



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, MWILU & ODEK, JJ.A)**

**CRIMINAL APPEAL NO. 170 OF 2014**

**BETWEEN**

**STEPHEN KANG'ETHE KARANU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nairobi (Justice Mbogholi & Achode, JJ.) dated 13<sup>th</sup> August, 2013*

*in*

***H.C.CR.A NO. 126 OF 2009)***

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**JUDGMENT OF THE COURT**

[1] This is a second appeal by **Stephen Kangethe Karanu**, the appellant, against the judgment of the High Court at Nairobi (Mbogholi & Achode JJ.), dated 13<sup>th</sup> August, 2013 in HC.CR.A No 126 of 2009. The appellant's appeal was dismissed and being dissatisfied, he filed the present 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.

[2] Both courts below fastidiously set out the facts of the matter but in order to put this judgment in perspective we briefly set out the facts that were before the trial court. On 6<sup>th</sup> April 2007, at about 8.30pm there were several patrons drinking in a local bar called Laini bar in Thika area. Two people armed with a gun stormed the said bar and ordered everyone inside to lie down and surrender all the valuables in their possession, money as well as mobile telephone sets. One of the people who was robbed of a wallet containing Ksh 2,000/= and personal documents was the bar owner Simon Kimani Mbugua (PW1). Other patrons were robbed of unknown items; the thugs also stole Ksh 4,000/- from the cash till and a VCD video all belonging to PW1. The matter was reported on the same night at the Administration Police camp by some of the patrons although they did not record a statement nor did they give evidence in court.

[3] This is how the appellant was arrested; after the robbery, on the following day at about 7pm, PW1 went to his bar and was informed by the waitress Hadija Nungari (PW2) that the person who had robbed them in the bar the previous night returned to the same bar in the company of another person. When PW2 recognized the appellant, she alerted PW1 and one Samuel Kimani Githagu (PW3) and went on serving him with drinks until the police were called and came to the scene. The police arrested him and charged him with one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Chapter 63, Laws of Kenya, before the Chief Magistrate's Court at Thika. The particulars of the offence were that on **6<sup>th</sup> day of April, 2007** at Laini area in Thika District within the Central Province, jointly with another not before the court while armed with a gun, they robbed Simon Kimani Mbugua of cash Kshs. 6,000/= and VCD Video make Artech valued at Kshs. 4,000/= and at, or immediately before or immediately after the time of such robbery, threatened to use actual violence against the said Simon Kimani Mbugua.

[4] The prosecution called a total of five witnesses in support of its case against the appellant. It was the prosecution's case that the following evening after the robbery at Laini Bar, the appellant and another man identified as his brother returned to the same bar and ordered for drinks. (PW2), immediately identified the appellant as one of the robbers who had robbed the bar patrons the previous night. She maintained that she did not know the appellant before but was able to recognize the person who had come with the appellant as she knew him before. She quickly notified PW1 and a colleague (PW3), soon thereafter the police were called, and they arrested the appellant who was eventually charged as aforestated.

[5] After considering the evidence by the prosecution witnesses the learned trial magistrate was satisfied, that the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement in defence but he did not call any witness. He testified that he was a trader in Kawangware and that on the material day he had travelled to Thika for Easter. He confirmed that on the evening of **7<sup>th</sup> April, 2007** he and his brother decided to go for drinks at Laini bar and that two hours later he was arrested while having drinks. He denied having committed any offence.

[6] Being convinced that the prosecution had proved its case; the trial court convicted the appellant for the offence of robbery with violence and sentenced him to death. Aggrieved with the said decision, the appellant filed an appeal in the High Court. The High Court (**Mbogholi & Achode, JJ.**) vide a judgment dated **13<sup>th</sup> August, 2013** upheld the conviction and confirmed the sentence meted out by the trial court. That decision is what has provoked this second appeal.

[7] Although the appellant proffered some lengthy memorandum of appeal with about 10 grounds of appeal, during the hearing of this appeal, Mr. Kariu learned counsel for the appellant urged only two grounds to wit;-

- ***Defective charge sheet.***

- ***Reliance on insufficient evidence of identification when there was no description given the police or to anybody of the assailant.***

[8] Mr. Kariu expounded on the two grounds of the appeal, and submitted that the conviction of the appellant was not safe as there was no complaint that was ever made by (PW1) who was allegedly a victim of the robbery or by any of the patrons. The complainant admitted in his evidence that he never made any complaint; it follows therefore that there was no complaint and the charge against the appellant was defective and any conviction emanating there from should be set aside. According to counsel for the appellant, PW1 stated that he lost Kshs. 6,000/= and a VCD player; that it was PW2's testimony that she did not know the make of the video machine that was stolen. Lastly, counsel urged that although PC Wilson Rotich (PW4) the investigating officer indicated that patrons reported the robbery and said they were robbed of their money, they never recorded their statements and their identities remained unknown.

[9] On identification of the appellant as the perpetrator of the robbery, counsel submitted that the appellant was identified by PW2 who informed PW1 and PW3 and these two witnesses admitted in their evidence that it was PW2 who told them that she had recognized the appellant as one of the robbers who

terrorised them the night before. Counsel argued that this was a single identifying witness when the circumstances for positive identification can be said to have been difficult. Moreover PW2 did not make a report to the police describing the features of the assailant. The evidence of PW2 points to a case of recognition yet no description of the assailant was ever given to the police or anybody else for that matter, however the two courts below noted that the evidence of PW2 was corroborated by PW3 although it was PW2 who first saw the appellant. PW3 said he recognized the appellant at the time of his arrest. His evidence too could not be relied on as he had not disclosed to anybody prior to the arrest of the appellant that he had recognized the assailant. Thus the evidence of PW3 could not possibly corroborate that of PW2. The two courts failed to take note of the evidence by PW3, who stated that he came back to the bar, PW2 informed him that the person who committed the offence the previous night was in the bar. PW3 said it was then that he recognized the appellant whom he said he knew even before the robbery.

[10] According to counsel for the appellant, PW3 was not corroborating PW2's testimony but confirming what he had been informed by PW2. Moreover no description of the assailant was given to the police or to anybody which could corroborate the evidence of PW3 and this obviously weakened the prosecution's case. Counsel pointed out that the alibi defence of the appellant totally disassociated himself from the scene of crime, however that defence was never considered. Lastly, that the appellant never objected to his arrest but called for an Occurrence Book (OB) where the first report of the alleged offence was made, which request was made consistently without success. Counsel urged us to allow the appeal.

[11] On the part of the State, Mr. O'mirera, learned Senior Assistant Director of Public Prosecution opposed this appeal and submitted that the two courts below made concurrent findings of fact as far as the issue of identification is concerned. On this, counsel singled out the issue of identification which he stated was supported by the evidence of PW2 and PW3 who were found to be truthful in their recollection of the events and their evidence was found cogent, and safe to sustain the conviction. He argued that PW2 was clear that on the material day, during the attack by the two assailants, she was able to recognize the appellant as the man who stood by the door. She described in her evidence, how the appellant moved from the door to the counter and even how he was dressed; even though PW1 did not file a complaint with the police that did not make him less of a complainant. PW1 was robbed of Kshs. 2,000/=, a VCD player and Kshs. 4,000/= at the bar till; he therefore became a complainant although he never went to the police to give his statement; PW1 did not identify the appellant.

[12] APC Fredrick Otio (PW5) confirmed the report of the robbery was made on the material night at the AP camp by other patrons. Therefore, it was not necessary to make another report. He submitted that although PW1, PW4 and PW5 did not identify the assailant; PW3 recognized the assailant although no report was made to the police, the evidence of PW3 should not be considered in isolation, but with that of PW2 while also bearing in mind that their memories were very fresh. Counsel for the State also pointed out that it takes time to record a statement and that perhaps explains why PW3 did not report or tell anybody that he recognized the appellant. While commenting on the authorities cited in support of the appellant's case, counsel urged us to consider and construe the circumstances of this case independently as every case is different.

[13] Mr. Kariu in reply, submitted that the charge sheet and the manner in which the applicant was charged negated the provisions of the *Criminal Procedure code*; he singled out the definition of "complaint" under **Section 2** which means;-

**“an allegation that some person known or unknown has committed or is guilty of an offence”**

Further Section 89 (1) of the same Code provides the procedure of making a complaint as follows;

**“Proceedings may be instituted either by the making of a complaint or by bringing before a magistrate of a person who has been arrested without a warrant”.**

According to counsel for the appellant, the charge sheet that was not predicated on a complaint did not meet the threshold of the above provisions of the law and cannot therefore be the basis of a lawful

conviction and the resultant death sentence. Also the particulars on the charge sheet was at variance with the evidence adduced in court.

[14] As stated in the opening paragraph, this is a second appeal, and we are restricted to address only matters of law. As this Court has stated many times before, 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 the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See 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)”***

[15] We have considered the record of appeal, the grounds of appeal, able submissions by counsel and the law. Counsel for the appellant, in his address to us made heavy weather of the charge sheet and the fact that the three witnesses who were present during the robbery did not record a statement of complaint with the police. Whereas we acknowledge it is a standard procedure for a victim of crime to record a statement with the police immediately after the incident, the law does not preclude an oral report or one that is made late after the arrest of the perpetrator as happened in the instant case. The fact that the appellant was apprehended by the police before the victims of the robbery recorded a complaint does not in any way contravene the provisions of Section 89 of the Civil Procedure Code. We are in agreement with the conclusions drawn by the learned judges of the High Court that the minor discrepancies in the charge sheet are all curable under the provisions of Section 382 of the Civil Procedure Code.

[16] This now leads us to the second issue of whether the appellant was positively identified as one of the perpetrators of the robbery with violence that took place at Laini bar in Thika on the material night. It is not in dispute that the appellant's conviction was based recognition by one Hadija Nungari (PW2). It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. In Wamunga -vs- Republic (1989) KLR 424 this Court held at page 426 that,

***“..it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”***

[17] We have to ask ourselves whether there was a possibility of mistaken identity in this case as urged by counsel for the appellant. PW2 testified that she was able to recognize the appellant as he returned the following day to the bar, this time accompanied by his brother. It was PW2's evidence that she knew the appellant's brother prior to the incident and he was the one who told her that the appellant was his brother. PW2 further stated that she was able to recognize the appellant as the assailant who was holding a gun on the material night, and that he even took time to compliment her for wearing “**a nice T-shirt**”. PW1 testified that he did not see the appellant in the bar but only obeyed orders and laid down without looking up to see who was making the orders. PW3 on the other hand stated that he was able to recognize the appellant as he was the one who was wielding a gun and had a scar on the right side near the eye. Further that he even knew the appellant's father. However PW3 did not inform anybody after the robbery that he recognized one of the assailants. It should be emphasized here that although PW3 stated that he recognized the appellant who was known to him, he never reported to anybody immediately after the robbery that he had recognized one of the assailants. The evidence of identification by recognition was given after the arrest of the appellant. This obviously invites the question that was not addressed by the two courts below why PW3 failed to mention to anybody not even the bar owner that he had recognized one of the assailants.

**[18]** For reasons that PW3 never mentioned to anybody; not even PW1 the bar owner or the police that he had recognized one of the assailants we entertain doubts as to whether his evidence of identification was free from error and whether it could be taken as corroborating the evidence of PW2. We are highly persuaded to think that based on the evidence before us there was a possibility that the case against the appellant unfolded when he was seen at Laini bar the day he was arrested; he may or may not have been convicted based on evidence of mistaken identity. We say so because the evidence of PW2 and PW3 is what we would describe as standalone evidence (if there is such a term in law) as none corroborated the other and each needed corroboration.

**[19]** What about the evidence of PW2, it was admitted that she did not know the appellant before; he was a stranger to her. To compound this further PW2 did not give the description of the appellant to the police or even to PW1 or anybody in authority after the incident. If this was done, it could have enabled the trial court to subject her evidence to an objective test as to whether the evidence on identification was consistent with the description that was given earlier. Had the High Court judges subjected the evidence of identification to exhaustive analysis, we have no doubt they would have come to a conclusion as we have that this evidence would not pass the test expounded in the case of;- ***Maitanyi -vs- Republic (1986) KLR 198***, wherein this Court held,

***“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. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description.”***

There is a possibility that the appellant was arrested merely on suspicion and the evidence of his identification was not subjected to thorough and careful analysis as set out in decided cases.

**[20]** In the upshot, we find merit in this appeal. It is not safe to sustain the conviction of the appellant based on the evidence of suspicion. In the event, we allow the appeal, set aside the conviction and quash the death sentence imposed upon the appellant. Unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

***Dated and delivered at Nairobi this 31<sup>st</sup> day of July 2015.***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***P. M. MWILU***

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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**