IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.)

CRIMINAL APPEAL NO. 316 OF 2009

BETWEEN

SAMUEL MWANGI KIBARIO …….…….....APPELLANT

AND

REPUBLIC……...…..…….….RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Azangalala & Odero,JJ.) dated 16th November, 2008

in

H.C.CR.A. No. 135 of 2008.)

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JUDGMENT OF THE COURT

Kipkoskei Rotich Boit (PW 2), was employed by Multiple Hauliers as a supervisor at their offices at Mikindani, along Mombasa-Nairobi Road. Part of his duties was to bank and withdraw money for his employers. On 29th April 2005, at about 4 p.m., he arrived at the gate of his employer's premises from the bank with Kshs.135,000/- that he had just withdrawn. As he was driving the company's vehicle into the compound, **Kwerentein Letereiwa** (PW 4), a security guard was opening the gate to let PW 2 in, when he suddenly saw four men armed with pistols approach the vehicle and surround it. They ordered PW 2 to remove the money that was in a rack sack and hand it over to them. As the four gangsters were in the process of robbing PW 2, PW 4 picked a stone and hit one of the gangster on the head who fell on the ground and was rendered comatose. Sensing danger, the other three jumped into PW 2's vehicle and drove off with him while shooting in the air, having abandoned their accomplice on the ground. In the process, they robbed PW 2 of the money as well as his Nokia cell phone. They later abandoned him with the vehicle some distance from the scene of crime and disappeared into the bush. PW 2 then drove back to the company premises. In the meantime, the security alarm at the company premises had been activated and KK Security Guards led by **Soya Iha Wanje** (PW 1) responded. They rushed to the scene and found the abandoned accomplice still lying on the ground but was being subjected to mob justice by the crowd that had assembled thereat. Next to the accomplice was a black bag and a firearm magazine. According to PW 1, PW 2 and PW 4, the abandoned accomplice was none other than the appellant. PW 1 was able to rescue the appellant from public lynching and called the police for assistance.

PC Jacob Njeru (PW 5) happened to be on his way to town from Miritini. When he approached Multiple Hauliers' premises, he saw a crowd of people and went to find out what was happening. He came across the appellant who was bleeding profusely from the head and was being bundled in a vehicle belonging to KK Guards. He apprehended the appellant and took possession of the black bag and the firearm magazine and escorted the appellant and the exhibits to Changamwe Police Station where he booked him pending further investigations. The case was investigated by **PC Italu** (PW 6). Part of his investigations involved submitting the firearm magazine to Firearms Examiner **SP Mwongera** (PW 3). In his report, PW 3 concluded that the seven rounds of ammunition found in the magazine were ammunitions as defined under the Firearms Act.

On the evidence so far gathered, PW 6 preferred two counts against the appellant. The first count was one of robbery with violence contrary to **Section 296 (2)** of the Penal Code with particulars being that on 29th April, 2005 the appellant, at Multiple Hauliers Yard at Mikindani in Mombasa District, within Coast Province with others not before court while armed with dangerous weapons namely pistols, robbed PW 2 of a mobile phone and cash Kshs.135,000/- and at or immediately before or after the time of such robbery beat the said PW 2. The second count was being in possession of ammunition without a Firearm Certificate contrary to **Section 4(2)** as read with **Section 3(3)** of the Firearms Act. The particulars were that on the same day and place, the appellant was found in possession of seven rounds of ammunition without a Firearm Certificate.

The appellant entered a plea of not guilty and was soon thereafter tried by the Chief Magistrate at Mombasa Law Courts, **Hon. Boaz Olao**, (as he then was). In defending himself, the appellant through a sworn statement claimed that he was a mere passerby who unfortunately got in a fray he knew nothing about. Essentially, he was claiming that he was in the wrong place at the wrong time and was merely a victim of circumstances.

Hon. Olao, upon a careful evaluation of the evidence on both sides, found the appellant's defence lacking in merit and rejected it. Instead, he found the evidence mounted by the prosecution to have established beyond reasonable doubt that the appellant was part of the gang of four that robbed PW 2 on the afternoon of 29th April, 2005. He accordingly convicted the appellant on both counts and sentenced him to death in respect of count one and 10 years imprisonment in respect of count two.

The appellant felt aggrieved by the conviction and sentence aforesaid. He therefore filed an appeal in the High Court of Kenya at Mombasa. That appeal was subsequently heard by **Azangalala** (as he then was) and **Odero, JJ**., who being equally satisfied that the prosecution had proved the case against the appellant, dismissed his appeal and thereby confirmed the convictions and sentences as determined by the trial court.

The appellant, being further aggrieved by the decision of the High Court has lodged before us this second and perhaps last appeal. Three grounds argued in the appeal are that:-

i. the trial court erred in amending the second count in its judgment;

ii. the circumstances obtaining at the scene of crime did not favour positive identification; and,

iii. the appellant's defence was not given due consideration.

Mr. Ngumbau, learned counsel for the appellant, submitted that the appellant was denied a right of a fair hearing under **Article 50(2) (b)** of the Constitution when the trial court amended the second count during the crafting of the judgment. That it was not within the provence of the trial court to amend the statutory provisions under which the appellant had been charged. That the amendment was prejudicial to the appellant as his defence was not anchored on the ingredients of the offence as set out in the amended section.

On the second ground, counsel submitted that, though the robbery was committed in broad daylight, the circumstances obtaining did not favour positive identification. That there was a huge possibility of the

appellant being mistaken as a member of the gang. That the incident occurred along the busy Mombasa-Nairobi Road. Further, counsel submitted that upon his arrest, no identification parade was conducted by the police. In the absence of such parade, what remained of the evidence of identification was dock identification which was worthless according to counsel.

On the last ground, counsel submitted that the appellant gave a sworn statement of defence in which he claimed that he was a mere passerby when the incident happened. That he was not in any way involved in the robbery. However, the defence was given short shrift by the two courts below.

Mr. Monda, learned Senior Assistant Director of Public Prosecutions, opposed the appeal and submitted that the High Court properly analysed the evidence on record and came to the proper finding that the appellant was part of the gang that had robbed PW 2. On the charge sheet, counsel submitted that the High Court had properly dealt with the issue when it found that although the wrong section under the Firearms Act had been cited, the appellant did not suffer any prejudice by the amendment by the trial court in its judgment. On identification, counsel submitted that the appellant was apprehended at the scene. In the circumstances, an identification parade would have been superfluous. Regarding the appellant's defence, counsel submitted that the offence was committed in broad daylight and that the appellant was not a mere passerby as he claimed in his defence. He was one of the gangsters. Finally, counsel submitted that the two courts below believed the prosecution's witnesses and indeed appreciated their demeanour. They were all found to be truthful and reliable witness. That this Court should therefore be bound by such findings.

Upon considering the record and oral submissions made before us, this Court as a second appellate court on the authority of **Chemagong v Republic [1984] KLR 611** and a host of other authorities and by dint of **Section 361 (2)** of the Criminal Procedure Code as well, we can only address points of law raised in this appeal. We are also warned not to interfere with concurrent findings of fact unless those findings are based on no evidence or on a misapprehension of the evidence, or that the two courts below are demonstrably shown to have taken into account wrong principles in making the findings.

To our mind, all the grounds urged by the appellant qualify as matters of law and therefore we have jurisdiction to entertain them. On the question of the amendment of the charge sheet with regard to the second count, we do not see how such undertaking violated **Article 50(2) (b)** of the Constitution. This Article deals with the right of an accused to be informed of the charge, with sufficient detail to answer it. What happened in the circumstances of this case is that the appellant was charged with being in possession of ammunition without a Firearm Certificate. However, the drafter of the charge sheet instead of citing the section of the law alleged to have been contravened as **Section 4(2) (a)** as read with **Section 4(3) (a)** of the Firearms Act, cited Section 4(2) as read with Section 3(3) of the Firearms Act. Otherwise, the particulars of the charge remained the same. It was only the statement of the charge that was interfered with by the trial court at the judgment stage, and the interference was minimal, merely substituting the proper provisions of the law. We would have been worried and indeed the appellant would have had a case if in the amendment the trial court brought in an entirely new provisions of the law with different particulars or if the evidence tendered was at variance with the amended charge sheet. This however is not the case here. No doubt the trial court appreciated the effect of what it had undertaken *vis a` vis* the rights of the appellant. It delivered itself thus:-

> **"…The discrepancy is not such that has caused the accused any injustice as there is nothing to suggest that the accused did not know the nature of the charges facing him. For my part, I am satisfied that the discrepancy was not fatal and does not amount to a miscarriage of justice…"**

The High Court agreed with the trial court's observations stating:-

> **"…All said and done our finding is that the omission to include the time, and the mis-framing of the charge sheet were not defects which could be said to have been fatal to the prosecution case…."**

We could not agree more. The wrong citation notwithstanding the charge sheet as framed, in our view, met the threshold in **Section 137** of the Criminal Procedure Code as all the essential elements were included in the particulars. Going by the appellant's participation in the proceedings and in particular, his cross-examination of the witnesses and defence, there is no doubt at all that the appellant knew the game he was engaged in. In any event, the omission is easily curable under **Section 382** of the Criminal Procedure Code. We must therefore reject this ground of appeal.

On identification of the appellant, the two courts below reached the following concurrent findings:-

(i) that the incident occurred at 4 p.m. in broad daylight;

(ii) that there was sufficient light to enable the witnesses to see and identify the appellant;

(iii) that PW 2 and PW 3 identified the appellant among the robbers;

(iv) that PW 4 hit the appellant with a stone rendering him comatose as he and his gang was in the process of robbing PW 2;

(v) that the appellant conceded to have been hit by a stone by PW4;

(vi) that the appellant was arrested at the *locus in quo*.

(vii) in the circumstances, there was no need for a police identification parade;

(viii) that the appellant was literally caught in act and was therefore one of the robbers and not a mere passerby;

(ix) as such the evidence on identification passed muster and therefore there was no possibility of mistaken identity; and finally,

(x) that the witnesses were reliable.

These being concurrent findings of the two courts below, we have no reason to disturb them. Indeed, they were based on sound evidence brought forth by the prosecution. It is common ground that the robbers involved numbered four, according to the uncontroverted evidence of PW 2 and PW 4. It is common ground that only three of those escaped with PW 2 leaving behind the accomplice. That accomplice was none other than the appellant. He could not have been a mere passerby as there is evidence by PW 2 that after being hit with a stone by PW 4 and before he fell on the ground he fired at PW 4 and at the time of arrest, he was lying next to a firearm magazine with seven rounds of ammunition two of which turned out to be live and were according to PW 3 deemed to be ammunitions in terms of the Firearms Act. The appellant too was saved from the crowd at the scene who were about to lynch him. Could all these have been mere coincidental? We do not think so. Having been arrested at the *locus in quo* and the only witnesses perhaps who could have participated in the identification parade would have been PW 2 and PW 4, what use would have such parade served? To our mind, such parade would have been superfluous in the circumstances given that the offence was committed in broad daylight and the appellant had been seen by these witnesses as he lay on the ground and as he was being escorted to the police station. Lastly, on this question of identification, we do not see just as the two courts below observed, that the four witnesses, PW 1, PW 2, PW 3 and PW 4 would have ganged up to falsely testify against the appellant who was a stranger to them. There would be no reason why they could have formed themselves into group of liars to give false testimony against the appellant. No reason or motive why the witnesses would want to lie against him is readily apparent from the evidence.

On demeanour of the prosecution witnesses, the trial court found all of them to be reliable and placed those observations on record. It is trite law that this court cannot interfere with the findings by the trial court based on the credibility of witnesses unless no reasonable tribunal could have made such findings or where the trial court made errors of law in arriving at the findings. See **Republic v Oyier [1985] KLR**

353. We have not been given any reason nor have we seen any that may force us to depart from the observations of the trial court with regard to the credibility of the witnesses.

With regard to the appellant's defence, the appellant's complaint is that it was not given due considerations by the two courts despite being sworn. This complaint is certainly bereft of any merit. The trial court considered the appellant's defence at length and concluded:-

> **"…..Their evidence was congest** (sic) **and unshaken and the accused's defence which I have is merely a ploy to portray him as a victim and which is devoid of merit and can only be for rejection….It is clear from the above that the accused's ascertion** (sic) **that he was himself an innocent victim cannot be true and must be rejected.."**

Lastly, we note that this complaint was not raised in the High Court. Accordingly, we do not have the benefit of the High Court's award over the same. On the whole however, we are satisfied that the appellant's defence was given consideration by the trial court and at the end, found wanting and rightly rejected.

For the foregoing reasons, we dismiss the appeal.

Dated and delivered at Malindi this 29th day of July, 2016

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR