IN THE COURT OF APPEAL

AT NYERI

(CORAM; WAKI, NAMBUYE & KIAGE JJA)

CRIMINAL APPEAL NO. 30 OF 2014

BETWEEN

JAMES MAINA WANJIRA……………............................APPELLANT

AND

REPUBLIC...RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Nyeri (Wakiaga & Ombwayo,JJ) dated 13th November, 2013)

in

H.C.CR.A. NO. 186 OF 2005**)**

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JUDGMENT OF THE COURT

By this appeal James Maina Wanjira (the appellant) challenges the dismissal by the High Court at Nyeri (Wakiaga & Ombwayo JJ) of his first appeal thereto whereby the learned judges affirmed his conviction and sentence of death for the offence of robbery with violence contrary to **Section 296(2**) of the **Penal Code** imposed by the Nyeri Principal Magistrate.

The particulars of the charge was that on 31st March 2003 at about 2.35 pm. at Karatina Township here in Nyeri, jointly with others not before court and while armed with a dangerous weapon namely a pistol, he robbed Annette Muthoni Mahu (Annette) of some Ksh.130,000 in cash, a camera, an interim driving licence, two passports and a national identity card. He is said to have used actual violence to Annette during that robbery.

The prosecution led evidence, accepted by both courts below, that on 31st March 2003 at about 2.30 pm., Annette's husband Peter Mahu Muthee (PW4) with whom she operated a hardware shop at Karatina known as G.M. Kariuki Hardware gave her some Ksh.130,000 so she could go to Thika to buy nails. He also gave their accounts assistant Naphtaly Ngatia (Naphtaly) and their shop assistant Beatrice Muthoni Kiune (Beatrice) some Ksh.95,000 each, for them to bank. The two workers went into Annette's car at the parking and waited for her. As she approached the car, she saw a man seated on a stone nearby. He looked at her and she looked right back at him. She then saw him scratch his head then walk straight to where she was. He pointed a gun at her and grabbed her handbag in which was the Ksh.130,000 and the

other items listed in the charge sheet. As he robbed her, Annette saw two other gun-totting men on the other side of her car.

Annette well-observed the man who robbed her and even noticed that he trembled as he trained the gun on her. As she screamed and started running back to the office, she heard a gun shot and fainted. After she was carried into the office and later taken to hospital, she gave a description of the thug who confronted and robbed her to both her husband and the police: he was brown, (sic) short and with big ears and deep eye sockets. She later identified the appellant, who still trembled when she touched him, at an identification parade.

Both Naphtaly and Beatrice also witnessed Annette being robbed by the gun-wielding robber and were also robbed of the money they had by the other two armed gangsters who opened the door on Beatrice's side, demanded and were given the money before walking away. When Naphtaly and Beatrice raised alarm, a huge crowd gathered and confronted the three thugs who shot in the air to scare them away and so made their escape. The two were unable to identify any of the thugs but Patrick Kihara Muita (Patrick) one of their colleagues was standing at the door to the hardware shop when he saw Annette get robbed and faint at the sound of the gunshot. He went to her assistance but had in the meantime had a good look at the first robber. He picked out the appellant at an identification parade mounted after his arrest.

The appellant was arrested by Flying Squad Police Officers including Joshua Otieno (PW8) on the night of 23rd and 24th April 2003 following a tip off from an informer. They found him in the house of his girlfriend at Alikina Building and arrested him. A quick search on him yielded a round of ammunition. He then led them to the house where he resided, and to his sister's house where they picked his Identity Card. He led them to yet another house where he also resided and sold bhang. A search there turned up some 53 stones of bhang which the appellant's nephew declared to be the appellant's in the latter's hearing without protest. He was put into custody and later charged after being identified as the lead robber.

When placed on his defence, the appellant dwelt on an account of how he was arrested and beaten on 23rd April 2003 and later placed on a parade where he was surprised to be picked by Annette. He stated that Annette said she had been robbed by someone with big eyes yet in the Police Occurrence Book she had reported "***a person who had deep eyes and big eyes***" (sic). All he said about the day of the robbery is that he was busy hawking at Karatina with one Joseph Mwangi who he intended was to be his witness before dispensing with him. The said Joseph was at the time serving term at King'ong'o Prison.

After considering both the prosecution and the defence evidence, the two courts below found the case against the appellant to have been proved beyond reasonable doubt.

In this Court, the appellant's learned counsel abandoned some grounds filed by the appellant in person and relied on a document titled "**Supplementary Grounds of Appeal**." The proper nomenclature for the pleadings containing the grounds on which an appellant seeks this Court's consideration, is a Memorandum of Appeal or a Supplementary Memorandum of Appeal filed pursuant to **Rules 64** and **65**, respectively, of the Court of Appeal Rules. These Rules exist to be complied with and it is both inappropriate and quite inexplicable that appellants and their counsel should baptize these vital documents at will.

Be that as it may, the Supplementary Grounds filed by the firm of Bali-Sharma and Bali-Sharma Advocates were that;

> ***"1. Both Subordinate Court and Superior Court erred in law on the legal requirements in identification as the account given by PW1 was not corroborated by any independant (sic) evidence by any witness.***
>
> ***2. The offence of robbery with violence, and all its elements were never proved against the appellant as provided for in Section 296(2) of the Penal Code.***

3. The Superior Court (sic) erred in law when it said the man "attacked" her (complainant)."

Urging the appeal before us, Mr. Mahan, the appellant's learned counsel faulted the evidence of identification on the basis that it was by Annette as a single identifying witness. He urged that it is not she but her husband (PW5) who reported to the police that the assailant was "**brown in colour, short, with big ears and deep centred black eyes,"** a description that was not matching the one given by Patrick who spoke of the eyes only.

The submissions on identification were countered by Mr. Kaigai, the learned Assistant Director of Public Prosecutions who submitted that there was no mistake as to the identity of the appellant as Annette's robber. The offence occurred in broad daylight and Annette had a clear look at the appellant as he confronted her hence her description of him to the police as a short brown man with big ears and sunken eyes which was captured in the Occurrence Book. Moreover, this was not a case of a single identifying witness as Patrick did also see, describe and identify the appellant.

This being a second appeal, we are very slow to disturb concurrent findings of fact by the courts below. The trial court had the benefit of seeing and hearing the witnesses as they testified and was best placed to gauge their credibility while the first appellate court is enjoined by law, repeated in many cases e.g. **PANDYA –VS- REPUBLIC** [1957] EA 336 and **OKENO –VS- REPUBLIC** [1972] EA 132) while we, on the other hand, are statutorily circumscribed to points of law only under **Section 361** of the **Criminal Procedure Code (CPC).** Our approach therefore is to defer substantially to concurrent findings of fact, interfering only if they are based on no evidence; on a misapprehension of the evidence or the two courts acted on wrong principles. See **CHEMAGONG –VS- REPUBLIC** [1984] KLR 213.

Applying those considerations to this appeal, we are not persuaded that we should interfere with the concurrent findings that the appellant was positively identified as Annette's robber. Mr. Mahan is, of course, right in his submissions that a court should tread carefully where, as here, the only evidence against an accused person is that of identification. The need for caution, and for the court to convict only when satisfied that the identification evidence is free from error, because mistakes in identification and recognition even of close relatives and associates do occur, has crystallized in a long line of cases including the well known ones of **REPUBLIC –VS- TURNBULL** [1976] 3 ALL ER 551; **WAMUNGA –VS- REPUBLIC** and **HUKA AND OTHERS –VS- REPUBLIC** [2004] 2EA 78. In all those cases, the principal considerations include, in the case of identification of a stranger, whether the witness had a clear, unimpeded view of the assailant; the light at the *locus in quo;* and quality or intensity; the length of the encounter; and whether the witness gave a description of the suspect at the earliest opportunity after the incident.

In the case before us, the robbery occurred in broad daylight. Annette did observe the appellant seated on a stone nearby. She looked him straight in the face. She even saw him scratch his head before rising and heading straight at her. She observed that he trembled as he pointed the gun at her. She gave a very specific description of his height, complexion and facial features after she came to. What is more, she picked him out at an identification parade and even noted that he trembled when she touched his hand.

Given that Patrick did also describe and later identify the appellant at a parade according to his evidence, Annette was not a single identifying witness whose evidence would have called for even greater care, and a warning by the courts below before entering and upholding the conviction in line with **ABDALLAH BIN WENDO –VS- REPUBLIC** (1953) 20 EACA 166 and **RORIA –VS- REPUBLIC** (1967) EA 583. At any rate and consistent with those cases, the evidence was of such a nature as to leave no room for doubt that the appellant was properly identified as the trembling robber.

Turning now to the complaint that the offence of robbery with violence was not proved, Mr Mahan's rather curious contention was that in so far as it was not proved that the appellant did not **"wound, beat, strike or use any personal violence,"** the offence was not committed. With respect, he cannot be right. The offence of robbery with violence under **Section 296(2)** of the **Penal Code** is

committed if during a robbery the offender; is;

i. **armed with a dangerous or offensive weapon or instrument or;**
ii. **in company with one or other person or persons**

or;

iii. **at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other personal violence to the victim of the robbery.**

The three elements stated above apply disjunctively and not conjunctively. Any one of them suffices to establish the offence and this was the holding of this Court's in **TURUNGI –VS- REPLUBLIC** [2007] 1 EA 389 which was cited before us by Mr. Mahan himself;

> ***"Any of these three alternatives or a combination of them would be sufficient for a charge under Section 296(2) of the Penal Code and it seems that in count one the prosecution chose to go under alternative two combined with alternative three, while on count two the prosecution chose to proceed under alternative one. There cannot be much quarrel with that."*** (At p.390)

In the case before us, it is quite clear the prosecution proceeded with alternative one combined with alternative two, and that was perfectly in order. We think that Mr Mahan's quarrel lies in the inaccurate and unfortunate phraseology employed by Parliament in the First Schedule to be Criminal Procedure Code, which has been adopted in charge sheets, in calling this offence "**robbery with violence**", when, from the reading of the sub-section, personal violence is only one of the ingredients of the offence, out of possible three. Actual violence is also an element of the offence of simple robbery as defined under **Section 295 Criminal Procedure Code (CPC).**

We would opine that much of the confusion would have been avoided had Parliament chosen a more appropriate term such as ***aggravated robbery*** as opposed to ***robbery with violence*** since the three elements speak to aggravation, as opposed to violence, in a case of robbery. Even then, it would seem that there is some grey area between simple robbery and robbery with violence with certain situations that could fall under either. That, however, was not the argument before us and must await another day.

Lexical distinctions aside, the offence was proved.

We do not consider that much turns on Mr. Mahan's submission that the courts below were wrong to hold that the appellant "**attacked"** Annette when all he did was take the money. In the eyes of the law, it is enough that he took it while armed with a dangerous weapon. He was also in the company of two other armed robbers. He did not borrow the money or receive it from her as a gift. It was not a friendly encounter. It was due to the menace of a gun that he, a stranger, got the money from her without her permission. It was robbery with violence as by law defined.

The upshot is that we find no merit in this appeal. It is dismissed.

Dated and delivered at Nyeri this 29th day of July, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR