IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 113 OF 2014

BETWEEN

SAMUEL MURIITHI MWANGI……. APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(*Being an appeal from the judgment of the High Court of Kenya at Nyeri (**Wakiaga & Ngaah, JJ**) dated 29th September, 2014* in ***H.C.Cr. A No. 95 of 2011***

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JUDGMENT OF THE COURT

The appellant Samuel Murimi Mwangi was arraigned in the senior resident magistrate's court at Karatina on the offence of robbery with violence contrary to **section 296(2)** of the **Panel Code**. The particulars of the offence were that on the 20th day of December, 2009 at Mwitua village in Mathira East District of Central Province jointly with others not before court while armed with offensive weapons namely pangas they robbed Jose Newton Mutinda Karegi of cash Kshs.15,000/= and immediately before the time of such robbery threatened to use actual violence on the said Jose Newton Mutinda Karegi.

The appellant denied the charge prompting a trial. The brief facts were that Jose Newton Mutinda Karegei (*Jose*) and his wife Janet Charity Mumbi (*Janet*) were at the material time running a retail shop at Karindundu area within Karatina. On 20th December, 2009, Janet was at the back of the shop washing when she was summoned by Jose to come to the front of the shop. She did so. She found Jose in the company of the appellant and one Jacob. The appellant was a stranger to her while Jacob was known to her. Jacob introduced the appellant as a shopkeeper from Mwitua who was winding up his shop business and was looking for a prospective buyer for his shop goods. Jose informed Janet that he was interested and left Janet to take charge of their shop as he went to bring in the intended new stock from the appellant.

The three (3) headed for the market centre where they hired a taxi to ferry them to the appellant's shop. On the way, the appellant had a disagreement with the taxi driver over something Jose did not understand and which forced the taxi driver to drive them back to their pick up point. It was then that the appellant advised that they just walk to his shop which was not far off, to which suggestion Jose and Jacob acceded. On the way the appellant suggested that Jacob should turn back and wait for them at Jose's shop which he did without any protestation from Jose. Janet said that after a few hours Jacob came back to the

shop alone and informed her that he had been advised by the two to come back and wait for them at the shop. He waited and when the two took long to show up he too left.

Jose continued to state that on reaching a certain church, the appellant excused himself to go and collect keys to his shop from his wife who was said to be in the said church. Jose was left waiting on the road side. When the appellant appeared, he was in the company of a group of about seven (7) others and on reaching where Jose was, they pulled out pangas from their jackets and threatened to kill him if he resisted or raised any alarm. He obliged and was frisked and all his money taken before the gang fled. On sensing that the gang had left, Jose made for the police station and reported the robbery. The police booked the report in the OB and then instructed him to alert them whenever he sighted the appellant. He then left for his home and on arrival informed Janet what had befallen him.

Jacob went underground until he was arrested in connection with a different offence. Jose alerted the police about Jacob's link to the appellant but was ignored. It is Isaac Mwangi Kinyua a brother to Jacob who helped Jose to trace the appellant who in turn alerted the OCS, chief and members of the public who effected the appellant's arrest. Both Jose and Janet were firm that the incident took place in broad daylight; they had ample time to discuss with the appellant and they registered his appearance very well.

When put to his defence the appellant denied the charge alleging fabrication of the charge against him on account of rivalry between him and Jose over an unnamed girl. That is why Jose never booked the appellants' name in the police OB as one of the robbers when he reported the incident to the police.

In a judgment dated the 2nd day of June 2011 L. Mbugua, PM, found the prosecution case proved to the required threshold, found the appellant guilty of the offence charged, convicted him and sentenced him to death. His appeal to the High Court was dismissed by Wakiaga and Ngaah, JJ, in a judgment dated the 26th day of September, 2014. The appellant is now before us on a second appeal raising four (4) grounds of appeal in a supplementary memorandum of appeal filed on his behalf by learned counsel M/s Warutere & Associates. It is his contention that the learned Judges erred in law:-

> ***i. by failing to re-evaluate the evidence of PW1 and PW2 on identification and wrongly held that the appellant had been positively identified by the above witnesses;***
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> ***ii. in failing to interrogate the evidence of PW3 which was hearsay;***
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> ***iii. in failing to appreciate that vital witnesses were not called during the trial in the lower court; and***
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> ***iv. in failing to appreciate that proper investigation of the case was not done hence a miscarriage of justice was occasioned upon the appellant.***

In his submissions Mr. Warutere urged us to fault the concurrent findings of the two courts below because the first appellate court failed to discharge its mandate properly and instead it just affirmed the findings of the trial court in a cursory manner and never looked for any exculpatory evidence in favour of the appellant. Further that both the chief and the OCS who were crucial witnesses as to why the appellant was arrested never testified. He also urged us to fault the investigations for its failure to tender Jacob in court either as a co-accused or a witness.

In response to the appellant's submissions, Mr. J. Kaigai the Senior Assistant Director of Public Prosecutions (SADPP) on the other hand urged us to dismiss the appeal. In his view, the prosecution case met the required threshold of proof beyond reasonable doubt as the robbery took place in broad daylight at 2.00 p.m. after the appellant had spent time with the complainant from morning till the time of the robbery. Issues of mistaken identity did not therefore arise. As for the testimony of PW3, the learned SADPP submitted that all that this witness did was to give information which led to the arrest of the appellant which arrest the appellant does not dispute. It is the reason for his arrest which he disputed. Learned SADPP conceded that the OCS and the area chief who effected the appellant's arrest were indeed not called as witnesses, but in his view, no adverse inference can be drawn against the prosecution

for its failure to call them as all that these witnesses could have told the court would have been limited to the appellant's arrest, which was not in dispute. As such no miscarriage of justice was occasioned to the appellant in this regard.

As for the mode of appraisal of the evidence by the two courts below, the learned SADPP urged that the two courts below were justified in believing the testimonies of PW1 and PW2 as truthful and rightly rejected the appellant's defence. He also added that failure to include Jacob either as an accomplice or witness occasioned no miscarriage of justice as there was no evidence linking Jacob to the actual commission of the robbery. All that Jacob did was to introduce the appellant to the complainant. He conceded the investigations could have been deeper but the lack of it caused no prejudice to the appellant as there was sufficient evidence to support his conviction.

In reply to the respondent's submission, Mr. Warutere reiterated his earlier stand on the grounds of appeal that evidence of PW3 should not have been accepted and acted upon in support of the prosecution case.

This is a second appeal. By dint of section 361 of the Criminal Procedure Code, our mandate has been restricted to dealing with issues of law only. In **Kiringo versus Republic [1982] KLR 213** the court held *inter alia* that:-

> ***"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."***

We have taken into consideration the totality of the evidence on the record in the light of the rival arguments set out above. In our view, the issues of law that fall for our determination are those raised by the appellant in his supplementary grounds of appeal. With regard to the proper exercise or otherwise of the mandate of the first appellate court, this Court in **Ngui versus Republic [1984] KLR 729**, the court held *inter alia* thus:-

> ***"the first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice. It is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions."***

In reminding itself of this role, the first appellate court had this to say:-

> ***"This is the evidence that was presented before the trial court. We are enjoined as the first appellate court to analyse it afresh and come to our own conclusion. It is the appellant's right as much as our obligation to undertake this task. As always we must bear in mind that the trial court had the benefit of hearing and seeing the witnesses and was therefore better placed to assess the witness's demeanor and disposition. In this regard we rely on the decision of* Okeno versus Republic [1972] EA 323*."***

From the above we are of the view that the approach taken by the learned Judges to determine the appeal before them was in tandem with the principle set out in the Ngui case (*supra*). The appellant's major complaints in this appeal is that the learned Judges fell into error when they upheld the trial court's findings on the identification of the appellant in connection with the robbery. The principles that guide the reception or otherwise of evidence on identification have now been crystalized by case law namely that a fact may be proved by a single witness save that this rule does not lessen the need for testing with the greatest care the evidence of such a witness. The second caution is that care has to be taken to ensure that there are identifiable conditions favouring a correct identification. Third, where the slightest doubt of such evidence is entertained the court has an obligation to identify other evidence, whether circumstantial or otherwise, that points to the guilt of an accused and which the court can safely say that receiving and acting on such evidence as a basis for a conviction is free from the possibility of any error. See **Abdallah**

bin Wendo versus Republic 20 EACA 166.

The court must also scrutinize such evidence carefully and satisfy itself before acting on it that the identification itself is positive and free from the possibility of error. See **Kariuki Njiru and 7 Others versus Republic** ***Criminal Appeal No. 6 of 2001***. Such evidence must also be tested with the greatest care. "Testing" means that the court has to ensure that the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straight forward person or raise a suspicion about his/her trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept and act on his/her evidence. See **Benson Mugo Mwangi versus Republic** ***Criminal Appeal No. 238 of 2008*** for the parameters for testing which the court must inquire into namely:

> ***i. the type of lighting used to enable the witness identify the suspect; and***
>
> ***ii. its size and position relative to the suspect which are all important matters that help in testing the evidence with the greatest care.***

In upholding the trial court on its conclusions that the appellant was positively identified in connection with the commission of the robbery, the learned Judges had this to say:-

> ***"Turning back to the appellant's first ground of appeal on identification, we are of the view that the circumstances or conditions under which he was identified were favourable; his identification does not appear to us to have been in doubt. He spent such considerable time with the complainant that the complainant would not have mistaken his identity. The complainant's wife who also saw the appellant when he came to the shop testified that the appellant is the person she saw together with her husband and Jacob. Although the legal burden is always on the prosecution to prove its case, the appellant himself testified that he knew the complainant. His evidence that there was bad blood between him and the complainant was in our view properly dismissed because it appears to have been an afterthought. We have come to this conclusion because this issue was not raised or put to any of the prosecution witnesses when the appellant had a chance to cross-examine them. We also do not think that the fact the complainant did not mention the appellant's name to the police when he made his report to the police is fatal or raises any doubt on the prosecution's case. Both the complainant and his wife testified that they had not seen the appellant before and the complainant only dealt with him because he had been introduced to him by Jacob Kibui who was described by the complainant's wife as their customer.***
>
> ***We are satisfied that the appellant was properly identified and from the evidence of the first two prosecution witnesses, there is nothing to suggest that there was any possibility of mistaken identity. We hold that the first ground of appeal does not have any merit."***

In line with the principles of law stated above, it is our view that there is no doubt that the learned Judges took into consideration the above principles when arriving at the conclusion reached by them. This is borne out by their reasoning that the incident took place at 2.00 p.m. and therefore in broad daylight; that the appellant and the complainant had spent a considerable amount of time talking to one another during which time the complainant registered the appellant's appearance; PW2 also saw the appellant in broad daylight when she was called by her husband and informed of the appellant's mission at their shop and shortly thereafter her husband left in the company of the appellant and one Jacob to get shop goods only to return in the evening empty handed with a story that he had been robbed of all the money he intended to use to purchase the intended goods by the appellant. We therefore find no error in the learned Judges' findings that circumstances were conducive to positive identification and this ruled out any possibility of mistaken identity.

As for the credibility of PW1 and PW2, the learned Judges had this to say:-

> ***"For the same reason we (sic) satisfied that the first two witnesses were consistent that the***

appellant together with Jacob Kibui and the appellant went to the complainant's shop and left with the complainant. The trial magistrate had the opportunity to hear and see the two witnesses and from what we can gather there is no hint that there (sic) evidence was not credible or trustworthy. We would certainly come to the same conclusion that the learned magistrate's court came to; that the complainant was robbed and that he was robbed violently by the appellant and others who were not before court; there was sufficient evidence to convict the appellant as charged. We have already said that the learned magistrate was right in dismissing the appellant's defence that the charge against the appellant was malicious. From what the appellant told the court in his defence, there is nothing to suggest that there was any grudge between him and the complainant and as noted, the appellant never mentioned anything to do with the grudge or any source thereof to the complainant or any other prosecution witness when he cross-examined them. His evidence could not be interrogated in this respect since it was unsworn."

In affirming the findings of the trial court on the credibility of PW1 and PW2, the learned Judges correctly took the view that the trial court had the opportunity to see, hear and observe the demeanor of the witnesses as they testified before it and they (*the Judges*) had no reason to doubt the impression created on the mind of the trial court by the said witnesses. In reasoning as they did the learned Judges were simply re-echoing a cardinal principle that is now trite that "***when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses."*** **See Ngui versus Republic** (*supra*).

In our view, there was sufficient material on the record to enable the learned Judges to affirm the trial court's finding on the credibility of the witnesses. It satisfied the need to test the witnesses' evidence with the greatest care to rule out any sort of untruthfulness see **Benson Mugo Mwangi** case (*supra*). Also the moment the appellant's defence was displaced by the two courts below nothing was left to controvert the prosecution version that he had been placed at the scene of the robbery as the perpetrator jointly with others not before court.

As for the failure to interrogate the evidence of PW3, we find that apart from summarizing the evidence of this witness, there is no further mention of it in the reasoning of the learned Judges. It is however our view that as submitted by the state, the failure to interrogate the evidence of this witness and make findings on it caused no miscarriage of justice to the appellant as this witnesses role was limited to alerting the complainant of the presence of the appellant leading to his arrest (*appellant*). It is not therefore correct as contended by Mr. Warutere that interrogation of PW3's evidence would have shed light as to the reasons as to why the appellant was arrested which according to Mr. Warutere had nothing to do with the robbery. The evidence of this witness speaks for itself. It runs thus:-

"I was not there during the incident. It is my brother who told me about you. I do not know of any grudge. I did not see any shop goods with you. I do not know when theft occurred."

What was under inquiry in the trial court was the issue of the robbery committed against the complainant and by whom. Once PW3 testified on oath that he knew nothing about the circumstances under which the robbery was committed, nothing was left for further interrogation of PW3 on this. Further, the moment he mentioned that all he knew about the appellant was limited to what his brother Jacob told him further inquiry into the matter through PW3 would have been nothing but a useless adventure into the arena of hearsay evidence which in law has no evidential value.

As for witnesses not called, it was conceded by Mr. Kaigai the learned SADPP that indeed the OCS, the area chief and members of the public involved in the arrest of the appellant did not testify, but in his view, no miscarriage of justice was occasioned to the appellant as these persons did not have any adverse evidence against the prosecution. In **Bukenya and others versus Uganda [1972] EA 540** the predecessor of this court laid down the following guiding principles on this issue:-

"ii. the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;

iii. the court has the right and the duty to call witnesses whose evidence appears essential for the just decision of the case;

iv. where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

As submitted by the learned SADPP the evidence of the uncalled witnesses would have been limited to the fact of the appellant's arrest which was not in dispute. There was also nothing to show that had the said witnesses been called to testify their evidence would have been adverse to the prosecution. Since it was the appellant who raised the theory of rivalry for a girl as the reason for his arrest other than robbery, it was for him to demonstrate that the uncalled witnesses were aware of the existence of the alleged grudge and rivalry between him and the complainant which he did not.

As for the investigations being shoddy, we take no issue with the learned SADPP admission that investigations could have been better but as submitted by him, the court had no alternative but to be content with the evidence before it as the basis on which it found sufficient grounds to convict the appellant.

The upshot of the above is that we find no merit in this appeal. It is dismissed in its entirety.

Dated and delivered at Nyeri this 9th day of November, 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