify afresh; the evidence on identification was water tight as Abdallah and Erastus knew the assailants very well before the incident as the 1st appellant had worked for him for two weeks while the second appellant had worked for him for twelve (12) days; there was sufficient light which enabled the witnesses to recognize the appellants; PW3 Rannie met the appellants whom she knew before as Abdallah's employees heading away from the complainant's premises when she went to respond to the Abdallah's distress call; she found Abdallah bleeding profusely and named his employees whom Rannie knew before as assailants; the appellants disappeared till they were variously arrested; and lastly that the two courts below concurrently arrived at the correct findings on the facts which should not be interfered with.

In reply, **Mr. Maragia** reiterated that complying with Section 200 was mandatory especially when the witness who had testified earlier like PW4 was never recalled; evidence on identification was weak; there were contradictions in the medical evidence which were not reconciled; the assailants were only referred to by tribe as the arresting officer said that he had been sent to arrest Samburus.

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. 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 [1956] 17 EACA 146)."***

In our view, three issues fall for our determination namely:

1. Whether compliance with the provisions of Section 200 Criminal Procedure Code was mandatory in the circumstance of this appeal;
2. Whether the evidence on identification was water tight; and lastly
3. Whether appellants' *alibis* are sustainable.

In relation to issue number one, the learned Judges made the following observation of the record:

> ***"The hearing of this case commenced on 25th March 2003 before the Hon J. S. Kaburu who recorded the evidence of PW1-PW3 inclusive. Hon. J. Nduna Senior Resident Magistrate took over the case on 9th March 2004, and recorded the evidence of PW4. There is no record that he warned the appellants of their right under Section 200 of the Criminal Procedure Code. However, Mr. Cheche counsel who appeared for the appellants then, applied that the matter be heard de novo and the court ordered that the matter be heard afresh.***
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> ***Thereafter the Hon. H. M. Nyagah, SRM, heard and recorded the evidence of PW1 on 26th August 2004. On 14th October 2004 after the arrest of the 2nd appellant, the Cr. Case No. 256 of 2003 and Cr. Case No. 2357 of 2004 were consolidated and the charges were read afresh to the appellants who both pleaded not guilty. Yet again, the consolidated charge was read to the appellants on 14th December 2004 and the appellants pleaded not guilty. The appellants were then represented by counsel Cheche for 1st accused, and Orina for 2nd accused.***
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> ***"Although there had been a lapse of non-compliance with the requirements of Section 200 of the Criminal Procedure Code before the Hon. J. Nduna on 9th March 2004, and who recorded the evidence of PW4, however because of the subsequent order that the matter do start afresh, and where upon further amendment of the charge sheet on 25th August 2005 and the appellants pleaded not guilty, Mr. Cheche and Mr. Orina, counsel for the appellants then told the court that they did not wish to recall any witness. There was therefore no question of Section 200 of the Criminal Procedure Code."***

The view taken above by the learned Judges was in line with the principles laid out by this Court as regards the compliance or otherwise of Section 200 CPC in the very case of **DAVID KIMANI NJUGUNA VS. REPUBLIC NYERI CRA NO. 294 of 2010** relied on by the appellants. In it, the Court set out the section in extenso, revisited its own application of the section in **BOB AYUB alias EDWARD**

GABRIEL MBWANA 'Alias' ROBERT MANDIGA vs. REPUBLIC KISUMU CRIMINAL APPEAL NO. 106 of **2009** and **CYRUS MURIITHI KAMAU & ANOTHER VS. REPUBLIC, NYERI CRIMINAL APPEAL NO. 87** and **88** of **2006** and then made the following observation:-

> ***"In all these pronouncements, this Court was restating and reaffirming as good and authoritative law what it had declared to be the logic, rationale, and philosophy behind Section 200 of the CPC more than thirty years ago in NDEGWA –VS- REPUBLIC [1985] 534 where it held that;***
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> ***1. The provision of Section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.***
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> ***(2) The provisions of Section 200 should not be invoked where the part heard trial is a short one and could be conveniently started*** *de novo.* ***Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.***
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> ***(3) No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.***
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> ***(4) The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.***
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> ***(5) A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses."***

In view of the above, we are in agreement with both the submissions of Mr. Omutelema and the findings of the learned Judges that compliance with Section 200 CPC in the circumstances of this appeal was not necessary as the hearing started *de novo* and the defence elected not to recall any witnesses who had not been been re-tendered by the prosecution for whatever reason.

Issue was raised about the failure to re-tender one witness namely Dr. Vitalis Ogutu who had testified as PW4 and tendered medical evidence in respect of the complainant's injuries but who could not be traced to testify when the trial started *de novo*. His evidence was however tendered through Dr. Paul Gachungu PW 7. We therefore find no prejudice was occasioned to the appellants for the failure to re-tender this witness, especially when both learned counsel elected not to recall any witness.

On identification, the position in law is that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court of law must therefore always satisfy itself that in all the circumstances, it is safe to act on such identification. In the case of **GEOFFREY CHEGE MWANGI VS. REPUBLIC CRIMINAL APPEAL NO. 92 of 2007 (UR)** the learned judges observed thus:-

> ***"As this Court has emphasized times without number, evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. We cite only two decisions for illustration:***
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> In ***Wamunga v Republic [1989] KLR 424 , the Court stated thus:-***
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> > ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to***

minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

And in ***Kariuki Njiru & 7 others –vs- R- Criminal Appeal No. 6 of 2001, the Court reiterated:-***

> ***"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."***

Some measures for minimizing this danger have been suggested in various authorities and we take it from the case of ***Republic vs. Turnbull [1976] 2 ALL ER 549 at page 551, thus:-***

> ***"First, whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness, can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?***
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> ***Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".***

In **MAITANYI VS. REPUBLIC [1986] KLR 198** the Court added that there is need for a court to make an inquiry as to whether:

> ***"....the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police....."***

In the case of **PATRICK MURIUKI KINYUA & ANOTHER VS. REPUBLIC NYERI CRIMINAL APPEAL NO. 11 of 2013 (UR)** the Court held that:

> ***"….where the appellants were well known to the complainants, then it is a case of recognition and not identification."***

The learned Judges had this to say on identification:-

> ***"From that evidence, it is quite clear that both appellants were clearly recognized as the persons who violently robbed PW1 of some money, between Shs 500-600/= and also his mobile phone – Nokia, none of which were recovered. PW2 a fellow watchman described in detail how the attack was executed by the appellants, he opened the first gate, for PW1 the complainant. While entering his house, the 1st***

appellant blocked PW1's entrance and hit him on the head. On hearing noise from outside, PW2 tried to find out what had happened. He was hit on the head by 2nd appellant. PW3 met the appellants, who refused to return his greetings. They were walking away fast. PW4, the investigating officer knew the 2nd appellant from his earlier service at Maralal Police Station when the 2nd appellant would volunteer to assist them (the police) in tracking cattle stolen by the Pokot. Besides his and the 2nd appellant's family were friends, and he knew him well. The names "Letiopa", "Lepataiye" were both fictitious. The 2nd appellant's name was "Robert Lecherono" which was also confirmed by his ID card, which was submitted by the mother of the 2nd appellant to PW4.

For those reasons we find and hold that the appellants were identified by recognition, and the contention otherwise fails."

In the circumstances, it is our finding that the circumstances portrayed above were conducive for positive recognition by both Abdallah and Erastus. The evidence of these two witnesses was corroborated by the circumstantial evidence of Rannie PW3 who met the two appellants walking away from the complainant's home where Rannie was headed to respond to the complainant's distress calls. She is on record as saying that the appellants refused to respond to her greetings.

Mr. Maragia took issue with the complainant's failure to give the names of the appellants to the police and that other persons were also arrested in connection with the attack on the complainant but released. The complainant's response to that was that it was because the appellants never gave Abdallah their identification cards. He referred to them by the names they gave to him and those are the names Abdallah gave to police. It was way after their arrest that their correct names were established through their identification documents.

Although identification parades were allegedly conducted, no evidence was adduced in this regard. However, we agree as was observed by the court in the Patrick Muriuki Kinyua & another vs. Republic case (supra) that such identification parades were unnecessary in instance such as in this appeal where it is a case of recognition. We reiterate circumstances were conducive to positive recognition as there were lights. The appellants were known persons to Abdallah and Erastus, the only eye witnesses to the attack. The attack was not sudden. It took some time. Abdallah said he even talked with the assailants who were persons he was already familiar with.

Turning to the issue of *alibis* raised by the appellants, the learned Judges made observation that:-

"an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged"

The learned Judges then drew inspiration from the case of **ANTHONY KINYANJUI KIMANI VS. REPUBLIC [2011] eKLR** and **KABELE VS. UGANDA [1999] I.E.A 148 (SCU)** all for the proposition that the prosecution has the burden of negating the *alibi.*

In ***SAIDI VS. R [1963] EA 6:*** the predecessor of this Court in the Court of Appeal for Eastern Africa had this to say:-

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

Further, in **SEKITOLEKO VS. UGANDA [1967] EA 531,** which has been applied before by this Court, the Chief Justice Sir Udo Udoma had this to say in relation to alibi evidence:

"(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R. v. Johnson, [1961] 3 All E. R. 969 applied; Leonard Aniseth v. Republic [1963] E. A. 206 followed);

(ii) the burden of proving an alibi does not lie on the prisoner,...."

On account of the above principles of law the learned Judges made the following findings on the issue:

"Having ourselves examined and re-evaluated the evidence of the prosecution, we are satisfied that the learned trial magistrate came to the correct conclusion. Not less than four witnesses testified that the appellants were working for the complainant PW1.

PW3 testified that after she heard noises, she went towards PW1's house and she met the appellants walking away. She found PW1 bleeding. PW2 was also injured. This supports the evidence of PW1 and PW2 that it was the appellants who attacked them. There were lights on. These appellants were people they knew physically as they had worked for a few days with them.

Even though the 2nd appellant introduced the confusion in names, we are satisfied that the appellants were positively identified physically and that they are persons who brutally terrorized and attacked their employer.

We also agree with and endorse the finding of the learned trial magistrate that PW1 was careful not to identify someone by the name Lapatoiye and had the suspect William Lepatoiye released (as also confirmed by the defence of DW2).

We further agree with the learned trial court's observation that the manner in which the appellants were arrested leave us with no doubt that PW1 and the other witnesses knew who they were looking for even if only by physical appearance. The names were certainly a problem and the witnesses confirmed by their evidence that it was the appellants who were employed by PW1 and who attacked him."

We agree that in principle the appellants assumed no burden to prove their *alibis*. The burden lay with the prosecution to negate them. Both courts below upheld the prosecution on this issue and we are enjoined by law not to interfere with that unless there is a strong reason for doing so. In the case of **DANIEL KABIRU THIONG'O VS. REPUBLIC NYERI CRIMINAL APPEAL NO. 13 OF 2002 (UR)** the Court gave this as a caution:-

"An invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is shown that there are compelling reasons for doing so."

Although the appellants have invited us to interfere with the concurrent findings of facts by the two courts below, we find no compelling reason to depart from the two courts below that on the basis of the recorded evidence and the principles of law set out above, the appellants had been placed at the scene of the robbery. Their *alibis* are accordingly displaced.

In the result, we find no merit in this appeal. It is accordingly dismissed.

Dated and delivered at Nakuru this 12th day of May, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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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