IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA), J. MOHAMMED & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 70 OF 2015

BETWEEN

HEZBON KAMAU WAMBU ……APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Achode & Mbogholi, JJ.) dated 27th May, 2014

in

HC. CR. A. No. 292 of 2012

****

JUDGMENT OF THE COURT

The night of 2nd December, 2011 was an eventful one for the residents of Ikinu village, Githunguri in Kiambu County. At about 9.30 p.m. **Priscilla Wangare Ngurumi (PW4) (Wangare**), a bartender, was serving drinks to her customers when she observed a person who was armed with a gun enter her bar. This person ordered everyone to lie down but cocked his gun when one customer coughed. There was a pressure lamp inside the bar and Wangare testified that she was able to see the appellant clearly. The appellant demanded for money and mobile phones while another person, an accomplice, entered the bar and picked mobile phones from customers. The appellant was given money from the counter till and left.

At about 10 p.m. **Virginia Muthoni (PW1) (Muthoni)** was at her house when she heard a knock at the door. She was expecting her husband **Samuel Munene (PW2) (Munene)** and therefore readily opened the door. Two people entered her house, one armed with a gun, and ordered her to lie down. They started ransacking the house but in the process Munene arrived home, knocked at the door and was surprised that it was an armed robber who ushered him in. He was, like his wife, ordered to lie down and surrender all the money he had. He complied. There was a fluorescent light in the room and Munene and his wife testified that they saw the appellant clearly.

At 11.15 p.m. of the same night the appellant's family of father (Raphael Wambu Kamau – PW6 – Kamau), mother (Susan Wanjiku Wambu) – PW7 – Wanjiku) and brother (James Njenga Wambu – PW5 – Njenga) were at home when Wanjiku heard the voice of her son the appellant which was followed by gun shots that were aimed at Njenga's house.

These are the events that led to four charges being laid against the appellant. On count 1 there was a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. Particulars related to the robbery at Munene's house where various items were stolen and there was a threat to use actual violence.

Count two was also robbery with violence particulars being in respect of the robbery at Wangare's bar where money was stolen and there was a threat to use actual violence.

The appellant was also charged with attempted murder contrary to **Section 220 (b)** of the **Penal Code** particulars being in relation to the shooting at Njenga's house.

There was a last count of threatening to kill contrary to **Section 223(1)** of the **Penal Code** particulars being that on diverse dates between 26th April, 2011 and 13th December, 2011 at the said Ikinu village, without lawful excuse directly caused Njenga to receive an SMS (Short Messaging Service) threatening to kill him.

A trial took place before **B.M. Nzakyo, Senior Resident Magistrate**, who in a judgment delivered on 19th October, 2012 convicted the appellant on all the four counts and sentenced him to death on counts 1 and 2. A sentence of life imprisonment was imposed on counts 3 and 4.

The appellant was dissatisfied with the findings by the Magistrate's court and in an appeal to the High Court of Kenya at Nairobi (A. Mbogholi Msagha and L.A. Achode, JJ) he challenged those findings. That court was not impressed with the appellant's appeal and dismissed it in a judgment delivered on 27th May, 2014. That is what has provoked this appeal grounded on the homemade "Memorandum Grounds of Appeal" filed on17th June, 2014 where 7 grounds are set out. In sum the grounds can be summarised as follows: that the first appellate court failed in its duty to analyse and re-evaluate the evidence; that the first appellate court erred in relying on contradictory and uncorroborated evidence; that that court erred in law for relying on the evidence of identification/recognition which did not meet the required legal standard; that the case was not proved to the required standard; that the first appellate court erred by failing to apply **Article 50(1) and (2)** of the **Constitution of Kenya, 2010** which resulted in an unfair trial and finally that the first appellate court erred by not finding the appellant's defence plausible.

We have already given a summary of the prosecution case. This is a second appeal and **section 361 (1) (a)** of the **Criminal Procedure Code** mandates us to consider matters of law only but not facts of the case which had been tried by the first court and re-evaluated by the first appellate court. This statutory provision has been given judicial pronouncement in various judgments of this Court such as the case of **Chemagong v Republic [1984] KLR 611**. In **KARINGO v R [1982] KLR 213 at 219** this Court stated:

> ***"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 second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja v. R. (1950) 17 EACA 146)."***

So our duty is to consider matters of law and we 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 misapprehension of evidence by the courts below or it can be demonstrably shown that the two courts have acted on wrong principles in making the findings.

The prosecution case already pointed out in count 1 was through the evidence of Muthoni and her husband Munene. Muthoni was in her house and when she heard the knock at 10 p.m. and opened the door thinking it was her husband Munene who was at the door. There was fluorescent light which illuminated the room. The two men who entered the house had not covered their faces or concealed themselves in any way. The two men demanded for money and ordered her to lie down whereupon they started ransacking the room. In the middle of this Munene arrived home, knocked at the door and according to his evidence, the appellant opened the door, let him in while pointing a gun at him and demanded for money. He was robbed of money and other goods that were taken from the house.

About 12 days after the robbery both Muthoni and Munene attended an identfiication parade at Githunguri Police Station and identified the appellant as the person who had robbed them on the material night.

In respect of count 2, the prosecution case was that Wangare was attending at her bar when at 9.30 p.m. she saw a person who had a gun enter the bar. The room was illuminated by a pressure lamp and the person who entered had not covered his face. That person was according to Wangare the appellant who demanded for money after ordering everyone in the room to lie down. Wangare testified that the appellant took money from the counter and left. Wangare attended an identification parade at the same police station on 14th of December, 2011 and identified the appellant as the person who entered her bar and committed the robbery.

In respect of count 3, the case was that Njenga, a brother of the appellant had had many runnings with the appellant who had shared a house with him but had had to move out for various reasons. There was a threat to kill their mother and also to kill Njenga. On 1st December, 2011 Njenga was in his house when at about 11 p.m. he heard somebody breaking his gate. He went out and observed three people who were trying to break into his house. He then heard gunshots after which the people fled. His mother Wanjiku was on the same night in the same compound when she heard voices including the voice of her son the appellant. She heard noise at the gate and heard three gunshots fired outside her house. She shouted for help and the people hit her house with some objects and then fled. According to her:

"I cannot mistake his voice. I identified the accused person through his voice."

We need not go into the case in respect of count 4 which the State Counsel conceded before us that it was not properly proved.

The other evidence was by **No. 78676 Corporal Juma Charche (PW3)** from Buruburu Police Station who on 13th December, 2011 was on patrol in Donholm, Nairobi when he received information that a vehicle had been hijacked. He with other officers rushed to Jogoo Road and found a vehicle. Amongst the occupants was the appellant. Another occupant of the vehicle was searched and a letter addressed to Kayole Police Station from Githunguri Police Station was found. This letter requested the arrest of the appellant. They arrested the appellant and took him to a police station from where he was transferred to Githunguri Police Station.

No. 231152 Chief Inspector Ernest Mapinga (PW8) from C.I.D. headquarters upon request visited the scene of shooting at Njenga's home. He observed bullet holes that had gone through a wall, a television set, a plywood wall, a bedroom and bathroom and the bullet exited and hit a neighbouring house. This witness took photographs of the scene and collected a cartridge found at the scene. He processed 17 photographs which he produced into evidence together with a certificate.

No. 231894 Chief Inspector Charles Kevilel (PW9) of the Ballistics Section of C.I.D. headquarters who was an expert in firearm and fair component parts on 13th December, 2011 received a fired cartridge for microscopic examination. Upon examination he formed the opinion that the exhibit was fired from a 7.62mm AK 47 assault rifle. He compiled a report which he produed into evidence.

No. 32750 Ciedlam Kariga Mwakio (PW10) conducted the identification parades we have already referred to. **No. 42378 Corproal Francis Opagala** of Githunguri Police Station Crime Branch was the Investigations Officer in the case. He visited the scene of crime at Njenga's home at Ikinu. He observed the bullet holes fired into Njenga's home. He searched and recovered a bullet cartridge. He also visited the homes of the complainants in respect of counts 1 and 2. He later wrote a letter and gave it to the complainant to take it to Shauri Moyo Police Station and it is through this letter that the appellant was lured into a taxi while at Gikomba market and this resulted in the appellant's arrest. He later charged the appellant accordingly.

That was the case made out by the prosecution upon which the trial court found that the appellant had a case to answer. Put on his defence the appellant in an unsworn statement stated that in the year 2009 his

brother reported to police that the appellant sold *bhang*. He was arrested, charged but acquitted. He further testified that on 13th December, 2011 he was in his home in Nairobi when a group of people came and arrested him and that he was bundled into a car which sped towards Jogoo Road. He raised alarm and police stopped that motor vehicle and the whole party went to Buruburu Police Station. He found his brother and sister at that station and his parents joined them the following day. He was charged with the offences which he knew nothing about.

Mr. A.L. Kariu, learned counsel appeared for the appellant while **Mr. Gitonga Muriuki**, learned Senior Principal Prosecution Counsel appeared for the respondent. Learned counsel for the appellant relied on the homemade grounds of appeal and combined most of the grounds in his submissions. Learned counsel made heavy weather of count 4 which as we have said was conceded by the State and it is not therefore necessary here to go into submissions made in that respect. In respect of count 3 according to learned counsel the offence should have been brought under **section 220 (a)** of the **Penal Code** and not **220 (b)** as was laid. According to counsel, an offence under **section 220(a)** can only apply if the offence is committed by a police officer. In respect of counts 1 and 2 learned counsel submitted that the conviction was not safe because the appellant was arrested twelve days after the offence and according to counsel identification parades conducted at Githunguri Police Station were irregular and flawed as they flauted police service standing orders. It was counsel's further submission that those standing orders do not allow witnesses to communicate and there was breach of the same because Munene confirmed that he called his wife Muthoni when he was asked to go to the identificaiton parade.

Mr. Muriuki opposed the appeal. According to him there was sufficient light to enable Munene and Muthoni on the one hand and Wangare on the other to identify the appellant as the person who committed the robberies. Learned counsel also submitted that the identification parades were properly conducted and that the appellant had not complained about the manner the parades were conducted.

In reply Mr. Kariu submitted that there was no proper complainant in resepct of count 3 and that it should have been the appellant's mother Wanjiku who should have been stated to be the complainant. We have considered the record of appeal, the grounds raised, the submissions by learned counsel for both sides and the law.

In respect of counts 1 and 2 the trial court was satisfied that Munene and his wife Muthoni properly identified the appellant when he entered their house which was illuminated by fluorescent light. That court was also satisfied that Wangare properly identified the appellant when he entered her bar which was illuminated by a pressure lamp. That court stated that that identification enabled those witnesses to identify the appellant at the identification parades that were mounted at Githunguri Police Station some 12 days after the robberies.

The High Court on first appeal was satisfied like the trial court that there was sufficient light to enable the witnesses to identify the appellant who committed robberies where there was sufficient light and who had not concealed his face. We are alive to the fact that visual identification can cause miscarriage of justice if not carefully tested. That is a caution given a long time ago in the English case of **R v Turnbull and Others [1976] 3 ALL ER 549** where Lord Widgery C.J. had this to say:

> ***"First, wherever the case against the accused 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 to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a 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 ……***
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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."***

That observation was also the subject of an examination by this Court in **Wamunga v Republic [1989] KLR 424** where we said:

> ***"……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."***

We have addressed our minds carefuly to this warning. Having done so we observe that identifiction here was by three witnesses independently, that is, Munene, Muthoni and Wangari. These witnesses testified that there was sufficient light and the robbery took time and they were able to clearly observe the appellant who did not conceal his face at all. When identification parades were mounted some twelve days after the robberies, all these witnesses picked out the appellant without hesitation. In respect of the identification parade where Munene picked out the appellant, it is recorded that the appellant said he was satisfied with the way the parade was conducted. That was the same in respect of identification by Muthoni. In respect of identification by Wangare it is recorded that the appellant complained that he did not know the identifying witness at all. That has no relevance.

Mr. Kariu learned counsel for the appellant says that there was breach of force standing orders because Munene was asked by the investigating officer to call his wife Muthoni. The evidence does not state that Munene upon calling his wife discussed any matter relevant to the parades that were to be conducted. As properly pointed out by the Senior Principal Posecuting Counsel there was nothing wrong in Munene calling his wife Muthoni who joined him at Githunguri Police Station. There is no evidence that the two witnesses discussed the impending identification parade in any manner at all or that they identified the appellant jointly. All that seems to have happened is that the investigating officer informed Munene that identification parades were to be mounted at Githunguri Police Station and that Munene should ask his wife Muthoni to attend. That did not amount to a breach of standing orders at all. There is no evidence on record that Munene discussed the impending parades with his wife at all.

On count 3 the trial court was satisfied that Wanjiku recognized the voice of her son the appellant when three people were seen in the compound and shots were fired. The court stated in its judgment:

> *"**She categoriclly confirmed that she could not mistake the voice of her son the accused and that accused was present outside her house before the shots were fired. There is no doubt that the three shots fired were armed (sic) at James Wambu. They could have caused fatal consequences on him if they were on target. Photographs of the house of James Wambu were produced as exhibits. A look at the photographs clearly shows bullet holes and marks on several spots inside the house. A catridge which was spent was also produced. The cartridge was recovered from the vicinity of the house owners (sic) by James Wambu."***

The first appellate court was satisfied that these findings were correct. The witness (Wanjiku) was categorical in her evidence that she could not mistake the voice of her son when she heard voices in the compound. Voice identification is not any less important than visual identification. We observed in **Karani v R [1985] KLR 290 at 293** that:

> ***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."***

It is obvious that Wanjiku was familiar with the voice of her son the appellant. She was categorical that she heard the voice of her son when gun shots were fired at the house of her other son Njenga. She could not have confused the voice of her son.

We are satisfied that both courts applied the correct standard in finding that Wanjiku had recognized the

appellant through voice as the person who fired the shots. We are also satisfied that the prosecution case was properly established and none of the grounds of appeal raised here have any merit. The appeal is accordingly dismissed.

Dated and Delivered at Nairobi this 22nd day of July, 2016.

P. KIHARA KARIUKI, (P.C.A.)

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR