IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, KOOME & AZANGALALA, JJ.A.)

CRIMINAL APPEAL NO. 135 OF 2007

BETWEEN

SAMUEL KAROKI MUTHEE...APPELLLANT

AND

REPUBLIC..……………...…….. RESPONDENT

(Being an appeal from a sentence of the High Court of Kenya at Nairobi (Ojwang & Dulu, JJ.) dated 25th September, 2007

in

H.C. Cr. A. No. 250 of 2007)

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JUDGMENT OF THE COURT

1. Following the dismissal of his first appeal to the High Court against conviction and sentences on two counts of robbery with violence, contrary to ***section 296 (2)*** of the ***Penal Code*** and one count of having suspected stolen property, contrary to ***section 323*** of the ***Penal Code***, ***Samuel Karoki Muthee*** *(the appellant)*, lodged the present appeal.

2. This being a second appeal, the provisions of ***section 361 (1)*** of the ***Criminal Procedure Code*** apply. That section, in pertinent part reads:

> ***"361 (1) A party to an appeal from a subordinate court may subject to sub-section (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law...".*** In ***Dzombo Mataza -v- R*** ***[2014] eKLR***, this Court expressed itself thus:
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> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court - See Okeno -v- Republic [1972] EA 32. By dint of the provisions of section 361 (1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong".***

3. Although the appellant listed eight (8) grounds of appeal in his memorandum of appeal, his learned counsel, ***Mr. Ratemo***, condensed them into two broad grounds when he argued the appeal before us. The first broad issue argued by counsel was that the appellant was convicted on evidence which was inconclusive. In other words, the case was not proved beyond reasonable doubt. The second broad issue argued by learned counsel was that the evidence relied upon in conviction the appellant was contradictory and that the appellant's defence was not appreciated.

4. A brief background will suffice. The appellant was charged before the Principal Magistrate's Court at Nairobi with two counts of the offence of robbery with violence, contrary to ***section 296 (2)*** of the ***Penal Code*** and one count of having suspected stolen property, contrary to ***section 323*** of the same code. In the first count, it was alleged that on 25th June, 2004 at Uthiru village in Kiambu District *(now Kiambu County),* jointly with others not before the court while armed with dangerous weapons viz crow bars and pangas, the appellant robbed ***John K. Nyambura*** of Kshs. 3,000/=, a mobile phone - make Ericson T10, a radio cassette-make panasonic and his personal documents, all valued at Kshs.15,000/= and at or immediately before or immediately after the time of the robbery threatened to use actual violence on the said ***John K. Nyambura*** *(hereinafter, PW 1 or the 1st complainant).*

5. In the second count, it was alleged that on the same date in the same place in consort with others not before the court, the appellant while similarly armed, robbed ***Mathew K. Karanja*** *(PW 2)* of one 14" coloured TV set, one amplifier and one mobile phone - make Siemens C35, all valued at Kshs. 19,500/= and at or immediately before or immediately after the time of the robbery, threatened to use actual violence upon the said ***Mathew M. Karanja*** *(hereinafter, PW 3 or the 2nd complainant*).

6. The 3rd count carried the following particulars. That on the same date, at the same place, having been detailed by No. 26408, ***Sgt. Paul Muteti***, a Police Officer, as a result of the exercise of the powers conferred by ***section 26*** of the ***Criminal Procedure Code***, the appellant had in his possession one pocket - S/N 20800696 reasonably suspected to have been stolen or unlawfully obtained.

7. The appellant was tried by a Principal Magistrate, ***Mrs. M. W. Murage***, who, at the close of the prosecution case and after hearing the appellant in his defence, convicted him of all the three counts. She then sentenced him to death on the first two counts of robbery with violence and to three (3) years imprisonment on the third count of having in his possession suspected stolen property. As we have stated earlier, the appellant's first appeal to the High Court was dismissed save for the clarification that the sentences of death were to run concurrently whilst the sentence on the third count was to remain in abeyance.

8. The appellant was still aggrieved and hence the appeal before us. ***Mr. Ratemo*** submitted before us that relevant exhibits such as the panga allegedly used in the robbery and purportedly left in the house of the 1st complainant was never produced and nor were exhibits the prosecution listed in the charge sheet. It was learned counsel's further argument that the evidence of PW 1, PW 2 and PW 3 did not prove the offences the appellant faced. Learned counsel also further urged the view that the prosecution did not adduce any evidence of recovery of any of the property robbed from the complainants nor did it avail fingerprint evidence on the panga allegedly used to terrorize the victims. With regard to identification, learned counsel submitted that all the identifying witnesses contradicted each other and therefore,were unreliable witnesses upon whose evidence a conviction could not be based.

9. Ms Maina, learned Senior Prosecution Counsel, in resisting this appeal submitted that PW 1, PW 2, PW 3 and PW 4 all positively identified the appellant at the time of the robbery. In her view, there was sufficient light for a positive identification and accordingly, that the conviction was safe.

10. The record shows that appellant's conviction was based principally on visual identification evidence of four eye witnesses PW 1, PW 2, PW 3 and ***Jane Wanjiku Mungai*** *(PW 4).* In convicting the appellant, the trial Magistrate found as a fact that those eye witnesses knew the appellant prior to the robbery and that although the robbery was committed at night, eye witnesses identified the appellant by recognition. In her view, the identification was buttressed by detailed description of the appellant's attire during the

robbery. On the basis of those findings, she held that the appellant's *alibi* defence could not be believed and accordingly rejected it.

11. The High Court *(Ojwang, J. (as he then was, and Dulu, J.)*, upheld those findings and dismissed the appellant's appeal. Both courts below made concurrent findings of fact as to the identification of the appellant by recognition of PW 1, PW 2, PW 3 and PW 4. ***Mr. Ratemo,*** learned counsel for the appellant, has invited us to reconsider the evidence of identification as recounted by the same witnesses especially given the discrepancies when he identified.

12. Although the correctness or otherwise of identification of a suspect in a criminal matter entails the examination of evidence, this Court has time without number held that the issue of identification is a matter of law. Bearing that in mind, we consider it imperative to re-examine the circumstances under which PW 1, PW 2, PW 3, and PW 4 testified that they identified the appellant in order to discover whether or not both the court's below erred in principle.

13. PW 1 was asleep in his house situated in Uthiru in Kiambu County on the material night when, at 3 a.m., the door of his house was broken and two people entered. The people went to where PW 1 was sleeping and demanded for whatever he had. They were armed with pangas. They took his mobile phone, radio and Kshs. 5,000/=. It was his evidence that he identified the appellant who wore a striped shirt and a brown jacket. As PW 1 was being robbed, he realized that there were other people outside his house who had a radio and threatened to shoot. PW 1 stated that during the robbery, his bedroom light was on. The appellant who was only two metres away from him, threw a panga at him but missed. His observation of the appellant was not momentary as he testified that he was with him in close proximity for four minutes.

The next morning, he reported to the police. In cross-examination he stated, among other things, that he had no doubt that it was the appellant who attacked him and that although he did not give his name to the police, he gave his description.

14. PW 2 was another victim of the robbery. Her evidence was that on the material night, at about 3 a.m., while sleeping, her door was broken and two people armed with pangas, entered. They demanded mobile phones and money. She gave them her mobile phone and money. The people then took her radio cassette. It was her evidence that lights were on and one of those people was the appellant. In her case, the thugs stayed for between 10 and 15 minutes before leaving. She later reported the robbery to the police. In cross - examination, she stated that although she did not identify the appellant in her statement, she stated that she would identify him on seeing him.

15. PW 3 was the 2nd complainant and 3rd victim. Like PW 1 and PW 2, he was asleep in his house at Uthiru on the material night when the door to his house was broken and thugs entered his bedroom. He had put on lights. It was his testimony that it was the appellant who entered his bedroom. He had a metal bar and his colleague threatened to shoot. The thugs took his mobile phone, TV set and amplifier. They then escaped.

The following day at 6.30 a.m., PW 3 met the appellant who started running away. PW 3 screamed and gave chase. He was joined by members of the public who caught up with the appellant at a church compound where he was arrested after suffering mob attack. It was his evidence that he recognized the appellant who he had known since he was a child. He had seen him with a police radio during the robbery and also the next morning before he started running away. In cross - examination, he maintained that he knew the appellant well.

16. Jane Wanjiku Mungai (PW 4) is the mother of PW 3. She recalled the events of the material night when her son shouted *"thief" "thief"*. She saw three people one of whom threatened to shoot her. The next day she witnessed the escape of the appellant to the church on seeing PW 3. She witnessed the appellant being beaten by members of the public. In cross-examination, she stated that she knew the appellant who was notorious in the area for stealing and that she had identified him at the locus in quo. It was her evidence that during the robbery, security lights were on and she identified the appellant.

17. The appellant gave an unsworn statement and called his father ***John Mwaniki (DW 1)***. He denied the charges against him and told the court that he was accosted by members of the public who demanded that he produces the person they were chasing. His father testified that he was with the appellant on the material night. In cross-examination however, he admitted that he could not vouch for where the appellant was after he (DW 1) had slept.

18. That was the evidence which was before the trial court upon which the appellant was convicted. That is the same evidence the learned Judges of the High Court considered and upon which it upheld the conviction. ***Mr. Ratemo***, as already stated has submitted before us that the identification of the appellant by those witnesses was not positive. ***Ms Maina*** on her part as we have stated argues that the same evidence was watertight against the appellant.

19. The law on identification is now well settled and this Court has time without number said that the evidence relating to identification must be scrutinized carefully and should be accepted and acted upon if only the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. (See ***R. -v- Turnbull [1976] 63 Cr. App. R. 132)***.

20. The decision in the Turnbull case has been accepted by our courts as good law. One of the factors the court considers is whether the eye witnesses gave a description of his or her attacker or attackers to the police or other relevant authorities at the earliest opportunity. In the case of ***Mohamed Elibite Hibuya & Another -v- R. [Criminal Appeal No. 22 of 1996] (UR)***, we held:

> ***"... it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the earliest opportunity. Both the Investigating Officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence.***
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> ***Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal, this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence".***

21. In this case, the complainants, in counts one and two (PW 1) and (PW 3) respectively, testified that they knew the appellant prior to the robbery. PW 1 gave evidence that the robbery occurred when his bedroom light was on. He then described the appellant to the police the very next day after the robbery. He also appears to have had adequate time to observe the appellant who he knew.

22. PW 2 gave similar evidence as PW 1. She too put on lights when the thugs entered her house after breaking the main door. She testified that she recognized the appellant who she had known prior to the robbery. In her case, the robbers do not appear to have been in any hurry to leave. They stayed for between 10 to 15 minutes before leaving. In her report to the police she stated that she would identify the robbers if she saw them. We are puzzled that the appellant was not charged for robbing her.

23. PW 3 also put on lights when thugs broke into his house. He recognized the appellant on the material night and also did so three hours later early the next morning when the appellant started running away and he gave chase with members of the public cornering him at a church compound where the appellant was badly beaten. He had known the appellant since he was a child. PW 3's testimony was buttressed by that of his mother, PW 4. She had security lights on when her son PW 3, was attacked and she recognized the appellant who she had known prior to the attack.

24. We also note that the attackers do not appear to have disguised themselves during the robberies. We are therefore, not surprised that both courts below accepted the evidence of recognition of the appellant. The evidence of PW 1, PW 2, PW 3 and PW 4, the eye witnesses, proved beyond reasonable doubt the two offences of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. We reiterate what is stated in ***Anjononi -v- R. [1980] KLR 59***, that recognition of an assailant is more reliable than

identification of a stranger.

25. There were some discrepancies in the evidence of the witnesses but in our view, that is only human and variations in observations are to be expected in the normal conduct of human beings. In this case the discrepancies were not material. The evidence of the same witnesses and that of ***Sgt. Paul Muteti (PW 6)*** proved, again beyond reasonable doubt, the third count of being in possession of suspected stolen property contrary to ***section 323*** of the ***Penal Code***.

26. The entire evidence in our view dislodged the *alibi* defence put forward by the appellant which defence was fully considered by the two courts below and was rejected on good grounds which were recorded.

27. The upshot is that this appeal cannot succeed. It is dismissed. However, as to sentence the learned Judges of the High Court ordered the two death sentences on counts one and two to be served concurrently and that of imprisonment to remain in abeyance. That was, with all due respect, erroneous. We wonder how the two sentences could be served concurrently. We correct the error and suspend the death sentence imposed on the second count. Save for this correction, the appeal is dismissed.

Judgment accordingly.

Dated and delivered at Nairobi this 2nd day of December, 2016.

P. KIHARA KARIUKI - P.C.A.

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.