**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CRIMINAL APPEAL NO. 27 OF 2010**

**BETWEEN**

**DANSON NGARI NYAGA ….....…….APPELLANT**

**AND**

**REPUBLIC..... …….RESPONDENT**

*(Being Appeal from Judgment of the High Court of Kenya at Embu (Karanja,J) dated, 9th February, 2010*

*in*

***H. C. CR. A. No. 117 of 2008)***

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**JUDGMENT OF THE COURT**

**Introduction and Background.**

1. The Appellant ***Danson Ngari Nyaga*** was tried and convicted on 22nd February, 2008 by the Senior Resident Magistrate Kerugoya, (***J.N. Onyiego***) on two counts for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. It was alleged in count 1 that on the 2nd day of June, 2007 at Mjini village in Kirinyaga District within the Central Province, jointly with others not before court being armed with offensive weapons iron bars, they robbed ***Belinda Kathuita Wachira*** **Kshs.1000/=**, a pair of shoes, a mobile phone, make Techno T.201 all of the total value of Kshs. 3,450/= and at or immediately before or immediately after such robbery used actual violence to ***Belinda Kathuita Wachira***. On the same facts in count 2, it was alleged that they robbed ***Elijah Mugambi Nyaga*** **Kshs. 3000/=** and a cap all of the total value of **Kshs. 3,150/=** and at or immediately before or immediately after such robbery used actual violence to the said ***Elijah Mugambi Nyaga***.Upon his conviction on both counts, he was sentenced to the only sentence known in law for this offence- death on count 1, with the sentence on count 2 being left in abeyance.
2. In brief, the facts which led to his conviction were that the two complainants namely **Elijah Mugambi** and **Belinda Kathuita** were on their way home on the morning of 2nd June, 2007 at about 6.00 am. On reaching a place called Mukuyu, they were suddenly set upon by four assailants who emerged from the bush nearby, armed with sticks and a metal bar. PW2 **Elijah Mugambi Nyaga** was the first to be attacked. When PW1 **Belinda Kathuita Wachira**

intervened she was also attacked. The two were robbed of the items enumerated in the charge sheet.

3. In the meantime PW3 **Mbugua Allans Mwaniki** who was using the same route but headed in the opposite direction heard the screams of the two. On nearing the scene he saw the two being attacked by the four assailants PW3 screamed and the four ran away towards a mosque. All the three witnesses PW1, PW2 and PW3 were firm in their testimonies that they recognized "Broker" and "Munyambu". "Munyambu" was said to be a nickname for the appellant. PW1 and PW2 promptly reported to police and gave the name of the appellant as one of the assailants. Investigations were commenced appellants arrested, charged tried and convicted.
4. The appellant was aggrieved by that decision and he appealed to the High Court (***Makhandia and Karanja,JJ***) (as they then were) which in its judgment dated 9th day of February, 2010 dismissed the appeal. It is now before us on a second appeal which is predicated on eight grounds listed in a supplementary memorandum filed by learned counsel for him, ***Mr. Gachuba***. They may be summarised:-

The learned judges erred in law by;

- ***failing to find that the appellant's plea was equivocal.***
- ***failing to find that the appellant was not positively identified or recognized.***

***failing to find that the ingredients of the offence of robbery with violence were not satisfied.***

- ***failing to find that the trial was unfair as the learned trial magistrate failed to comply with the mandatory provisions of the Constitution of Kenya (supervisory jurisdiction and protection of Fundamental rights and Freedoms of the individuals (High Court practice and procedure Rules 2006.***
- ***failing to find that the trial was unconstitutional as it contravened the appellant rights, guaranteed under section 77 of the Constitution of Kenya and section 198 of the Criminal Procedure Code of the laws of Kenya.***
- ***failing to find that contradictory evidence favoured the appellant.***
- ***failing to find that the trial was unfair as it violated section 211 of the Criminal Procedure Code.***
- ***The conviction in the circumstances of the case was such that a manifest travesty of justice occurred therein.***

**<u>Appellants Submissions</u>**

5. **Mr. Gachuba** compressed the grounds of appeal into three issues;

- Whether the appellant was positively identified and or recognized.
- Whether the ingredients of the offence of robbery with violence were satisfied.
- Whether the appellant's alibi defence was sufficiently rebutted by the prosecution.

6. On identification by recognition ***Mr. Gachuba*** implored us to find that the prosecution case did not meet the required thresh-hold of proof beyond reasonable doubt According to him, the complainants were from a night club at 6.00am, and the possibility of their having been intoxicated and incapable of identifying or recognizing their assailants properly could not be ruled out. Their evidence should therefore have been treated with caution. Furthermore, he submitted, there was no mention as to how long they took to look at the appellant before the attack; visibility may have been impaired since it was the month of June when days and nights are usually hazy; the appellant could not have been a member of the parade in which he was allegedly identified by the complainant as his name was missing from the parade

form; and lastly the appellant's alibi was neither investigated nor evidence adduced to rebut it.

7. As to whether the ingredients of the offences of robbery with violence were satisfied or not, ***Mr. Gachuba*** urged us to resolve this issue in the negative because, PW1 did not specify who among the four assailants was armed with a metal bar; PW1 did not mention that the appellant was armed with a dangerous weapon and that there was no mention that the alleged metal bar was ever recovered from the appellant.

8. As to whether there was more than one assailant, counsel observed that it was only the appellant who had been booked in OB No.11/2/6/07; in the absence of evidence that police were pursuing the other alleged assailants and upon acquittal of the 1st accused at the trial there was no way the appellant could be said to have been in the company of one or more persons at the time of the alleged commission of the offence.

9. Turning to the issue of violence, ***Mr. Gachuba*** submitted that this too had not been established as none of the witnesses saw the appellant wound, strike, beat or use any other form of personal violence on the complainants.

**The Appellant's Authorities.**

10. The appellant placed reliance on the case of ***Victor Mwendwa Mulinge versus Republic [2014] eKLR*** for the proposition that it is trite law that the burden of proving the falsity, if at all of an accuseds' defence of *alibi* lies on the prosecution; the decision of ***Joshua Onyango Osiwa versus Republic [1989] eKLR*** for the proposition that where the only evidence against an accused is evidence of identification or recognition, a trial court must examine such evidence carefully to be satisfied that the circumstances of identification are favourable and free from the possibility of error before it can safely make it the basis of a conviction. Second, for the proposition that an accused person who pleads a*libi* as a defence assumes no burden to prove it; and lastly the case of ***Oluoch versus Republic [1985] KLR 549*** first for the proposition that dock identification of a witness in the absence of the holding of an identification parade is worthless and; second, for the elements or ingredients upon which the offence of robbery with violence is deemed to have been committed.

**Respondent's response**

11. In response to the appellant's submission, ***Mr. Kaigai*** learned Assistant Director of Public Prosecutions urged us to dismiss the appellant's appeal on the grounds that the prosecution's case was proved to the required standard based on recognition; the complainants knew the appellant by his names and that is how details of his particulars were given to the police and booked in the OB resulting in the appellant's arrest.

12. On visibility, ***Mr. Kaigai*** argued that it was past 6.00 a.m hence visibility was clear and there was nothing to suggest that it was hazy. Identification was therefore free from error considering that the attackers took some time with the victims thereby affording the witnesses an opportunity to register the assailants' appearance.

13. Counsel further submitted that even if there was no demonstration that the appellant was the one who hit the complainants with the metal bar, the doctrine of common intention applied to involve the appellant in the commission of the offence; that the appellant's *alibi* defence was considered before its rejection; that this being a case of recognition the holding of an identification parade for the appellant was not necessary and lastly that the finding by the two courts below that the key witnesses were worthy of belief should not be disturbed.

**Appellant's response**

14. In response to the respondent's submission, ***Mr. Gachuba*** urged us to find that there was no justification for the rejection of the appellants' *alibi* defence considering that the prosecution had made no

effort to call evidence in its rebuttal.

**Analysis and determination.**

15. This is a second appeal. By dint of the provisions of **section 361 (1)** of the Criminal Procedure Code, we are enjoined to consider matters of law only. As was stated in the old case of ***Rex v. Hassan Bin Said [1942] EACA 62***:-

> ***" A second appeal lies only upon questions of law. In such a case this Court is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the findings of fact. This being a question of law.***

16. On identification, it is evident from the record that the learned trial magistrate in the course of evaluating and assessing the facts before him made observation that both PW1, and 3 knew the appellant by a nickname. On reporting, the complainant gave the appellant's name to the police who entered it in the OB; the appellant was known before and was therefore recognized; the offence took place at 6.00am when the sun was rising and PW1, 2 and 3 had said it was already day time and there was sufficient light conducive to positive identification; the court did not believe that the case was a frame up as no grudge had been established between the appellant and the witnesses to justify a frame up; the court was not persuaded by the appellant's reason for a possible frame up; the court dismissed the appellant's alibi that he was not at the scene that day; the court was satisfied that the evidence of PW1, 2 and 3 was consistent and well corroborated; from their general demeanor they appeared innocent, truthful and reliable witnesses. On that account the trial magistrate entertained no doubt as to the credibility of their evidence and proceeded to find that the prosecution case proved to the required standard and convicted the appellant on both counts.

17. The first appellate court revisited the findings of the trial court re-evaluated and re-analized the same and made observations that they believed the prosecution witnesses' testimony that the complainants had been accosted by some people while on their way home; it was at 6.00am and there was therefore sufficient light; it was day break; the complainants were able to positively identify the appellant and another; they attacked and injured the complainants with a metal bar; the complainants properties as listed in the charge sheet were stolen; the complainants went to the police immediately and gave the name of the appellant who they knew very well before the incident as he used to sell *miraa* in their town; the appellant did not deny that he was a *miraa* seller; they knew him by his nick name "***Munyambu***"; identification by nick name was not unusual as it is not the name that the complainants identified but the physical person and the witnesses had no doubt about that; the prompt reporting and the entry of the appellant's name in the OB showed that the naming of the appellant was not an after-though ; the identification parade was unnecessary since the complainants knew the appellant before notwithstanding that he was picked out on the identification parade.

18. Applying the standard of proof set out in the case of ***Anjononi and another versus Republic [1980] KLR 59*** to the evidence on identification before them, the lead Judges made observation that the robbery was committed in the morning; there was sufficient light and one would easily identify another; PW1 and PW2 clearly saw and identified the appellant; PW3 who was not a victim also saw and identified the appellant whose name the complainants gave to the police in their first report and even recorded in the OB; that it was not the description that the complainants gave to the police but the name of a person who they already knew; and ruled out any chances of mistaken identity for any other person. In the learned judges' considered view, the appellant's identification in connection with the alleged commission of the offence was fool proof. On that account they concluded that the appellant had properly been identified by the witnesses in connection with the commission of the offence.

19. The above is a clear demonstration that the two courts below concurrently made a finding that the appellant had positively been identified and/or recognized in connection with the commission of the alleged offence. In the decision in the case of ***Sasi versus Republic [2009] KLR 353,*** this Court reiterated

*inter alia* that on a second appeal the court was bound by the concurrent findings of fact made by the lower courts unless these findings were not based on evidence; and should not disturb findings on alleged identification where such identification was clearly by a complainant who had known the appellant for a long time.

20. On our own, we find the first appellate court's in testing the veracity of the trial court's findings on identification took the right approach in that it applied the principles enunciated in the case of ***Anjononi and another vs.*** **UR (supra)** and applying them to the rival arguments before them, they correctly found that the prosecution's case before them had met that threshhold by reason of the fact that visibility was clear and favourable to positive identification, that the case before them was one of recognition as the complainants had known the appellant as a *miraa* trader in the local market, a fact not denied by the appellant; that the complainants promptly made their reports to the police and gave the name of the appellant at the earliest opportunity when their recollection was very fresh. On that account they affirmed the learned trial magistrates finding on recognition of the assailants by the complainants. We find that the findings by the trial court were well founded on cogent evidence on the record. The first appellate court rightly affirmed it. We find no reason to disturb that finding.

21. As to whether the ingredients of the offence of robbery with violence were satisfied or not. All that the prosecution was required to do was to demonstrate existence of facts showing that the offender was armed with any dangerous or offensive weapon or instrument; or that the offender was in the company of one or more other person or persons or lastly, that at or immediately after the time of the robbery, the offender wounded, beats, struck or used other personal violence on the victim. The concurrent findings of the two courts below were that the assailants were four; the appellant was among them; they were armed with sticks and a metal bar which they used to inflict injuries on the victims as borne out by medical evidence.

22. ***Mr. Gachuba*** raised issue with those findings because none of the complainants identified the appellant as the person who struck the complainants; and because the alleged bar was not recovered from him. In response, ***Mr. Kaigai*** submitted that it mattered not that it was not the appellant who inflicted injuries on the victims of the robbery, or that the weapon used to inflict the injuries was not recovered from the appellant. It suffices to show that he had a common intention with the assailant who was so armed and inflicted the injury on the victim.

23. In the decision in the case of ***Ganzi & 2 other versus Republic [2005] 1KLR 52,*** this Court held *inter alia* that the words "***dangerous or offensive weapon, in section 296(2) of the Penal Code bear the same meaning as defined in section 89(4) of the Penal Code, that is, any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use."***

The stick and metal bar mentioned by the witnesses which were adapted by the assailants to inflict that injury fit that definition.

24. The evidence was that all the four assailants set upon their victims and attacked PW1 first and when PW2 intervened is when he was also attacked. It is not clear from the record as to which of the four wielded which weapon when causing the injuries complained of. It was therefore correctly submitted by **Mr. Kaigai** that the doctrine of common intention would in the circumstances apply to bind all the four assailants.

25. **Section 21** of the Penal Code Cap 63 Laws of Kenya provides:-

> "***When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence"***

26. Herein the assailants were four, they waylaid their victims, attacked, robbed and inflicted personal

injuries on them. The evidence adduced placed the appellant at the scene of the robbery as one of the robbers. We agree with ***Mr. Kaigai's*** submission that having been placed at the scene of the robbery, it mattered not whether it was the appellant who actually wielded the metal bar and inflicted the injuries on the victims or not. He was so tainted by mere presence through the application of the doctrine of common intention. We entirely agree with the stand taken by the State on this aspect of the case.

27. Turning to the issue of the *alibi* raised by the appellant, we are in agreement with the submission of ***Mr. Gachuba*** that the appellant indeed raised the defence of *alibi.* The obligation of the court on what to do once an alibi is raised as a defence is as was set out in the case of ***Ganzi & 2 others versus Republic (supra)*** namely to weigh the defence of *alibi* against the prosecution's evidence.

Herein, it is evident from the record that the learned trial magistrate did weigh the appellants *alibi* against the prosecutions evidence on identification and found it displaced because in the trial courts' opinion, the evidence on the record before it had placed the appellant at the scene of the robbery.

28. The first appellate court on the other hand had this to say:-

> ***"In his defence, the appellant had only said how he was arrested. He proceeded to state that he had a grudge with one CP1 Juma. It is however noted that CPL Juma was not the complainant and there was no possibility that he could have fabricated the case against the appellant herein. The learned trial magistrate considered the appellants alibi defence and dismissed it. We too find it untenable."***

We entirely agree with the conclusions reached by the two courts below because these conclusions were supported by the content of the record.

In the result, we find no merit in the appellants appeal. It is accordingly dismissed.

**Dated and Delivered at Nyeri this 13th day of May, 2015.**

**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***