IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 53 OF 2011

SAMUEL MAINA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nakuru

(Wendoh & Emukule, JJ.) dated 1st April, 2011

in

H.C. CR. A. No. 338 of 2009)

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JUDGMENT OF THE COURT

[1] Samuel Maina Mwangi (appellant) was charged with two counts: robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** and Personating a Public Officer contrary to ***Section 5(b)*** of the ***Penal Code***. He pleaded not guilty to both counts before the Chief Magistrate's Court at Nakuru. The evidence against the appellant was by a single Prosecution's witness. On the basis of this evidence, the appellant was found guilty of the main count of robbery with violence, convicted and sentenced to death.

[2] Aggrieved by both the conviction and sentence, the appellant appealed before the High Court. In a judgment dated 16th April, 2011; the High Court, ***Wendoh*** and ***Emukule, JJ***., dismissed the appellant's appeal. The outcome of that appeal before the High Court is what has provoked this appeal that was argued before us on the basis of the 13 grounds stated in the supplementary grounds of appeal to wit:

1. ***The Superior Court erred in law by confirming the conviction on the basis of a defective charge sheet.***

2. ***The superior court erred in law by relying on evidence of identification and/or recognition that did not meet the required legal standards.***

3. ***The Superior Court erred in law by relying on circumstantial evidence that did not meet the required legal standards.***

4. ***The charges of Robbery with Violence under Section 296(2) of the Penal Code were never proved beyond reasonable doubt as required by the law.***

5. ***The Court was not independent and impartial within the meaning of Section 77(1) of the former Constitution.***

6. ***The Superior Court erred in law by admitting part of evidence of PW 1 which was not credible.***

7. ***The Superior Court erred in law by failing to appreciate that critical witnesses were never called to the prejudice of the Appellant.***

8. ***The Superior Court failed to re-evaluate the entire evidence and draw their own conclusions.***

9. ***The Superior Court misapprehended the facts and applied wrong legal principles to the prejudice of the Appellant.***

10. ***The Superior Court ignored the plausible defence given by the Appellant.***

11. ***The Superior Court erred in law by shifting the burden of proof to the Appellant.***

12. ***The Superior Court failed to appreciate that Section 143 of the Evidence Act applies to civil cases not criminal proceedings.***

13. ***The Superior Court erred in law by upholding the death sentence.***

[4] In further arguments to support the above grounds of appeal, Mr. Ondieki, learned counsel for the appellant, submitted that the sole evidence by the complainant who allegedly identified the appellant from a public place was not safe to sustain a conviction. Counsel cited the well-known case of ***Kiarie v Republic, [1984] KLR at 739***, especially the holding that:

> ***"The Court of Appeal on a second appeal may upset a finding of fact by the trial or the first appellate court where there is misdirection but such misdirection must be of such a nature and the circumstances of the case must be such that if it were a trial by Jury, the Jury would not have returned their verdict had there been no misdirection. It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken".***

[5] According to Mr. Ondieki, the circumstances of this case did not favour a positive identification. The complainant was likely to be mistaken because he did not give a description of the appellant to the police when he made the report; the report to the police was made after about 7 days, thus the two courts below failed to address the pertinent question of how the appellant was able to recognize the appellant at a public place and how that identification caused his arrest; no identification parade was carried out; the complainant took one week before reporting the robbery to the police and the appellant was not arrested until after two months. Mr. Ondieki further faulted the trial court for relying on the evidence of a single witness. Although under the law the court may base a conviction on the evidence of sole witness, the circumstances of this case were such that the evidence of the arresting officer was critical to demonstrate to the court how the complainant was able to identify the appellant in a public place as one of those who attacked him. Counsel for the appellant urged us to allow the appeal.

[6] On his part, Mr. Chirchir for the Prosecution maintained the same position they held before the High Court that is conceding to the appeal both on conviction and sentence. This was because the identification by the single prosecution's witness was not positive. The complainant saw the appellant during the robbery, there was no evidence that he gave the description of the attackers to the police. There was, therefore, a likelihood of mistaken identity.

[7] It is common ground that the appellant was convicted based on the evidence of Isaac Kibet Ronoh, PW 1, the only witness who testified in this matter. On 26th May, 2009, PW 1 received a telephone call

from a person who identified himself as Samuel Kimani. PW 1 owned a tractor that he used to hire out for ploughing purposes. He however did not note the telephone number of the person but he stated in court that the said Kimani requested for tractor services to plough his land that he said was situated near Gichia Farm at Elburgon . PW 1 agreed that they meet at the farm the following day that is on 27th May, 2009, at 10.00 a.m. PW 1 obliged and while at the appointed place, he saw a person who identified himself as Kimani standing by a white motor vehicle. They agreed on the price and a deposit of Ksh.2,000/= for petrol. Kimani told PW 1 to get into the motor vehicle so that he could be shown where the shamba the tractor was going to plough was. Upon entering the vehicle, there was another man sitting on the back seat; he pulled a pistol while Kimani flashed a police identity card and some handcuffs.

[8] Kimani said they were CID Officers from Nakuru and PW 1 was under arrest regarding his tractor which was under investigations. The man at the back who had a pistol introduced himself as an official from Kenya Revenue Authority. He removed a search certificate showing particulars of ownership of the tractor which he said they were investigating. PW 1 told them he had all the documents of ownership of the tractor at his home although the tractor had never gone for inspection by the CID. Kimani ordered the driver and turn boy to get off the tractor which was driven away by two other people ostensively to the police station.

[9] As they approached the home of PW 1, he pleaded with them to remove the handcuffs as he enters the house to remove the documents pertaining to the ownership of the tractor as he had a sick child. They removed the handcuffs but the person called Kimani remained in the sitting room as PW 1 went to the house, he gave them the sale agreement, the original form of transfer and the photocopy of the logbook for this tractor Registration No. ***KAE 491 L MERSSY FURGUSSION***. They ordered PW 1 to accompany them to Nakuru Police Station, but because he of the condition of his sick child in the house, he pleaded that he be allowed to take the child to hospital first. PW 1 was not able to go to the CID Offices in Nakuru until 3rd June, 2009, when he reported although he had been in communication with the said Kimani. PW 1 was shocked to be told there was no Kimani at the CID offices in Nakuru and he did not see his tractor there as well. He made a formal report at Menengai Police Station.

[10] On 27th August, 2009, while he was polishing his shoes near Shell Petrol Station at Nakuru, he saw a person eating fruits and recognized him as the man who sat at the back of the vehicle during the robbery and pointed a pistol at him. This was the person who had identified himself as a Kenya Revenue Authority Officer. PW 1 immediately called the police from the Flying Squad and they pursued and arrested the appellant who was charged with the two counts. No other witnesses testified. The record shows the matter was adjourned severally to give the prosecution a chance to call other witnesses to no avail.

[11] Eventually the prosecution closed its case, the appellant was found to have a case to answer and upon being put on his defence he denied the offence and stated that it was merely a case of mistaken identity. He stated that he was a businessman based in Nairobi and he was in Nakuru on the material day to promote products that he sells.

[12] The learned trial magistrate was satisfied that PW 1 was with the assailants for a long time and although there was no other evidence, there was no doubt the case was proved. This is what was stated in a pertinent part of the trial magistrate's judgment:-

> ***"Having spent such a long time with the persons, the court is convinced that the identification by PW 1 was not mistaken and he picked the right person having dealt with the identification, were the other elements of an armed robbery proved? PW 1's evidence was that the accused person was in the company of another who identified himself as a CID Officer and who even had a gun and police identity. This person who sat at the front gave the person behind handcuffs and PW 1 was not only handcuffed, but had a gun pointed at him when the tractor was being taken away. Even though PW 1 did not sustain any physical injury, he was threatened with a firearm and also handcuffed. The accused person was in the company of two others, they were armed. PW 1 was threatened with the gun and even handcuffed when the tractor was taken away. Clearly all the***

elements of an armed robbery were proved under Section 296(2) of the Penal Code".

[13] The Judges of the High Court revisited this evidence as they are bound to do on a first appeal and arrived at concurrent findings as follows:

> ***"We have already observed that the complainant gave a very detailed account of the communication between the Appellant's accomplices, and the complainant. He was with the appellant from about 10.00 a.m. to 3.00 p.m., a period of 5 or more hours. It was enough time to internalize the appearance of the appellant and his tall dark accomplice who is still at large. The appellant and his accomplices even accompanied the complainant to his house. They waited for him in his sitting room while he collected papers of title from his bedroom. The chances of mistaken identity when he next saw the appellant on 27th July, 2009, some 2 months later were minimal.***
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> ***In addition, the trial court warned itself of the dangers of relying on the evidence of one or a single witness, more so, on a serious charge as the one of robbery with violence, like this one. As it was stated in the case of RONA VS. REPUBLIC, [1967] E.A. 583 at page 584, and KARANI VS REPUBLIC, [1985] KLR 292, the court must test such evidence with the greatest care before concluding that such evidence is free of the possibility of error. The learned trial magistrate did warn herself of such danger. We have no reason for differing with either her findings or conclusions".***

[14] This being a second appeal, only matters of law fall for our consideration. See ***Section 361*** of the ***Criminal Procedure Code***. 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***.

Also 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 grounds of appeal, the able submissions by counsel, and the law. In our view, the State rightly conceded to this appeal. The Prosecution's evidence by PW 1 left some gaps regarding how the appellant was arrested and whether PW 1 had given any description to the police that led them to arrest the appellant. The two courts below, did not address what personal knowledge or attributes PW I had kept in his mind since the encounter with the assailants that enabled him recognise the appellant from a public place. In ***Anjononi and Others vs Republic***, ***(1976-80) 1 KLR 1566,*** at page 1568, this Court held:

> ***".....recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other".***

See also ***Maitanyi –vs- Republic, (1986) KLR 198***, this Court at page 201 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".***

[16] Both courts below unnecessarily belaboured and went as far as giving justification for the Prosecution's failure to call vital evidence especially by the Investigating Officer and the Arresting Officer. The impression we get from this is that the appellant was indirectly blamed for the threats allegedly issued to the prosecution's witnesses who failed to attend court, while forgetting as a general rule of law, the burden remains on the Prosecution to bring evidence to prove the guilt of an accused person beyond reasonable doubt and it can never shift to an accused person.

[17] This is what the Judges observed in part of their judgment that demonstrates that undue expectation was placed upon the appellant:

> ***"We observe that the appellant's cross-examination of the complainant concentrated on the soft and, therefore, technical aspects of the case, and not the complainant's solid evidence, as stated above. The appellant avoided completely any reference to the complainant's evidence. Instead, the appellant concentrated on matters such as why the complainant made his report to the police 7 days after the incident, and not immediately, whether he had described the men who had robbed him of his tractor, whether he had himself written his statement, or whether it was recorded, and whether he had signed it and whether it was countersigned by the recording officer, where and when he was arrested, questions that should have been appropriately answered by the Investigating Officer but the complainant handled them well. The complainant explained the delay, he had a sick child, his tractor had been taken by men who said they were CID Officers, and that it had been taken to a Police Station.***
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> ***Similarly, and perhaps not unexpectedly in his defence, the appellant told the court he is a resident of Githurai 45, in Nairobi and was a promoter of Chinese Tianshi Tea and was in Nakuru between 23rd July, 2009, and 27th July, 2009, promoting sales of such tea, and that he had gone for a light lunch on 26th July, 2009, where he was arrested, and denied any knowledge of the complainant's tractor".***
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> ***"Although there may be suspicion against the appellants, we are not satisfied that their guilt has been proved beyond reasonable doubt. Suspicion, however strong, cannot supply a basis for interring guilt when proof of guilt cannot be inferred beyond reasonable doubt on all the evidence".***

[18] It was within the appellant's rights to ask all the soft and technical questions to advance his defence. The Prosecution's Case should never have defended on the appellant's defence or lack of it. The appellant alluded to a defence of alibi, it was not his burden to prove that he was at Githurai 45 when the offence occurred. In the case of ***Sekitoleleko v Uganda, [1967] EA, 531***, it was held as follows:

> ***"(i) As a general rule of law, the burden on Prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else.***
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> ***(ii) The burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected herself".***

[19] We have considered the record of appeal, the submissions by counsel and we are in agreement with both counsel for the appellant and the Prosecution that had the two courts below analyzed the evidence of PW 1 against the set principles of law, they might have come to a different verdict as we have done. The evidence by PW 1 left doubts as to whether the appellant was positively identified thus entitling to the benefit.

We find merit in this appeal. We allow the appeal, quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 20th day of March, 2014.

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