IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 5 OF 2013

BETWEEN

SULEIMAN KAMAU NYAMBURA…….APPELLANT

AND

REPUBLIC ……....RESPONDENT

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

(Sergon & Wakiaga, JJ.) dated 1st November, 2012

in

***H.C.CR.A. No 123 of* 2010)**

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JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court (Sergon & Wakiaga, JJ.,) dated 1st November, 2012, wherein the appellant's conviction and sentence for the offence of robbery with violence was upheld while the appeal for his co-appellant Joseph Mwangi Wanjiku was allowed. We think it is imperative to briefly set out the essential background facts of the matter.

Suleiman Kamau Nyambura alias ***Karogo*** was jointly charged with ***Joseph Mwangi Wanjiku,*** before the Principal Magistrate's Court at Murang'a with the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***. The particulars of the charge were that on 25th July, 2009, at Mukuyu area, Murang'a North District, in the then Central Province, jointly, while armed with offensive weapons namely knives, they robbed Mauritius Njatahini Mwangi of cash Kshs. 15, 850/= (Fifteen Thousand Eight Hundred and Fifty Shillings) and at the time of such robbery used actual violence to the said Mauritius Njatahini Mwangi.

The prosecution called a total of six witnesses in support of its case against the appellant and the co-accused. It was the prosecution's case that on 25th July, 2009 at about 10 a.m. the complainant who testified as PW 1, Mauritius Njatahini Mwangi was on his way to his home from Murang'a town using the road to Mukuyu area. He was pushing his bicycle, when suddenly, two young men appeared from behind, they tripped him, and as a result he fell with his bicycle. The young man who tripped the

complainant produced a knife and ordered him to keep quiet. The second assailant also produced a knife and put his hands into the complainant's pockets and stole Kshs.15, 850/=. The threats not to scream notwithstanding, the complainant managed to scream and the two attackers fled from the scene and entered a nearby *shamba* before disappearing from sight.

Two people arrived at the scene moments later and chased the two attackers albeit without success. The said persons returned to the scene of the robbery and advised the complainant make a report to the police. They also told the complainant that they knew the two young men who had attacked him. The complainant reported to the police as advised before proceeding to Murang'a District Hospital for treatment; the P3 form was filled by Samuel Kahado, (PW4). He also produced the P3 Form in evidence confirming the injuries suffered by the complainant, which were a swelling on the forehead and some lacerations on the right hand and forearm and right knee joint. According to the complainant, the two assailants were people he used to see but he did not know their names. Upon his return from hospital on the same day, while taking the P3 Form back to the police, he met with the appellant who had been apprehended and brought to the station. It is at that moment the complainant said he identified the appellant as one of the attackers. It was complainant's testimony that the appellant is the one who tripped him and produced a knife and that during the incident, he identified him. The second co-accused was arrested much later apparently because of another unrelated offence.

PW 2, Chief Adams Kariuki, (Chief Kariuki), the area Assistant Chief received information on the material date that there were suspicious characters roaming around in his area of jurisdiction. An informer showed him the appellant and the co- accused prompting him and Administration Police Officer Joseph Mutali (PW3), to lay an ambush. They saw the complainant walking along the road leading to his home pushing a bicycle. The appellant and his co-accused were following him closely. Chief Kariuki testified that the appellant hit the complainant, and fell him down; he saw the second co-accused remove money from the complainant's trouser before fleeing from the scene. Chief Kariuki and his officers gave chase to no avail. The appellant was arrested on the same day while his co-accused was arrested much later.

PW 5, P.C. Tom Odhiambo, (P.C. Odhiambo), testified on the circumstances under which the 2nd accused person was arrested. It emerged that he had been arrested for a different offence only for police officers at the police station to discover that he had played a role in attacking the complainant. PW6, Cpl. Vincent Kembui, (Cpl. Kembui), who was the duty officer at Murang'a Police station on the material date testified that he received a report about the robbery at about 11.45 a.m. The complainant informed him that his attackers were armed with knives and that he had been robbed of the sum of Kshs. 15, 850/=. He had also sustained injuries to his head, right hand and leg. Cpl. Kembui further testified that at about 1.45p.m. on the same day, the appellant was brought to the station by Apc Sgt. Mutali and Chief Kariuki. According to Cpl. Kembui, the complainant had informed him that the appellant was wearing a red T-shirt at the time of the attack, and indeed when the appellant was arrested he was in a red T- shirt.

Another notable aspect of CPL Kembui's testimony relates to the arrest of co- accused on 11th September, 2009, on different charges initially, before they realized that he was involved in the robbery of 25th July, 2009. It was CPL Kembui's testimony that the co-accused declined to participate in an identification parade without giving any reason; and that during the course of investigations he got to learn that the co- accused feared being identified by the complainant.

In their defence the appellant and his co- accused each gave sworn statements in which they raised a defence of alibi, they also alleged that they were framed as there existed a grudge with Chief Kariuki which was the source of their tribulations.

The trial court convicted the appellant and his co- accused and sentenced each of them to death. Aggrieved by the decision of the trial court, the pair lodged an appeal at the High Court. The co-accused's conviction was quashed and his sentence set aside while that of the appellant was upheld giving rise to the present appeal which was principally argued on one ground of appeal as per the supplementary Memorandum of appeal to wit:-

"The High Court erred in law in failing to subject the entire evidence rendered at the

trial court to a fresh and independent assessment and failed to consider at the grounds of appeal and submissions lodged by the appellant thereby arriving at the wrong conclusion".

At the hearing of this appeal, the appellant was represented by Mr. Gathiga, learned counsel who argued the appeal on his behalf, while the State was represented by Mr. Kaigai, Assistant Deputy Public Prosecutor. Mr Gathiga submitted that the first appellate court did not subject the entire evidence to a thorough, exhaustive and independent re- evaluation as required; the appellant's defence was not considered especially the evidence by the defence witness; had the two courts below considered the defence evidence, it would have become clear that the appellant had left his place of work at noon and was arrested only 30 minutes later thus he could not have been at the scene of crime which occurred at 10;30 am; moreover, the evidence of identification that the appellant was found wearing a red T-shirt was not safe to sustain a conviction as it was possible another young man wore the same and thus there was a possibility of mistaken identity .

On part, of the State, Mr. Kaigai submitted that the charge was proved to the required standard, that the evidence from the complainant was clear and consistent and that the person who presented the defence of alibi on behalf of the appellant was a convict. Moreover, there were concurrent findings by the two courts below that the appellant was positively identified by the red shirt he was wearing when the offence was committed and was arrested while in the same.

This is a second appeal and that being so by dint of the provisions of ***Section 361*** of the ***Criminal Procedure Code,*** only points of law turn in for our consideration. See also ***Chemangong -vs- R, [1984] KLR 611***. In ***Kaingo -vs- R, (1982) KLR 213 at p. 219*** this Court said:-

"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 second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R, (1956) 17 EACA 146)".

We discern only two points of law; that is whether the appellant was positively identified as one of the perpetrators of the offence of robbery with violence that was visited upon the complainant; secondly, whether the High Court Judges subjected the entire evidence to fresh scrutiny and analysis. The case of ***Johanna Ndung'u vs Republic - Criminal Appeal No. 116 of 2005, (unreported)*** sets out the ingredients of robbery with violence pursuant to ***Section 296 (2)*** of the ***Penal code*** as follows:-

a. ***If the offender is armed with any dangerous or offensive weapon or instrument, or;***

b. ***If he is in the company with one or more other person or persons, or;***

c. ***If at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.***

Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under ***Section 296 (2)*** of the ***Penal Code***. See ***Oluoch vs Republic (1985) KLR 549***. In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredient of robbery with violence is the need to positively identify the assailant/s in question. In ***Wamunga v Republic, [1989] KLR 424-Criminal Appeal No 20 of 1989***, this court held that:-

"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 a defendant depends wholly or to a great extent on the correctness of more or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

In ***Roria v R, [1967] EA 583*** at **page 584** this court held that:-

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C. said recently in the House of Lords in the course of debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:***
>
> ***" There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten-if there are as many as ten-it is the question of identity".***

It is clear from the record of the trial court that the appellant's red T-shirt was the item which led to his arrest and subsequent arraignment in court. No mention is made of the appellant's facial features, name or any other distinct mark. It is also worth mentioning that from the testimony of Chief Kariuki, the appellant was arrested 45 minutes after the complainant was attacked. CPL Kembui on the other hand testified that the appellant was arrested after three hours. Other than the said T-shirt, and a sum of Kshs. 450/= which was recovered from the appellant at the time of his arrest there was nothing else that linked him to the offence. It is difficult to ascertain whether the money in question was part of the amount stolen from the complainant. The appellant was also identified because the person who robbed the complainant was wearing a red T-shirt and the appellant was found wearing the same T- shirt. Again we find this evidence problematic as no evidence was adduced to show the distinctive features that were on the red T. shirt that distinguished the appellant.

The case of ***R V Turnbull, [1977] QB 224,*** provides useful guidelines in so far as identification is concerned. The court stated:-

> ***"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution[…..]***
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> ***When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."***

There is a wide gap between 45 minutes and three hours which raises the possibility of mistaken identity. The identification evidence weakens thereby requiring other collaborative factors: that is neither good nor poor as described in the Turnbull case (supra). This state of affairs falls short of the requirement which was set in ***Wanjohi&2 Others V Republic, [1989] KLR 415,*** that a question as to identification is to be answered beyond reasonable doubt. Matters are not helped either by the first appellate court's assertion that: ***"PW 1(complainant) was able to identify the (1st) appellant at the said police station"***. It is necessary to point out that it was only the complainant who got a glimpse of the appellant at the time he was being led into the police station following his arrest. From the record, no description had been given of the appellant either by the complainant or the two arresting officers who said they had sported the suspicious looking characters.

In our respectful view we find the evidence of identification that formed the basis was wanting and that the appellant was not positively identified.

Although this appeal could have been disposed on the above findings, we also wish to comment on the

evidence before the trial court as it was submitted the High Court judges failed in their duty to re-evaluate it exhaustively as mandated by law. In ***Okethi Okale Vs Republic (1965) E.A. 555*** it was held that in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or counsel's speeches. In his judgment the trial magistrate violated this principle by departing from the evidence on record. Instead he came up with theories as to how the robbery came to pass.

An Excerpt of one of the theories formulated by the trial magistrate is to the effect that:-

> ***"Some of the likely ways in which frame-ups can be conjured up would look like this: For 1st accused: PW2 dreams up a scheme to fix the 1st accused (the appellant) for failing to show the whereabouts of a recalcitrant neighbor hell-bent on bhang peddling. Towards the end, PW2 co-opts PW3 into the scheme. Somewhere along the way, PW1 is brought on board and prevailed upon to pretend he was robbed"***.

It was unnecessary for the trial magistrate to develop theories in a criminal trial, moreover, the theory put forward was not supported by evidence, neither were they contained in the prosecution's submissions. This goes to confirm further that the appellant's conviction was not safe to sustain. In the instance case we find there are compelling reasons for departing from the findings of the two courts below. The trial magistrate demonstrably acted on wrong principles by formulating theories in support of the appellant's guilt as opposed to relying on evidence tendered.

Those being our findings, we allow the appeal, quash the conviction and set aside the death sentence, and order the appellant released from prison forthwith unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 13th day of April, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR