IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 597 OF 2010

BETWEEN

SAMSON SOMALI KOSKEI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. D.K. Maraga and J.A. Emukule JJ) dated 26th May 2010)

in

H.C. CR. APPEAL NO.132 OF 2009)

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JUDGMENT OF THE COURT

1. This is a second appeal against the conviction and sentence as meted out on Samson Somali Koskei, the appellant by the learned Principal Magistrate at Molo, Hon. S.M.S. Soita and upheld by the High Court. The appellant was charged jointly with three others with two counts of robbery with violence contrary to section **296(2)** of the **Penal Code**. The particulars of the offence relating to count 1 were that on the 22nd day of September 2008 at Nakuru Teachers College in Nakuru District within Rift Valley Province, being armed with dangerous weapons namely a homemade gun, swords and metal bars, the appellant jointly with others not before the court robbed Francis Kibet Ngetich of his motorcycle make Bajaj Reg. KBA 207L valued at Shsh.85,000/-, one Nokia 110 mobile phone valued at Kshs.2,500/- and cash Kshs.2,800/- and at the time of such robbery wounded the said Francis Kibet Ngetich. The second count related to the similar particulars save that the victim was Geoffrey Kipngetich Langat whose motor cycle is reg. KBD 454B and cash 1,500/-.

2. All the accused persons denied the charges and were tried before the learned Principal Magistrate. Following the close of the prosecution case, two of the accused persons were acquitted under **section 210** of the **Criminal Procedure Code**. The appellant and another were put to their defence. In the judgment delivered on 6th May 2009 the other person was acquitted under **section 215** of the **Criminal Procedure Code** while the appellant was the only person convicted and sentenced to death.

3. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. The High Court as the first appellate court was obliged to re-evaluate the evidence on record and satisfy itself that the conviction was well founded. Upon undertaking this re-evaluation, the High Court judges were satisfied that the appellant was positively identified as one of the robbers and dismissed the appeal.

4. Being a second appeal our duty is to consider only issues of law and not to consider matters of fact which have been considered by the two courts below. This is indeed the essence of **Section 361 (1) (a) Criminal Procedure Code** which limits our jurisdiction in respect of second appeals. We are therefore bound by the concurrent findings of fact made by the lower courts unless those findings were shown not to be based on evidence as was held in **Thiongo v R [2004] 1 EA 333.**

5. From the record of appeal, the memorandum of appeal filed and the submissions by **Mr. Ombati J.,** Advocate for the appellant, only three grounds of appeal suffice. Apart from improper identification, the other grounds of appeal relate to the lack of cogent evidence and witnesses to support the charges. Having considered all the grounds, we take the view that the grounds of appeal can be summarized as follows:

a). There was improper identification of the appellant.

b). The evidence adduced by the prosecution did not warrant the accused being put on his defence.

In his submissions in support of the appeal, Mr. Ombati faulted the High Court decision in attributing the identification of the appellant by PW2 to an identification parade. Counsel pointed out that PW2 had testified that he had identified the appellant at Rongai police station after he had been arrested. Learned counsel submitted that the testimony of PW3 did not link the appellant to the robbery subject of the charge as the witness only stated that the appellant was a suspected thief which statement did not suffice. Indeed the prosecutor had pointed out during the trial that the appellant had no previous record.

6. On the evidence adduced by the prosecution at the trial, learned Counsel submitted that the arresting officer was merely handed over the suspects and the exhibits relying on hearsay evidence having been told by the police at Kaptembo Police Post. The officer who did the actual arrest and recovery of exhibits did not testify. Counsel did not doubt the credibility of the doctor's evidence but argued that the said evidence did not relate to or implicate the appellant. Counsel urged us to allow the appeal

7. In response, Mr. J.K. Chirchir, the Senior Principal Prosecution Counsel appearing for the State opposed the appeal. He submitted that PW5 had testified that there was no identification parade. Be that as it may, counsel submitted that the robbery was done in broad daylight and the appellant was identified by PW1 and 2, being well known to them. The appellant in any event did not deny knowing the complainants, PW1 and 2. The Prosecution Counsel further submitted that PW3 had seen the appellant with ropes which were however not identified. Mr. Chirchir urged us to disallow the appeal.

8. Considering the foregoing, it became apparent that the conviction was based on evidence which the appellant now disputes. There are discrepancies that have been pointed out by the appellant. We have carefully perused the record and note that the main issue on appeal before the High Court related to identification of the accused. In its judgment, the High Court held that both complainants, that is to say, PW1 and PW2, identified the appellant at an identification parade. Our consideration of the issue as per the record is that the appellant was only identified by PW1 and PW2 while in police custody and at the dock during the trial. PW4 who is the investigating officer conceded on cross examination that no identification parade was conducted as he could not get persons of similar features and had to go by time. The Prosecution Counsel before us also conceded that no identification parade was conducted. The appellant was thus identified by PW1, 2 and 3 who were people that were known to him.

9. The question we have grappled with is whether the knowledge of the appellant by the witnesses in itself confirms the crime as charged. We bear in mind that the appellant faced a mandatory death sentence upon conviction. This in our view called upon the prosecution to exercise greater caution and adduce watertight evidence against the appellant, the burden of proof always resting with the prosecution.

10. The case against the appellant from the record was largely circumstantial. We have previously reiterated the holding by the predecessor of this Court, the Court of Appeal for Eastern Africa in **Rex vs. Kipkerring Arap Koske & 2 others [1949] EACA 135** , where the principle relating to conviction on circumstantial evidence was laid out thus:

> ***"In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."***

To prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution and that the said chain must never be broken at any stage. (See **Mwendwa versus Republic [2006] 1KLR 133**).

11. Both the courts below were expected to carefully pursue this chain. We obviously bear in mind that discrepancies are bound to occur in any trial arising out of witness testimonies. The appellate court not having had the opportunity to examine the witnesses still has an obligation to reconcile any discrepancies where it is alleged that the discrepancies arise. From this reconciliation, the High Court as an appellate court determines whether the discrepancies go to the root of the prosecution as to affect an otherwise proved case or not in terms of section 382 of the Criminal Procedure Code. In this regard we are guided by our previous decisions in **Vincent Kasyula Kingo versus Republic Nairobi Criminal Appeal No.98 of 2014** and **Njuki & 4 others versus Republic [2002] 1KLR 771**

12. In our pursuit of the chain, we note that from the prosecution side, the complainants allege to have been robbed violently as per their report to the police station. The complainants were injured and received medical examination as per the Doctor's report. The appellant was arrested and charged together with others who have since been acquitted at different stages of the trial and some items belonging to PW2 were recovered. From the appellant's side as the defence; there was collusion between PW1 and 2 to sell their motor vehicle and feign robbery so as to be paid by their insurers; the appellant was a broker who was paid his commission of Shs.5,000/= and there is no link between the complainants injuries and treatment to the appellant.

13. Moreover, there is no evidence linking the appellant to the scene of crime apart from the testimony of the victims. We found it rather curious that despite PW1 and PW2 both alleging to be tied on hands and legs, PW1 somehow managed to untie and assist PW2 to the tarmac notwithstanding that PW1 had been hit in the face with a pistol and had fainted. PW2 had also lost consciousness. Both the complainants seem to have suffered the same fate at the same time yet each of them did not mention having accompanied the other and none of them knew the appellant before the accident. The appellant and the other accused were merely handed over to the investigator who proceeded based on what he had been told by his colleagues. The home made gun or even exhibits recovered were not directly linked to the appellant.

14. In our view, the investigations ought to have pursued alternative hypothesis to eliminate the possibility of doubts prior to resorting to charging the appellant for this particular offence. It is no surprise in the circumstances that out of the initial four suspects, three were acquitted for lack of evidence. The investigators were quick to pursue prosecution and did not bother to pursue the appellant's allegation as to his line of business. All this in our view breaks the necessary chain in the absence of additional evidence from the prosecution. It was not difficult to produce the good Samaritans who assisted the complainants or even the arresting officers to give the circumstances of arresting the appellant. This in our view was quite a casual approach by the investigators and by extent the prosecutor in a case where an accused faces a mandatory sentence of death on conviction. From the foregoing, we could not help but find that the discrepancies go to the root of the prosecution. Such discrepancies are resolved in favour of the appellant and did not warrant the conviction of the appellant.

15. In the result we find merit in the appeal and allow it. We quash the conviction and set aside the sentence. The appellant shall be set at liberty Forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 2nd day of August, 2016.

N. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

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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