IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 105 OF 2013

BETWEEN

PETER MWANGI GACHIE……..…..……...…………………. APPELLANT

AND

REPUBLIC ………………………………………...………… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Wakiaga & Ombwayo, JJ.) dated 7th November, 2013

in

H.C.CR. A. No. 202 of 2009)

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JUDGMENT OF THE COURT

Peter Mwangi Gachie the appellant in this appeal was charged with three counts; Robbery with violence contrary to ***Section 291 (2)*** of the ***Penal Code***; Demanding property with menaces, contrary to ***Section 302*** of the ***Penal Code*** and Improper use of licensed telecommunication system contrary to ***Section 29 (a)*** of the ***Kenya Communication Act*** . The appellant was tried before the Senior Resident Magistrate at Nyeri. He was acquitted of the 2nd and 3rd counts but was found guilty, convicted and sentenced to suffer death in respect of the main count of robbery with violence.

Aggrieved with the conviction and sentence, the appellant appealed before the High Court. Wakiaga and Ombwayo JJ., dismissed the appeal. This is what has provoked this second appeal which by dint of the provisions of ***Section 361 (1) (a)*** of the ***Criminal Procedure Code***, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered or looking at the entire case, their decisions on such matters of fact were plainly wrong in which case this Court will consider such omission or action as matters of law. See ***Karingo – v – R, (1982) KLR 214***.

> ***"A second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence***".

In ***David Njoroge Macharia – v- R* [2011] e KLR** it was stated that under ***Section 361*** of the ***Criminal Procedure Code***:

> ***"Only matters of law fall for consideration and the court 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 a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic (1984) KLR 213)".***

The evidence that led to the conviction and sentence of the appellant is briefly stated. Naomi Wanjiku Wangechi was the complainant in this matter. She testified as PW1 before the trial court, she used to operate a shop at Ramuria in Laikipia East. Prior to the robbery incident herein, her shop was broken into and her goods were stolen several times by thieves who used to gain access with the use of a master key. When the complainant changed the padlock and perhaps the thieves were not able to easily gain access to her shop as in previous occasion, they changed their tact. On 17th September, 2008, at about 7pm, the complainant was violently attacked by a group of 4 robbers who were armed with a fire arm. The robbers posed as customers. The complainant inquired from them what they wanted; one of the assailants whipped a pistol and shot her on the left hand while demanding to be given money. The complainant sustained serious injuries with a lasting impression of the bullet that remained lodged in her body as at the time she testified in this matter before the trial court. The complainant had Ksh. 150,000/= which the thugs took. The thugs also stole Safaricom calling credit cards, and assorted cigarettes.

The complainant was taken to hospital where she was hospitalized for sometimes. While in hospital, she received threatening calls by people she believed were the ones who had robbed her. The calls were made from telephone no 0715086664 belonging to John Kinoti one of the suspects who was shot dead as he attempted to escape from police. The appellant Peter Mwangi Gachie was linked to this offence of robbery with violence through his telephone set that was found after investigations was used to make some of the threatening calls that were made to the complainant. The appellant admitted that John Kinoti had borrowed his mobile set but he denied he was aware it was used to make threatening calls. The people who made threatening calls to the complainant admitted in the course of those calls that they were the ones who were involved in the robbery.

Using data from the Safaricom, the police were able to arrest the appellant in Nanyuki. He admitted that he used to call John Kinoti through Telephone No. 0715086664 and led the police to the arrest of the said Kinoti. However Kinoti escaped from the police custody but was later shot in a different incident involving a police shoot out. After John Kinoti was killed, the complainant was summoned to the mortuary and identified the body of the suspected thug as the one who had shot her. She was told the dead suspect was arrested with another who was at the police station. The complainant was able to identify the appellant at an identification parade conducted on 21st November, 2008, by Chief Inspector Richard Mathenge. During the identification parade, the complainant was with John Nderitu (PW3) who was apparently able to identify the appellant during the parade despite the fact that he had stated in his evidence that he was not able to recognize or identify any of the assailants during the robbery. The evidence of PW3 was rejected and rightly so, by the trial court.

After the prosecution closed its case, the appellant was placed on his defence, he gave a sworn statement. He denied that he knew the complainant. He narrated the chronology of the events that happened on 15th August 2008, the day he was arrested. He met with a lady in the company of two men who turned out to be police officers. The lady told him the two men were looking for John Kinoti who was his brother in law. The appellant told them he had just spoken with the said John Kinoti a short while ago. The men asked for John's number, but when they tried to call him the call did not go through. That is when the appellant was arrested, he led the police to the house of John Kinoti, he also explained that John Kinoti was his brother in law they therefore used to call each other. He denied that he used his telephone to make any demands and that he was arrested following the data obtained from Safaricom. Convinced that the prosecution had proved its case against the appellant on the 1st count, he was convicted and sentenced to death.

It is clear from the summary of the above evidence that the appellant's conviction turned only on the sole evidence of identification by the complainant during the identification parade. This is because the trial court disregarded the evidence of the use of the appellant's telephone set that had allegedly linked him with the threats issued to the complainant. The learned trial magistrate concluded that there was a possibility that the appellant had lent out his mobile telephone set to the deceased suspect. Also the evidence of identification of the appellant by PW3 was similarly rejected on the grounds that he could not specify how he was able to identify the appellant but merely stated he was able to pick him from the parade on account of his height. This is what the trial magistrate stated in his own words;

> *"**From the evidence of P.W. 1 I am certain that she positively identified her attacker. Since the lights were on the court finds that the circumstances were favorable for positive identification. The veracity of her identification of the attackers was also tested and she managed to positively identify the accused during the police identification parade. I do therefore find that the accused was positively identified at the scene of robbery by P.W 1.***
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> ***His evidence on his association with the deceased raises reasonable doubt on his involvement in the threats sent to P. W 1 via 0715086664 as such the court will resolve all lingering doubts in favour of the accused in respect of the charges; he is faced with count 11 and count 111. The accused defence is that he lent his mobile phone to deceased to use which is plausible explanation on how the deceased used this handset of the accused herein. I am aware that P.W1 is the only identifying witness and I am aware of the dangers of relying on her evidence. I do therefore warn myself.***
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> ***The upshot, I find that the prosecution managed to prove its case against the accused as charged in count 1 to the required standards. I have no doubt that the accused with others not before court robbed P.W.1 and shot her in the process wounding her…".***

The appellant unsuccessfully challenged that conviction and sentence before the High Court. The Judges were in concurrent findings with the trial court that the evidence of identification was satisfactory. After re- evaluating the evidence this is what the learned Judges concluded:-

> ***"On the issue of lighting, there is no dispute as to whether there were lights. The issue raised by the appellant is the contradiction between the testimony of PW 1 and PW 3 because PW 3 says that the electricity lights were on whilst PW 3 stated that they were using a battery to light the shop. The issue is whether there was enough light to enable PW 1 mark the appearance of the robbers to enable her identify them and not whether the light was electric or battery. The appellant referred to the statement by PW 3 that he hid inside the store and heard movements of the people while flashing torches and asked why they would flash torches when there was light. This court evaluates the evidence to mean that the store was dark and separate from the shop and, therefore, was likely to have been dark and that is why the witness hid there. The court finds that there was enough light to identify the persons who attacked PW 1.***
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> ***The issue as who shot PW 1 was also raised by the appellant as the witness appeared to contradict herself when she states that she went to the mortuary and identified the dead person as the person who had shot her but later she appears to say in cross-examination that she was shot by the appellant. After carefully analyzing the evidence of the PW 1, the court finds that she stated that the thugs took some time before shooting her and in cross-examination, she states that she was shot by the appellant. Though there is contradiction in exactly who shot the PW 1, the court finds that the appellant was properly identified as one of the thugs who attacked the PW 1.***
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> ***The contention by the appellant that he could not have been similar to the members of public as he was shaggy and unkempt does not negate the outcome of the identification parade. The accused was placed amongst 9 members of an identification parade drawn from the public who were similar in size, colour and appearance of the accused in***

compliance with force standing orders on identification parade that requires the accused person to be placed among at least eight persons as far as possible of similar age, height, general appearance and class of life as himself. This court does not find any irregularity with the recall of PW 1 to produce the P3 form.

The upshot of the above is that the appeal is dismissed".

This appeal is predicated on the following grounds of appeal:

- ***Failing to reconsider the evidence and evaluate it and draw its own conclusion in deciding whether the judgment of the trial court should be upheld.***

- ***Failing to find that the conditions under which the appellant was identified were far from being favorable.***

- ***Failing to find that the identification parade that was conducted with regard to the appellant was faulty and had not been preceded by the description of the appellant by the witness.***

- ***The Judges were also faulted for relying on facts/ evidence that should not have been for consideration at the hearing of first appeal.***

During the hearing, Mr. Gichimu learned counsel for the appellant emphasized in his submissions that in as much as the learned trial magistrate warned himself of the dangers of convicting based on the evidence of a sole identifying witness, nothing more was done especially to resolve some fundamental contradictions that went into the root of the matter. He pointed out the evidence of the complainant who stated that she identified the deceased suspect as the one who shot her during the robbery. The complainant did not identify any other suspect and yet she was able to identify the appellant during the identification parade. Also there were contradictions regarding how long the complainant stayed with the assailants which affected the circumstances for positive identification. The source of lighting, the intensity and the distance was not analyzed by the two courts below and the description of the assailant was not given to the police, the culmination of all these lapses by the two courts below went to weaken the evidence of identification.

Counsel for the appellant challenged the credibility of the identification parade that he stated were conducted against the standards set out in the police standing orders. Firstly, the parade officer did not ensure that the witness touched the appellant as a way of identification. Secondly, there were two witnesses in respect of one parade, and the witness merely identified the appellant due to his physical stature, being the shortest person in the parade and not by touching him. Moreover, the appellant complained that the witness had seen him while his finger prints were being taken. Finally, counsel submitted that the High Court analyzed the evidence that had been discarded by the trial court and thus arrived at an erroneous conclusion.

On the part of the State, Mr. Kaigai, learned Assistant Director of Public Prosecution opposed this appeal. He pointed out that under the provisions of ***Section 143*** of the ***Evidence Act***, an accused person can be convicted on the basis of evidence of uncorroborated evidence. It is obvious the complainant sustained serious injuries and was hospitalized and that explains why a report was not first made giving the description of the assailants. He urged us to dismiss the appeal.

Upon consideration of the above grounds of appeal, it is clear from the analysis done by the learned Judges that they appear to have considered the evidence of the appellant's mobile telephone set that was discarded by the trial court in addition to the evidence of identification. In analyzing that evidence, this is what the Judges concluded:

> ***"PW 6 was assigned the duty to investigate the robbery. He wrote a letter to Safaricom seeking for information on the mobile numbers 0715086664. He got information that the mobile number had been used in different handsets thus, serial number***

> ***35890011838750 and serial number 353106026125140. During his investigations, he found out that serial No.353136326125140 was at one time used by mobile phone number 0724545112. This number was used by the appellant. He never knew the appellant but in the company of Sgt. Mureithi, they went to Nanyuki and arrested the appellant and found him with a Nokia 1110 handset serial number 353266018205799 with sim card for mobile No. 0724545112. The investigating officer did not explain how he managed to trace the appellant in Nanyuki. He does not explain how he traced him in Nanyuki and where he found him, however, the appellant did not deny that the handsets were his and that he was the user of the mobile sim card no. 0724545112".***

From the foregoing, it is impossible to conclude on the basis of the material before us that the inclusion, in the Judges analysis of evidence that was disregarded by the trial magistrate did not affect the weight of the evidence they attached to their overall conclusion. This probably may have occasioned the appellant prejudice. That being the position in which we find ourselves in, the appellant would have the benefit of the unknown.

The second issue was the conclusion drawn from the evidence of identification of the appellant and the ensuing parade. As demonstrated by a portion of the judgment by the learned Judges reproduced verbatim above, it was admitted that there were contradictions in exactly who shot the complainant. This is also demonstrated in the complainant's evidence when she stated;-

> ***"I went to Nyeri Provincial General Hospital where I saw the body and saw that it was the person who had shot me. After I recognized the body, I was called to record my statement".***

This is what the same complainant stated during cross examination;

> ***"I asked you whether you wanted to buy something but you did not talk you kept quiet. I saw you before you shot me"***.

Were these contradictions fundamental? In the case of ***<u>Joseph Maina Mwangi –vs- Republic</u>, Criminal Appeal No. 73 of 1993***, wherein it was held:

> ***"In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellate or they are inconsequential to the conviction and sentences".***

The appellant was convicted based on the evidence of identification by the complainant during the identification parade. Although the learned trial magistrate was aware of the dangers of basing a conviction on this kind of evidence and did warn himself, there are certain factors that he ought to have brought to bear and after ruling out a possibility of a mistake, proceeded to convict. First the offence occurred at night at 7 pm, and the complainant did not adduce any evidence regarding the lighting that illuminated the scene, its intensity or position. Secondly no description of the assailant was given to the police. We appreciate that the complainant sustained injuries and was hospitalized but even after she left hospital, the complaint that she lodged with the police was regarding threatening calls that were linked to the robbery. Thirdly, the appellant was arrested in connection with a mobile telephone set that was used to call the complainant and that evidence was disregarded by the trial court. Had the two courts below addressed their minds to the above, which all went to weaken the prosecution's case, we have no doubt; they would have arrived at a different conclusion.

In the result we find merit in this appeal, we quash the conviction recorded against the appellant, and set aside the death sentence. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 20th day of January, 2015.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO- ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR