IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 304 OF 2010

BETWEEN

ALVAN GITONGA MWOSA ……..……APPELLANT

AND

REPUBLIC ……RESPONDENT

(*An appeal from the judgement of the High Court of Kenya at Embu (Khaminwa&Makhandia, JJ.) dated 29th June, 2007*

in

H.C.CR.A No 70 of 2005)

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JUDGEMENT OF THE COURT

1. The appellant, Alvan Gitonga Mwosa was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the night of 14th November 1998 at Kanja Sub-Location, Kagaari North Location, Embu District of the Eastern Province, jointly with others not before court robbed Antony Mugo Kanampiu of one pair of shoes, one pair of socks, One National Identity Card, One Barclays Bank Plate Card and Ksh 2, 850/= all valued at Ksh 3, 900/= and at, or immediately before, or immediately after the time of such robbery used actual violence to the said Antony Mugo Kanampiu.
2. The appellant pleaded not guilty to the charge setting in motion a trial in which the prosecution called four witnesses. It was the prosecution's case that on 14th November, 1998 PW1, Antony Mugo Kanampiu (Antony) departed for his home at Rukuriri at 9.30p.m. after a day punctuated with errands, his brother's pre-wedding party and a stopover at Starehe Bar where he took three bottles of beer before setting off. It was Antony's testimony that the route leading to his home is downhill and that as he descended, two people passed him. He was able to identify them as Gitonga and Muthamia respectively. After walking for about 50 meters, the pair turned back and started to make their way uphill. On looking behind Antony noticed two other people approaching; whereupon he gathered courage and asked Gitonga and Muthamia why they made a sudden change in direction. In response Gitonga slapped Antony on the face across his eyes.
3. Antony asked Gitonga why he had struck him only for Muthamia to set upon him and held him by the neck as he struggled to free himself. According to Antony he held Muthamia on the forehead

and scratched his face hard almost removing his eye in the process, forcing Muthamia to release him

from his grip. Antony further testified that he could feel his coat being held on both sides. The appellant approached Antony such that they were now face-to-face. A scuffle ensued with the duo knocking each other down.

It was Antony's testimony that he bit the appellant on the ear during the scuffle before receiving a blow to the lower lip of the mouth. Upon turning Antony saw two other men namely: - Njeru Rutere and Muriithi.

Moments later he was hit with an iron bar on the back of the head before falling down and losing consciousness.

4. Antony testified that he could feel hands rummaging through all his pockets even as he lay on the ground. He lost his national identity card, bank card and cash in the sum of Ksh. 2,850/=.The assailants carried Antony and dumped him in a nearby shamba. When Antony regained consciousness the following morning, he heard screams and a person asking who it is who had been killed at the site. The complainant testified that he could not talk or identify the person who was making the query. The owner of the shamba where Antony was dumped went to report to the police about the incident. When the police arrived at the scene Antony was still lying still and could not turn or stand up. He was taken to Runyenjes Hospital for treatment and was admitted for four days, during which period he was still unable to talk (sic). It was also Antony's testimony that he recorded a statement with the police while still admitted at the hospital; and that he stated in his statement that he had bitten the appellant on the right ear.
5. Antony also managed to identify the appellant positively during the trial and reiterated that he was attacked at 9 p.m. on the material date, that it was not dark at the time as there was moonlight; and that the accused and his colleagues are people he knew very well. It was also Antony's testimony that on the material date he had bought the appellant some tea at Kanja Market and that he had seen the accused at Starehe bar where he had been on the night in question.
6. The evidence of PW 2, CPL Ndwiga Kinyua, (CPL Kinyua), PW 3, APC Zablon Njeru, (APC Njeru), and that of PW 4, AG.IP Justus Matono, (AG.IP Matono), was in tandem with that of Antony save for slight discrepancies as to the content of the statement which the complainant recorded and the entries which the police in turn made in their Occurrence Book (herein after referred to as the O.B.). We shall revert to the said discrepancies in due course.
7. Upon consideration of the facts and the evidence adduced by the prosecution, the trial magistrate convicted the appellant and sentenced him to death. Aggrieved by the decision of the trial magistrate, the appellant lodged an appeal at the High Court against his conviction and sentence. On its part, the High Court upheld the appellant's conviction and sentence vide it's judgement dated 29th June, 2007, (Khaminwa & Makhandia, JJ. -as they then were), hence this second appeal based on the following grounds:-

- ***That the learned High Court Judges erred in law by failing to analyze and re-evaluate the evidence on record and draw that (sic) own conclusion as required by the law.***

- ***That the learned High Court Judges erred in law by failing to find that the circumstances prevailing at the scene of robbery were not conducive for any positive identification even that of recognition.***

- ***That the learned High Court Judges erred in law by failing to find that the complainant denied his statement and that he was cheating the court and hence was not a credible witness to be relied upon.***

- ***That the learned High Court Judges erred in law by failing to find that the O.B. obstruct(sic) availed in court did not support the prosecution case as it did not have the names of the appellant to prove the case of recognition as alleged by the prosecution.***

- ***That the learned High Court Judges erred in law in failing to find that the complainant was a confused person during the commission of the robbery as he was influenced with alcohol.***

- ***That the learned High Court Judges erred in law in failing to find that the prosecution did not prove their case beyond reasonable doubt as required by law.***

- ***That the learned High Court Judges erred in law by failing to consider the appellant's defence and yet it was plausible to displace the prosecution case.***

8. At the hearing of this appeal, Mr. Nderi, learned counsel for the appellant chose to urge the seven grounds of appeal highlighted hereinabove as two grounds. It was his submission that the High Court had a duty to ensure that the evidence tendered was watertight. He submitted that the two courts below all fell into error and did not execute their duties. Counsel submitted that the complainant knew the appellant; and that it was the finding of the trial court that the appellant was neither named in the first report nor in a subsequent statement recorded. Counsel termed this a contradiction. It was also counsel's submission that the fact that the High Court failed to reconcile the inconsistencies in the statement recorded before the incident was an error of law in re-evaluating the evidence on record.
9. Counsel further submitted that the trial court failed to address the contradictions which were replete in Antony's entire evidence. He cited the example of Antony being unable to speak after the incident only for him to say in the same breath that he hailed a vehicle. The appellant's counsel also took issue with the complainant's lack of clarity with regard to which of the appellant's ears he bit, the date on which he recorded his statement and the names of the appellant which he gave at the time he gave the first report; and at the time he recorded a statement. Mr. Nderi submitted that the O.B. and the statement showed that there was no name recorded. Counsel described Antony as a false witness and his testimony as equally false.
10. The appellant's counsel cast aspersions as to whether the appellant had been positively identified. Given that the appellant and the complainant knew each other prior to the attack, it would only have been natural for the latter to give the name of the former as he gave his statement to the police. It was also submitted that the trial court misdirected itself and veered off course by placing reliance on the impugned statement which in turn led to the arrest of the appellant. Counsel submitted that the complainant gave the names of Muthamia and Sammy to the investigating officer, and that there was no link to the appellant. Counsel submitted that the trial court had shifted the burden of proof by asking the appellant the cause of his injury; that, no medical evidence was tendered to show that the injury to the appellant's ear was caused by a human bite.
11. In conclusion, it was submitted that the prosecution's case was full of contradictions rendering the resulting conviction unsafe. Counsel also faulted the superior court for failing to conduct an exhaustive evaluation of the evidence on record and submitted that the evidence on record was not watertight.
12. Mr Kaigai, learned Assistant Deputy Public Prosecutor, appeared for the State and opposed the appeal. He supported the conviction and sentence and submitted that the circumstances which were prevailing on the night of the attack were conducive for positive identification. According to him, this was a case of recognition as the complainant knew his attackers by name; that he spent a considerable amount of time fighting them off. The State also submitted that there was ample corroboration as Antony testified he had bitten the ear of one of his attackers. Mr Kaigai also submitted that the first report on the attack was made by a good Samaritan; and it was while the complainant was in hospital that the appellant's name was recorded. It was also submitted that the trial court had considered the defence of alibi and dealt with the subject of contradictions in the O.B. In a brief response, counsel for the appellant submitted that the first report was not made by a good Samaritan, but by the complainant himself.
13. We have considered the record of appeal, the grounds of appeal, submissions by counsel and the law. By dint of **Section 361** of the **Criminal Procedure Code**, this court's jurisdiction is confined to matters of law only. We also hasten to remind ourselves what this court has stated severally, that it 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 evidence, or the courts below are shown to have demonstrably to have acted on wrong principles in making the

findings. See ***Daniel Kabiru Thiong'o –vs- R, -Nyeri Criminal Appeal No 131 of 2002 (unreported),*** where this court stated that:-

> ***"An invitation to this court to depart from concurrent finding of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so"***.

14. Upon perusing the record we are persuaded that the sole issue which commends itself to us for determination is:-

a. ***Whether the appellant was positively identified as amongst the persons who violently robbed PW1.***

The importance of identification cannot be gainsaid in any criminal trial. In ***Cleophas Otieno Wamunga –vs- R, - Kisumu Criminal Appeal No 20 of 1982***, this court stated as follows:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification"***.

We are also persuaded by the words of Lord Widgery C.J. in ***R-vs- Turnbull, (1976) 3 ALLER 549*** in the following terms:-

> ***"Recognition may be more reliable than identification of a stranger but even when the witness in purporting to recognize someone which he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made……..".***

15. Applied to the present appeal, and having perused the record of the trial court and that of the 1st appellate court, it becomes abundantly clear that Antony recognized the appellant herein amongst others who violently robbed him and assaulted him on the material date. Antony's testimony is relevant in this regard and we reproduce excerpts thereof in brief:-

- ***"As I was going down two people passed me. They were Gitonga and Muthamia. I was able to know they were the ones".***
- ***"As I turned I saw two other men Njeru Rutere and Muriithi"***.

Our attention is drawn to two events which precede the robbery: (a) Antony testified that he bought the appellant tea at Kanja Market during the day; and

(b) Antony spotted the appellant at a bar he visited on the fateful night. It follows therefore that Antony and the appellant knew each other well. We cannot help but notice the level of familiarity between the complainant, the appellant and the rest of the attackers.

16. Antony testified as follows when the appellant and Muthamia made a U-turn and started to come towards him: ***"I asked Gitonga what is it that made them to come back. Gitonga slapped me on the face across the eyes. I asked him why he was hitting me……"*** We are therefore convinced that the complainant recognized his assailants; and that there was some degree of association hence the surprise when the appellant acted out of character.

We note that the robbery in question took place at 9.30p.m. In **Maitanyi –vs- R (1986) KLR 198** this court held:-

> ***"It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care"***.

It also held that:-

> ***"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid or to the police….. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description"***.

17. We hold and find that both the trial court and the first appellate court were alive to the requirement of identification and properly applied their minds to the subject. Having established that the moon was the source of light as set out by the Maitanyi case (supra), the trial court expressed reservations as to whether positive identification was possible in the circumstances. The court warned itself of the need for caution and further corroboration in line with the second line of inquiry which was set down by the Maitanyi case (supra).
18. The trial court settled on the description of the appellant given by Antony that he had bitten one of his assailants on the right ear. The said description also led the police to arrest the appellant. We note that the appellant raised this aspect more or less in passing during cross-examination and did not give any explanation as to the cause of the injury during the defence hearing to displace the evidence by complainant. In ***Anjononi & Another -vs- R, (1976-80) KLR 1566***, it was held that:-

> ***"The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case where no stolen property is found in the possession of the accused……. Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"***.

It is the appellant's contention that the trial court and the learned Judges shifted the burden of proof upon him by requiring that he explains the cause of injury to his ear. We have considered this ground and find it has no merit. The complainant testified that he bit the ear of one of his attackers, the complainant named the appellant as one of his attackers and the appellant was found to have an injury to his ear. The injury to the ear of the appellant is corroborative and consistent with the complainant's statement that he bit one of his attackers at the ear. The naming of the appellant and the injury to the ear corroborate the positive identification of the appellant. The defence by the appellant did not dent this evidence at all.

19. We do not find any merit in the ground of appeal urged by the appellant's counsel to the effect that the Judges of the High Court failed to analyse and re-evaluate the evidence on record and draw a conclusion therefrom. Our perusal of the record reveals otherwise. On the question of the complainant being confused at the time of the robbery on account of consumption of alcohol, it is settled in law that he who alleges must prove. No evidence has been tendered in support of this ground. The same fails for want of proof.
20. We are inclined to agree with the superior court's findings with regard to the discrepancies between the statement which was taken from the complainant and the entries in the O.B. Our examination of the record reveals that CPL Kinyua and APC Njeru were the first police officers to arrive at the scene of

crime on 15th November, 1998, and the principal tasks they undertook upon arrival included a brief interview with the complainant to ascertain what had transpired before taking him to hospital for treatment.

21. Antony was able to recall that he had been violently robbed and beaten by the appellant and two other people overnight. This information was recorded by CPL Kinyua in his statement dated 4th January, 1999, save that the name of the appellant or the fact that he bit the complainant's right ear

was not indicated therein. On his part APC Njeru also recorded a statement on 15th (sic) based on what the complainant told him as he was being taken to hospital. The same was booked in the O.B. but the officer could not recall the exact contents. No names were recorded in the O.B.

22. AG. IP Matono, who was the Investigating Officer, testified that he was at Runyenjes Police Station on 15th November, 1998, when Antony made a report that he had been violently robbed the previous night. He obtained the complainant's statement on 19th November, 1998, whose gist was that Antony managed to bite the ear of one of his assailants. It was also his testimony that the appellant was arrested on 16th November, 1998, and that at the time of his arrest he had an injury to his right ear which was subsequently treated at the Runyenjes District Hospital. A P3 Form was duly prepared and was marked for identification by the trial court. According to AG. IP Matono, Antony was able to identify the appellant by name. We are also able to gather from the record that the Investigating officer did not take a statement from the complainant in person neither did he make entries in the O.B. From the foregoing sequence of events it is clear that the appellant was clearly identified as one of the assailants who attacked Antony. Accordingly, we also confirm the superior court's finding of taking of statements by one officer and the entry of details in the O.B. by another.

23. In view of the foregoing analysis, we are satisfied that the prosecution proved its case beyond reasonable doubt. Consequently, we find the present appeal to be devoid of merit and hereby dismiss the same; and affirm the conviction and sentence of the appellant.

Dated and delivered at Nyeri this 14th day of April, 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