IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G. B. M. KARIUKI & OUKO, JJ.A)

CRIMINAL APPEAL NO. 131 OF 2013

BETWEEN

JOHN NAKOROTO EREGAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Nairobi (Ochieng & Achode, JJ.) dated 4th December, 2012

in

H.C. CR. A. NO. 263 OF 2008)

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JUDGMENT OF THE COURT

John Nakoroto Eregai (appellant) was charged before the Senior Resident Magistrate's court Limuru with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. On the first count, it was alleged that on 4th day of January 2008 at Kamirithu Village in Kiambu West District, jointly with another not before the court while armed with a pistol, they robbed one **Simon Njogu Maina** of his motor vehicle reg. no. KRM 594 Datsun Saloon.

On the same date and time he is said to have robbed **John Ndungu Mungai** of cash Kshs 35,000/=, a mobile phone and a wrist watch both valued at Kshs 17,000/=.

After a full hearing which consisted of eight prosecution witnesses and appellant's unsworn statement of defence, the learned trial Magistrate (M. A. Murage) found both counts proved beyond reasonable doubt, convicted the appellant and sentenced him to death "*in each of the two counts*".

Being dissatisfied with the conviction and sentence, the appellant moved to the High Court challenging the same both on facts and the law. His appeal was heard and the High Court (F. A. Ochieng & L. A. Achode, JJ) after re-analysing and re-evaluating the evidence tendered before the subordinate court found the appeal devoid of merit and dismissed it. They nonetheless corrected the error in the duplicity in the sentence and confirmed the death sentence on count one but held the sentence on count two in abeyance in line with this Court's decisions on the subject. (See for instance **Osbon Ouko & Another vs**

Republic, Cr Appeal No. 173 of 2006).

A brief summary of the evidence adduced before the trial court is as follows.

Simon Njogu Maina (PW1) used to operate a taxi registration no. KRN 594 Datsun station wagon. On the date in question, his friend **Ndungu Mungai (PW2)** hired him to take him home. He had parked his taxi outside a butchery as he waited for PW2. PW2 came and boarded the motor vehicle but before they could start their journey, they were approached by two people who said they wanted to be dropped at a place called Ngarariga. They boarded the taxi at the back as PW2 sat at the front passenger seat. They drove off but on reaching the highway, one of the passengers at the back who they identified as the appellant herein whipped out a pistol and hit PW1 on his left ear and ordered him to divert the motor vehicle towards a different direction which he did. According to PW1, as he was driving slowly, he opened the driver's door and managed to jump out. He told the court that the appellant then jumped to the driver's seat and took charge of the motor vehicle and drove away towards the forest. PW1 then went back to the main road where he found a police patrol car and reported the incident.

Meanwhile, according to PW2 he was also hit with the pistol and ordered to lie down. One of the robbers frisked him and took away the items listed in count two of the charge sheet. He told the court that after driving for about five minutes, the motor vehicle overturned. The robbers then managed to disembark and ran away. By the time members of public went to the scene, the robbers had disappeared.

PW1 went to the scene with **P.C. Felix Kilonzo (PW6)** and other police officers. They found members of public and PW2 who had sustained injuries on his leg and face. They searched the motor vehicle and recovered two caps and a toy pistol which had been used to hit PW1 and PW2. According to PW2, one of the robbers who he identified as the appellant sustained an injury on his face in the accident.

According to PW1 and PW2, at the scene outside the butchery when they were approached by the appellant and another, there were security lights and the light was sufficient for them to see the appellant and his accomplice clearly. According to PW1, when the appellant turned to hit him, the reading light went on by mistake and he was able once again to see him clearly. According to PW1, he gave a description of the appellant to members of public who he found at the scene. Some of them said they knew who he was and so they led PW1 to his house but they did not find him.

They started looking for him and on 12th January, 2008 PW2 spotted the appellant at the market place. He raised an alarm and members of public responded, chased and arrested him. They confirmed that he had a healing scar on his face. They tried to lynch him but some police officers appeared at the nick of time and rescued him from the angry mob. He was taken to the police station and subsequently charged with the robbery charge.

In his very brief unsworn statement of defence, the appellant just narrated to the court how he was arrested, beaten up and taken to the police station and charged.

As stated earlier on, the trial magistrate found him guilty as charged on the evidence placed before her. His first appeal to the High court was predicated on the grounds that the prosecution had not proved its case beyond reasonable doubt; the charge sheet was defective; and that the visual identification was not free from error and mistake.

He was not successful in that appeal and so he moved to this court on second appeal. He filed his homemade grounds of appeal on 14th December 2012 and supplementary grounds on 9th October, 2013 which were basically similar.

Learned counsel Ms Arati filed another supplementary memorandum of appeal on 21st March 2014. At the hearing of the appeal, she abandoned the two earlier memoranda and relied on the latter one. She also abandoned ground 2 of the same and urged only three grounds. Paraphrased, these grounds were to the effect that the identification of the appellant was not proper; that the appellant's defence was not considered; and finally that the learned Judges failed to analyse the entire evidence and come up with

their own conclusion.

She amplified these grounds at the hearing.

On the issue of identification, she submitted that the intensity of the light was not given and that the complainant was shocked after he was pointed at with a gun and there was therefore a possibility of mistaken identity. She further submitted that PW2 had identified the appellant by voice and that was not possible as he had met him only once before.

On the failure to consider the appellant's defence, counsel appeared to suggest that the courts below ought to have believed the appellant's evidence as opposed to that of the prosecution witnesses.

On the defect in the charge sheet, the purported defect was the discrepancy in the registration number of the complainant's taxi. Whereas the registration number was indicated as KRM 594 in the charge sheet, the witnesses described it as KRN 594.

In reply, Mr Kivihya, learned counsel for the State urged that there was sufficient light outside the butchery when the appellant and another negotiated the price and thereafter boarded PW1's taxi. PW1 and PW2 therefore had a good opportunity to see the appellant clearly and be able to identify him a few days later.

He submitted that the learned Judges re-evaluated the evidence properly as was required of them. He further submitted that the appellant was upon his arrest found with the healing scars on his forehead which according to PW2 had been sustained when the motor vehicle overturned. He submitted that the discrepancy in the registration number of the motor vehicle had been resolved by the High Court and further that the discrepancy was curable under **Section 382** of the **Criminal Procedure Code**. He therefore, entreated us to dismiss this appeal as the same lacks merit.

This being a second appeal, by dint of **Section 361** of the **Criminal Procedure Code**, we are confined to determine matters of law only. See also **Kaingo vs. R. (1982) KLR 219** where this Court pronounced itself in the following terms:-

> ***"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''.***

A look at the three grounds of appeal discussed above evidently confirms that they raise points of law which we therefore proceed to consider.

On the issue of identification, it is a ground that pops up most of the time in criminal appeals particularly where the offences in question are committed at night. There is a litany of decided cases on this subject but ultimately, the court must consider each case on its own merits. The court should nonetheless be very circumspect in cases where an accused person is convicted purely on the basis of visual identification. This court in the case of **Karanja & another vs Republic [2004] KLR 140** pronounced itself as follows:-

> ***"Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction, R - V – Eria Sebwato [1960] E.A. 174***
>
> ***……a witness may be honest but mistaken. Roria – v – Republic [1967] EA 583 and a number of witnesses could all be mistaken. R – v – Turnbull & Others [1976]…..3AER 549."***

We have considered the evidence pertaining to identification in this matter and warned ourselves of the

possibility of mistaken identity leading to a conviction. In this case, we note that there were security lights outside the butchery where the complainant's motor vehicle was parked. The appellant and another were negotiating the taxi hire charges with PW1 and must therefore have been standing in close proximity. Both PW1 and PW2 said they saw the two clearly.

PW1 said he saw the appellant again whilst inside the car as he switched on the reading light by mistake as he reached out to hit him. Further, according to PW2, when the motor vehicle overturned, the appellant who was driving then was hit on his face and injured. When the appellant was arrested, he was found with the healing scar on his face where he has been hit. This cannot have been a coincidence. Although, PW2 said he first heard the appellant's voice and that is when he turned towards him, this identification was not one premised on voice only. On hearing the voice, he turned and confirmed visually that the appellant was indeed one of those who had robbed him a few days earlier.

We note further that the witnesses had described the appellant to some members of public who immediately said they know who the suspect was. They even went to his house but did not find him. PW1 and PW2's evidence was corroborative and we are satisfied that they were not mistaken on the identification of the appellant.

We agree with the concurrent findings of the two courts below that identification of the appellant was not mistaken, rather it was watertight and to the required standard.

On the issue of failure to re-analyse and re-evaluate the evidence adduced before the trial court afresh, we note that the learned Judges of the High Court were totally alive to that requirement. Guided by this Court's decision in **Odhiambo vs Republic Cr. Appeal No. 280 of 2004**, they re-evaluated the evidence adduced before the trial court and arrived at their own independent decision. We reiterate here that such re-evaluation and re-analysis need not follow any particular format. What is important is that from the judgment, one can explicitly see that the totality of the evidence before the trial court was analysed and a decision arrived at on the independent assessment of the same. Failure by the High court to arrive at a different decision does not necessarily mean that there was no fresh analysis and re-evaluation of the evidence.

In this case, we are satisfied that the learned Judges of the High Court reached their decision following evidence adduced before the trial court. This analysis included the defence proffered by the appellant before the trial court. The appellant had only said that he was a hawker and gave an account of how he was arrested. He did not offer any challenge to the evidence adduced by the prosecution either through cross-examination or in his defence. Whereas the burden of proof reposes squarely on the shoulders of the prosecution, the appellant's defence did not cast even the slightest of doubt onto the prosecution case.

On the issue of the defect in the charge sheet, we note that the registration of the motor vehicle was settled with the production of its photographs which bore the correct number. It appears therefore that the discrepancy was a mere typographical error which did not go to the root of the case. There was no demonstration as to how this small error prejudiced the appellant. We hold that the same was curable under **Section 382** of the **Criminal Procedure Code.**

Consequently, we find this appeal devoid of merit and dismiss the same in its entirely.

Dated and Delivered at Nairobi this 30th day of May, 2014.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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