IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), MUSINGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 357 OF 2012

BETWEEN

VICTOR MWENDWA MULINGE …..……. APPELLANT

AND

REPUBLIC ……...… RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Nairobi (Ochieng & Achode, JJ.) dated 30th July, 2012

in

HC. CR. A. No. 296 of 2007)

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JUDGMENT OF THE COURT

The appellant together with five others were charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 11th day of May 2003 along Argwings Kodhek Road in Nairobi, jointly with others not before the court and while armed with dangerous weapons namely, pistols, robbed **Jacob Okeyo Otieno** of a motor vehicle registration no. KAP 526L and at or immediately before or immediately after the time of such robbery used personal violence to the said Jacob Okeyo Otieno. After a full trial, all the other five co-accused were acquitted of the said charge but the appellant was convicted and sentenced to death as by law provided. Being dissatisfied with that conviction and sentence, the appellant preferred an appeal to the High Court (Ochieng & Achode, JJ.). The first appellate court appreciated that the trial magistrate had done a very sketchy judgment and took upon itself to evaluate all the evidence that was tendered before the trial court. That was in line with this Court's holding in **NZIVO v REPUBLIC [2005] 1 KLR 699** which the learned judges cited. Upon so doing, they upheld the conviction and confirmed the sentence that had been passed by the trial court.

The appellant was again dissatisfied with the High Court decision and preferred a second appeal to this Court. This being a second appeal the Court can only consider matters of law in such an appeal as stated under **Section 361 (1)** of the **Criminal Procedure Code**. The Court cannot interfere with concurrent findings of fact by the two courts below, unless such findings are based on no evidence or on a misapprehension of the evidence or where the courts below are shown to have taken into account wrong

principles in making their findings, see **CHEMAGONG v REPUBLIC [1984] KLR 611**.

The appellant's conviction was premised on the evidence of only one identifying witness, **Jacob Martin Okeyo Otieno, PW1**, a taxi operator. He told the trial court that on the material day at about 5.30 p.m. he was at Hurligham when the appellant, whom he had not known therebefore, approached him and requested to be driven to a place near Ufungamano House along Mamlaka Road where there was a party. The appellant picked up a friend whom they were to travel together and the three of them commenced their journey. Upon reaching a certain junction near the venue of the party, the appellant alighted and his friend who was seated on the co-driver's chair told the appellant to move to the passenger seat. He pointed a gun at PW1, who cooperated so as to save his life. The appellant's friend jumped to the driver's seat and drove off. But before driving off he called some friends on his mobile phone who joined him in the car. After driving for some distance the car stopped. PW1 was bound and locked up in the car boot. The car was driven for some time and PW1 was abandoned at some place along Mamlaka Road. He managed to open the boot and got out. He went to the Central Police Station and reported the incident.

In his statement at the police station, which was recorded on 19th May, 2003, PW1 alleged that he had given a detailed description of the person who had hired the vehicle. He said that he could identify the person by his complexion, stature and physique. The statement was however not produced before the trial court. PW1 further testified that when the appellant approached him at Hurlingham they took about 10-15 minutes in negotiating about the taxi charges.

Upon arrest of some suspects on 16th May, 2003, an identification parade was conducted on 22nd May, 2003, 11 days after the date of the robbery. PW1 identified the appellant as the person who had hired him on the material day. He did not state any peculiar features which may have made him identify the appellant.

In his sworn defence, the appellant stated that he was a student at 4th Dimension College in Nairobi and on the material day he had classes from 4.30 to 6.30 p.m. After college he proceeded to his home at California Estate. On 16th May, 2003 together with a friend known as Mutungi they proceeded to his late father's funeral meeting in town. They hired a taxi in town to take them to a restaurant along Mamlaka road where he was to meet a work mate of his late father who had pledged to donate some money towards the funeral arrangements. Along the way they were intercepted by a certain vehicle and they were ordered to alight from the taxi and lie down. A search was conducted on their bodies but nothing was recovered. They were told that they were under arrest and were taken to Shauri Moyo Police Station where an identification parade was carried out after several days. The appellant denied having committed the alleged offence.

The first appellate court held that the evidence adduced by PW1 though of a single identifying witness, was sufficient to enable it uphold the appellant's conviction and proceeded to dismiss the appeal.

In his self drawn memorandum of appeal, the appellant raised five grounds of appeal. However, when **Mr. Samuel Oguk**, learned counsel for the appellant argued the appeal, he abandoned one of the grounds and condensed the remaining ones into two and the same may be stated as hereunder:

1. ***The High Court erred in law in confirming the appellant's conviction which was based on uncorroborated evidence of a single identifying witness.***

2. ***The High Court erred in law in failing to take into consideration the appellant's alibi defence.***

Arguing the first ground of appeal, Mr. Oguk submitted that PW1 had a very short period to observe the face of the person who had hired him on the material day and it was therefore highly unlikely that he could remember his appearance eleven days after the robbery. Further, PW1 had not told the police why he was able to identify the person if he were to see him again. In addition, the description of the person PW1 gave to the police was unsatisfactory. In his view, the evidence of identification was unsafe.

Turning to the second ground of appeal, counsel submitted that the appellant, having stated in his defence that he was in class upto 6.30 p.m., it was the duty of the prosecution to adduce evidence to dislodge the appellant's alibi but that was not done. He cited the case of **SSENTALE V UGANDA [1968] E.A. 365**.

Miss Oundo, Principal Prosecuting Counsel for the respondent, submitted that the evidence of PW1, though uncorroborated, was sufficient to sustain the appellant's conviction. The appellant and the complainant spoke for a period of about ten to fifteen minutes in broad daylight and that was sufficient time to enable the complainant observe him, she stated.

Regarding the defence of alibi, Miss Oundo submitted that the defence was rightly rejected since it was not raised at the earliest instance, immediately after the appellant's arrest, but instead was given at the tail end of the trial when the prosecution had no opportunity to lead evidence to dislodge it. She urged this Court to dismiss the appeal.

More often than not, the conviction of an accused person solely on the evidence of a single identifying witness poses some uncertainty. In **MAITANYI v REPUBLIC [1986] KLR 198,** this Court stated as follows:

> ***"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.***
>
> ***2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.***
>
> ***3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made.***
>
> ***4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."***

The first appellate court, having cited the aforesaid authority and reminding itself of the need for testing with the greatest care the evidence of PW1 nevertheless went ahead to uphold the appellant's conviction by the trial court. In the circumstances, it is imperative that we examine closely the evidence of PW1 to determine whether his identification of the appellant was credible.

While it is not disputed that PW1 was approached by a person in broad daylight with a request to be driven to some place along Mamlaka Road, there was nothing peculiar about that person. The two proceeded to negotiate about the taxi charges in the ordinary manner of business. The negotiations took just a few minutes, at most fifteen. It is logical that as he drove to the intended destination, the eyes of PW1 were not focused on the passengers. When somewhere along the way a gun was pointed at him, PW1 was in a state of shock and shortly thereafter he was bundled into the boot of the car.

When later he went to the Central Police Station to report the incident, PW1 was treated as a suspect and locked up for four days. It was on the fifth day that the police recorded a statement from him. He did not describe the person who had robbed him. He only said that he could identify him by his complexion, stature and physique. We think that was not an appropriate description. That statement was not even availed to the trial court so that it could form part of the record.

The complainant's identification of the appellant on the basis of his appearance, as vague as it was, naturally causes us considerable anxiety and discomfort. In **AJODE v REPUBLIC [2004] 2 KLR, 81** this Court held that before an identification parade is held, a witness should be asked to give the

description of the person sought to be identified. Ideally, that advance description of the person ought to be in writing and the same, together with the parade forms, availed to the trial court so that it can compare the description given of the accused. It is doubtful whether the appellant could vividly remember his assailant eleven days after the robbery, given the short period that he had interacted with him and the prevailing circumstances.

The trial court did not undertake any analysis of the evidence given by PW1 and as was held in **MAITANYI v REPUBLIC (Supra),** failure to do so is an error of law and such evidence cannot sustain a conviction.

In addition, both the trial court as well as the first appellate court did not give any consideration to the appellant's defence. The first appellate court stated that:

> ***"The appellant was correct in submitting that the learned magistrate did not comment or express her opinion on the said alibi defence."***

But having made that observation, the learned judges fell into the same pit as the trial court because they neither analysed the appellant's defence nor considered the law regarding the defence of alibi.

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see **KARANJA v REPUBLIC [1983] KLR 501.**

The appellant was arrested on 16th May, 2003 and taken to Shauri Moyo Police Station where his statement was recorded. That statement was not produced before the trial court. Had that been done, the court would have been able to consider whether what the appellant had stated at the earliest opportunity regarding his whereabouts on the material day was in line with his defence of alibi before the court. In **KARANJA v REPUBLIC (Supra),** this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

In this case, we do not know whether the appellant in his statement to the police had stated that on the material day and time he was in a college class. This is an issue that ought to have been dealt with by the trial court but that court failed to discharge that duty.

But even assuming that the appellant raised the defence of alibi for the first time while in court, as rightly submitted by Mr. Oguk, pursuant to the provisions of **Section 309** of the **Criminal Procedure Code** the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant's defence. The section states as follows:

> **"309.** ***If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."***

The prosecution failed to do so.

All in all, we find and indeed hold that for the reasons stated herein, the appellant's conviction was unsafe and accordingly allow this appeal. The appellant's conviction is quashed and the death sentence is hereby set aside. The appellant is set at liberty unless otherwise lawfully held.

This judgment is delivered in accordance with the provisions of **rule 32 (2)** of the **Court of Appeal Rules, 2010**, duly signed by only two judges, as Gatembu Kairu, JA. declined to sign the judgment.

Dated and Delivered at Nairobi this 14th day of March, 2014.

P. KIHARA KARIUKI

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PRESIDENT, COURT OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

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

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