IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MWERA & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 37 OF 2013

BETWEEN

JEREMIAH MULEI KIMEU…….....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (Makhandia & J. M. Ngugi, JJ.) dated 15th June, 2012

in

HC.CR.A.NO. 118 OF 2009)

****

JUDGMENT OF THE COURT

The appellant, ***Jeremiah Mulei Kimeu***, was charged at the first instance with robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars of the offence were that, on the 31st day of October 2008 at around 8.00pm at Kwa Mwau Centre along the Machakos –Wote Road in Machakos District within the Eastern Province, jointly with others not before the court, and while armed with crude weapons, namely, knives robbed ***Benard Kanyulu***, the complainant, of cash in the sum of Kshs. 10,000/- and a Nokia 2300 mobile phone, and that immediately before or immediately thereafter the time of such robbery threatened to use such violence against Benard Kanyulu.

Briefly the facts are that on 31st October 2008 at around 8.00 pm, Bernard, a prisons officer, boarded a Public Service Motor Vehicle registration No. KBC 170Z to Makueni along the Machakos – Wote route. Upon entering the motor vehicle, he was directed to the last row of seats where he sat next to the appellant who he knew as *Kinasye*, and whom he had met on previous occasions selling boiled eggs in the Machakos Bus Park. According to Benard, he greeted and engaged the appellant in conversion whilst departing from the Machakos Bus Park bound for Wote.

Just before arriving at Katoloni Centre, a passenger seated in the second row of the vehicle suddenly stood up and ordered all the passengers to lie down. Upon realizing that a robbery was in progress,

Benard turned to the appellant to seek assistance to avert the robbery, but to his shock, the appellant became hostile, and instead demanded that Benard lie down. His attempts to wrestle and overcome the appellant were in vain, as a result of which the appellant robbed him of his leather jacket and the Kshs.10,000/- that was in the pocket.

The robbers commandeered the motor vehicle, and then turned off the main Machakos -Wote Road and headed towards the Mombasa Road, where after driving for some distance, they abandoned Benard together with the other passengers in a remote area in the bush, and drove off with the driver. A while later, the driver of the matatu returned to collect them stating that, he had been ordered to drop the robbers at a location on the opposite side of the Mombasa Road. Upon returning to Machakos, Benard and the other passengers reported the robbery to the Machakos Police Station. Benard also reported that one of the robbers was known to him, though he did not give his name to the police.

Four days later when Benard returned to Machakos, he spotted the appellant near the Oil Libya Petrol Station and called out to him, but he disappeared into Kathonzweni Bar and escaped. The next day, as Benard waited at the same place, he again saw the appellant, and this time apprehended him with the assistance of the crew of the motor vehicle in which the robbery had taken place. The appellant was arrested and charged with the offence of robbery with violence.

In his sworn statement, the appellant stated that on 4th November 2008 he had met Benard at the bus park, and had sold him eggs. Thereafter he was shown an officer's identity card, put inside a motor vehicle and driven to the Machakos police station where he was charged. On cross-examination, he denied ever boarding a vehicle to Makueni, or resisting arrest by the complainant. His main complaint was that he had not been paid for the eggs that he had sold to Benard.

The trial magistrate, having considered the entire evidence was satisfied that the appellant had committed the offence, and so convicted and sentenced him to death.

The appellant being aggrieved with the decision of the trial court, filed an appeal in the High Court against both the conviction and sentence. The appeal came up for hearing in the High Court and was heard by Makhandia, J (as he then was) and Ngugi, J, who being equally satisfied that the prosecution had proved its case against the appellant, dismissed the appeal and upheld the conviction and sentence.

The appellant, being further aggrieved by the decision of the High Court lodged this appeal. When the appeal came up for hearing before us, the appellant relied on the further supplementary memorandum of appeal, having abandoned the other grounds of appeal, and raised the following issues:

1. *The 1st appellate court affirmed the decision of the trial court notwithstanding that the appellant was not afforded a fair hearing within the meaning of section 77 of the former constitution.*

2. *The 1st appellate court affirmed the decision of the trial court despite the fact that in the circumstances of this case, it was unsafe for the latter court to convict the appellant on the evidence of a single identifying witness and the corroboration of his evidence was both necessary and desirable.*

3. *The 1st appellate court misdirected itself in fact and law.*

4. *The trial court and the 1st appellate court placed the burden of proof on the appellant.*

5. *The 1st appellate court erred in law and in fact in affirming the decision of the trial court despite that the latter court did not consider the evidence as a whole but considered the evidence of the prosecution separately and accepted the same thereby forcing it to reject the defence without any or adequate consideration.*

6. *The 1st appellate court affirmed the decision of the trial court despite the fact that the kind of light*

which was in the vehicle, its intensity or brightness was not indicated.

7. *The 1st appellate court affirmed the decision of the trial court despite the fact that the charge was defective within the meaning of section of 214 of the Criminal Procedure Code.*

With respect to the first issue, learned counsel for the appellant, ***Mr. Oyalo*** submitted that, the appellant had not been afforded a fair trial as, despite having applied for the production by the prosecution of the Occurrence Book (OB) for the 31st October 2008, it was not produced to assist the appellant with his defence. On the issue that the charge was defective, counsel submitted that there was a variance between the charge and the evidence, as the charge stated that the attackers were armed with the pangas and threatened to use actual violence on Benard, but his evidence showed he was subjected to actual violence, which would lead to the conclusion that he was an unreliable witness.

Regarding the issue of the conviction of the appellant on the evidence of a single identifying witness, counsel contended that, Benard had stated that he knew and recognized the appellant, yet he had not indicated the intensity of light at the time, and further no other evidence was produced to support the identification or recognition. See the case of ***Abdala bin Wendo & Another vs R [1953] 20 EACA 166.*** Counsel continued that the trial magistrate failed to caution himself, prior to deciding on the issue of identification by a single identifying witness, of the appellant, which caution ought to have been made before determining that it was the appellant who had committed the offence. Counsel relied on ***Maitany vs Republic [1986] KLR 198*** for the contention that it was meaningless to issue the caution after determining the question of identification. Counsel submitted that another issue was that the trial magistrate had shifted the burden of proof to the appellant, by stating that the appellant did not raise any evidence that could discredit the prosecution's case or the complainant's evidence. The other issue was that the trial court did not consider the appellant's evidence as a whole, which it rejected, and only considered the procecution's evidence.

Finally counsel complained that there were witnesses who were not called to testify, including the driver, the conductor and the crew of the public service vehicle, and that neither was Abedinego Kyathi, who was also in the minibus and known to Benard called to testify, which prejudiced the appellant's case.

Mr. Kivihya, learned counsel for the State, opposed the appeal. In respect of the complaint that the appellant was not subjected to a fair trial on account of the prosecutions failure to produce the OB, counsel submitted that the OB was produced in court by the prosecution, and as such was made available for the appellant's use. On the question of identification or recognition of the appellant, counsel submitted that the complainant knew the appellant, as he had encountered him on other occasions as he normally sold boiled eggs at the Machakos Bus Park; that a few days later, when the appellant saw the complainant he ran away, but was apprehended and charged the following day after the complainant lay in wait for him. On the issue that the charge sheet was at variance with the evidence, counsel submitted that the robbers were armed with pangas and knives, which were used to threaten the complainant and the other passengers. As a result, the complainant feared for his life, while the appellant robbed him off his jacket. With respect to the contention that the trial court shifted the burden of proof to the appellant, counsel submitted that the trial court clearly relied on the evidence of the complainant and ***PC Daniel Njuki (PW2),*** a CID officer in Machakos, to convict the appellant. The court considered the prosecution's case as well as the appellant's case and was satisfied that the prosecution had proved its case.

On the complaint that the prosecution failed to call crucial witnesses, counsel submitted that the appellant did not make any application to call witnesses, despite being at liberty to do so. Counsel further submitted that the prosecution did not call any of the other witnesses as they were unable to identify the appellant. In respect of the contention that no indication was provided on the intensity of the light with which to identify the appellant, counsel submitted that the light was sufficient in the motor vehicle enabling the complainant to recognise the appellant. Regarding the failure by the trial court to caution itself before determining the identity of the appellant, counsel submitted that, what was crucial was that, provided the self-awareness caution was made by the trial court before the conviction, the caution issued was considered to be sufficient. Counsel concluded that the evidence against the appellant was overwhelming and the prosecution had proved its case.

In his response, Mr. Oyalo stated that in addition to the fact that the complainant did not mention anywhere that he had named that appellant in his statement, and there was also no evidence to show that the appellant was called Kinasye or went by the alias of Kinasye.

We have considered these submissions and carefully read the record of appeal. This being a second appeal and by dint of ***Section 361(2)*** of the ***Criminal Procedure Code***, this Court can only address a point or points on law only. In the case of ***Karingo vs Republic (1982) KLR 213*** this Court stated,

> ***"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 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."***

Having regard to the circumstances of this case, it is our view and we agree with the two courts below that the main issue turns on the question of identification of the appellant through recognition.

In reaching a finding that the appellant was properly identified by Benard the High Court took into account the factors as laid down in ***R vs Turnbull [1976] 3 ALL ER 549 at page 552*** and stated thus,

"Looking at the relevant *Turnbull* ***factors, we can easily conclude that the quality of the identification in this case was strong despite it being that of a single identifying witness. We note that,***

a. ***The witness had plenty of time to observe the Appellant since he boarded the vehicle until it made its way to Katoloni and Kwa Mwau centre;***

b. ***The witness was seated right next to the Appellant hence significantly lessening any chances of misidentification due to the proximity;***

c. ***The Complainant testified and his testimony remained unchallenged on cross examination that the inside cabin, the lamp of the*** *Matatu* ***was on so the Complainant could easily see the Appellant;***

d. ***Since the Complainant and the Appellant were literally next to each other, there was a clear line of sight which eliminates the possibility of error;***

e. ***Like the learned Trial Magistrate, we note that the evidence we are dealing with here is one of identification by recognition and not identification of a mere stranger. The former is treated as more reliable; re-assuring and satisfactory. See*** *Anjononi v R [1980] KLR 59****. In the instant case, the Complainant knew the Appellant before the incident. The Appellant confirms as much.***

According to the Complainant, he knew the Appellant as Kinyase who used to hawk boiled eggs at the Machakos Bus Park. The Appellant agrees that he was known to the Complainant is only framing him because he took three boiled eggs from him but refused to pay for them.

f. …"

From this excerpt which we have taken the liberty to set out *in extensio*, the courts below found that the conditions prevailing at the time, and the length of time within which Benard was able to observe the appellant were favourable for the identification of the appellant; that in any event this was a case of recognition and not identification.

In ***Anjononi v R [1980] KLR 59*** there Court there stated,

> ***"This was a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it***

depends on personal knowledge of the assailants in some form or other".

In this case Benard's testified that,

> ***"Kinasye is the one in the dock. I knew the accused by this name. He was familiar to me as he (sic) regularly used to meet at the bus park. I have never differed with the accused even on one day. When I entered the vehicle at 8.00 pm the vehicle lights were on and I clearly saw the accused and even greeted him".***

It is quite apparent that, not only was the lighting in the motor vehicle sufficient for Benard to identify the appellant, it also enabled him to recognize the appellant as the boiled eggs vendor he knew, having met him on other occasions at the bus park. When this evidence is considered in its totality, like the courts below, we are satisfied that the appellant was properly identified by the complainant, and as such, this could not be considered a case of mistaken identity.

Having said that, as a corollary to the issue of identification, it was a further argument that the trial court reached the decision of the appellant's identification before cautioning itself on the evidence of a single identifying witness. As a result, of this improper sequence in administration of the caution, an inherent miscarriage of justice had occurred.

To determine this issue, it would be important to go back to the genesis of the requirement as laid down in the ***Turnbull*** Guidelines to be found in ***Archibold Criminal Proceedings, Evidence and Practise 1998 Chapter 14, Page 1163,***

> ***First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury (him/herself) of the special need for caution <u>before convicting</u> the accused in reliance on the correctness of the identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular words.***
>
> ***Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light?***
>
> ***Was the observation impeded in any way, as for example by passing traffic or the press of people? Had the witness ever seen the accused before? How often? How long elapsed between the original observation and the subsequent identification to the Police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance – Finally he should remind the jury of any specific weaknesses which appeared in the identification evidence.***
>
> ***Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of identification evidence. If the quality 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." (emphasis ours)***

The necessity of self-caution before conviction when identifying the accused was again reiterated in the case ***<u>Cleophas Otieno Wamunga vs Republic</u>***

> ***Criminal Appeal No. 20 of 1989*** where it was stated thus,
>
> ***"Evidence of visual identification in criminal cases can bring about a miscarriage of justice and***

it is of vital importance that such evidence is examined carefully to minimize this danger. Whatever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution <u>before convicting</u> the defendant in reliance on the correctness of identification". (emphasis ours)

In the instant case, the trial court tacitly examined the identification evidence, cautioned itself, and subsequently convicted the appellant. We take the view that determination of the appellant's identity prior to the self-caution did not negate the process of examination of the identification evidence undertaken by the trial court. Pursuant to the ***Turnbull*** guidelines, provided the terms of the caution were clearly outlined, and it was administered prior to conviction in reliance on the evidence, there would be no possibility of a miscarriage of justice. For this reason this ground fails.

We turn next to the issue of whether or not the appellant was not afforded a fair trial for reasons that the OB was not produced. From the record, the appellant applied for the production of the OB, which was allowed by the court. After several reminders to the prosecution, on 18th February 2009, the Prosecutor, CI Cathrine stated,

"I have the investigating officer in court with the OB."

Given these circumstances, there is no doubt that the OB was produced in court by the prosecution. With the production of the OB, the appellant was at liberty to utilize it in his defence in such a manner as he deemed fit. If he failed to do so, he cannot now turn around and state that he was not subjected to a fair trial. Accordingly, this ground is unfounded.

On the issue that the trial court shifted the burden of proof, the appellant's complaint is that when the trial court stated, that:-

"…The accused did not raise any evidence that could discredit that of the prosecution and in particular the complainant's evidence,…"

the court shifted the burden of proof.

As to whether the burden of proof was shifted would be determined by proof of the necessary ingredients under ***section 296 (2)*** and whether the prosecution was able to demonstrate that an offence under the section had been committed in the circumstances of this case.

Section 296 (2) of the ***Penal Code*** provides:-

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person, he shall be sentenced to death."

See also ***<u>Johana Ndungu vs Republic</u> Criminal Appeal No. 116 of 1995*** where the ingredients that require to be proved were set out by the court. Then, as variously stated, the prosecution need only prove the existence of one of the ingredients to secure a conviction.

In this case, the appellant was together with a gang that robbed Benard while he was in the motor vehicle. During the robbery, Benard struggled with the appellant who overcame him, and robbed him of his money and a jacket.

Benard recognised and identified the appellant whom he knew as a boiled-eggs vendor in the bus park. At this point, the evidential burden of proof shifted to the appellant to rebut the complainant's evidence, which the appellant did not do. The trial court considered the evidence before it, in this case the complainant's evidence, and found it to be credible and cogent. In so doing, it reached the conclusion that

the prosecution had proved its case to the required standard that it was the appellant who was amongst the robbers who committed the offence. Without the existence of any evidence that was capable of controverting the prosecution's case, we are satisfied that the trial court rightly relied on the evidence before it to arrive at a conviction.

From the record before us, the statements made by the trial magistrate cannot be construed to mean that the legal burden of proof shifted to the appellant. It is evident that the statements as made, must be considered in the context of the judgment in its entirety. Consequently, we find that the burden of proof was not at any time shifted by the trial court; that it rightly found that the prosecution had discharged its burden of proof and proved its case beyond reasonable doubt. Accordingly, we dismiss this ground.

With respect to the complaint that the trial court did not consider the appellant's case, we find this to be unwarranted. In the appellant's defence, the only reference to the particulars of the robbery were made on cross-examination, where the appellant denied that he had ever at any time boarded a minibus to Makueni. When the learned trial magistrate analysed the appellant's defence, taking into account all the circumstances of the case, he found this to be a mere denial and an afterthought. In the result, we find that the trial court did consider the appellant's defence, and consider this ground to be unfounded.

In addressing the issue that the charge and the evidence were at variance, we take the view that such variance was not material to the circumstances of the case, and therefore nothing really turns on it. From the evidence, we are satisfied that, the robbers were armed with pangas which were used to threaten the complainant and the other passengers, to the extent that Benard was intimidated into submission, and robbed of his jacket and money by the appellant. The offence having been proved, we consider that this ground lacks merit.

Finally, on the issue that the crucial witnesses were not called, though this was not one of the grounds before us, the issue was addressed by the High Court where it stated thus,

> ***"Finally, we find it unmeritorious the Appellant's argument that failure to call the other victims of the robbery to testify made conviction untenable. The investigating officer was forthright in explaining this "failure": the other passengers in the vehicle said they could not identify the Appellant. Hence, their testimony would not have added much to the trial. Of course, the Appellant could have called any of them if he thought that their evidence would have aided his defence or undermined the Prosecution case."***

We agree, and need say no more on this issue.

Accordingly, the appellant's appeal is without merit and we find no reason to interfere with the concurrent findings of the two courts below. We order that the same be and is hereby dismissed.

We so order.

DATED and DELIVERED at NAIROBI this 8th day of MAY, 2015.

P.N. WAKI

….....

JUDGE OF APPEAL

J.W. MWERA

….....

JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR