**IN THE COURT OF APPEAL**
**AT KISUMU**

**(CORAM: ONYANGO OTIENO, KIAGE & MURGOR JJ.A)**

**CRIMINAL APPEAL NO. 291 OF 2012**

**BETWEEN**

**SAMSON MATOKE MACHOKA ……..APPELLANT**

**AND**

**REPUBLIC ……..……..RESPONDENT**

**(Appeal from judgment of the High Court of Kenya at Kisii (Musinga &**

**Karanja ,JJ) dated 29th May 2009,**

**in**

**H.C.CR.A No.75 of 2007)**

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**JUDGMENT OF THE COURT**

**Samson Matoke Machoka**, the appellant, was charged before the Ag. Senior Principal Magistrate at Kisii with two counts of robbery with violence contrary to section 296 (2) of the Penal Code, ten counts of impersonation contrary to section 382 of the Penal Code, one count of possession of public stores contrary to section 324 (3) of the Penal Code and one count of possession of imitation firearm contrary to section 34 (1) of the Firearm Act.

After pleading not guilty to all the counts, the appellant was tried and convicted on counts 1, 13, 14 by the trial magistrate's court and sentenced to suffer death on count one, one year imprisonment on count thirteen and seven years imprisonment on count fourteen, but was acquitted on all other counts.

The particulars of count 1 were that, on the nights of 15th/16th May 2005 at Gesieka trading centre in Kisii, Central District Nyanza Province, jointly with others not before the court while armed with dangerous weapons namely rifles, robbed ***Nicholas Ogado ,Mbuge, (PW7), the complainant*** of his Motor Vehicle Reg. KAL 903 T Datsun pickup, one radio make Sony serial number unknown, one mobile phone make Sagem and a wrist watch make Zeiko all valued at Kshs. 600,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Nicholas Ogado Mbuge.

The particulars in count 13 were that on the 16th May 2005 at Jogoo village Kisii Central District Nyanza Province, the appellant had in his possession public stores namely three smoke jungle jackets and one

jungle long trouser the property of a disciplined force namely Kenya Air Force, such property being reasonably suspected of having been stolen or unlawfully obtained.

The particulars of count 14 were that, on the 16th May 2005 at Jogoo village Kisii Central District Nyanza Province, the appellant without reasonable excuse had in his possession two imitation firearms with intent to commit a felony namely robbery.

**Nicholas Mbuge (PW 7),** testified that, he was asleep at home with his wife on the night of the 15th/16th May 2005, when he heard a knock at the door. When he asked who was at the door, he was informed that it was the police. According to PW 7, when he refused to open the door, the robbers gained entry into the house by breaking the windows and cutting the window panes, whereupon three men entered the bedroom, and demanded money from him. When he told them that he did not have any money, they demanded the keys for his motor vehicle registration no. KAL 903 T, a Datsun pick up. The motor vehicle was parked on slippery ground, causing the robbers to have to push the motor vehicle out of the compound, after which they drove away. The following morning PW7 learnt that the motor vehicle had been found abandoned at Keroka town. He proceed to Keroka where he identified his motor vehicle.

**Sgt. Naftally Wang'ondu (PW 9)** testified that he is a finger print expert attached to Nairobi CID Headquarters. He stated further that when he compared the fingerprints lifts from the motor vehicle to those taken from the appellant, he concluded that they were the appellant's.

***Cpl.Maurice Odawo PW 10*** of Scenes of Crime, Kisii, stated that when he examined the stolen motor vehicle KAL 903 G a white Toyota pick-up at Keroka Police station, he found five fingerprints on it. Lift No 1 and 2 were found on the outside part of the rear windscreen and Lift No 3, 4, and 5 were outside the top of the roof of the cabin of the subject motor vehicle. He stated that he thereafter submitted the lifts to Nairobi CID Headquarters for further analysis.

In his defence, the appellant testified that, on the night of 15th /16th April 2005, he was in his house listening to the news when police officers entered. The police officers searched the house and took away a mattress, a radio and a car battery, and various items of clothing. He stated that he was then driven to Kisii Police Station in a Land Cruiser, and subsequently charged in court.·

Being dissatisfied with the conviction and sentence the appellant then filed an appeal in the High Court at Kisii where *Musinga & Karanja, JJ* ( as they then were), re-evaluated the evidence tendered before the trial court. The appeal in regard to count 1 was dismissed, while those in regard to counts 13 and 14 were allowed, thus provoking this second appeal.

This Court is now called upon to consider the appellant's appeal to this Court with grounds of appeal as thus:-

> **1. The learned Honourable judges of the Superior Court erred in law by giving credence to the evidence of identification by a single witness without warning themselves of the possibility of error.**
>
> **2. The learned judges of the Superior Court erred in law by finding that the appellant was properly identified when the description of the accused was not given.**
>
> **3. The learned judges of the Superior Court erred in law when they failed to interrogate the source of light, the intensity thereof or nature of the light allegedly used to identify the appellant.**
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> **4. The learned judges of the appeal erred in law by failing to interrogate the finger prints lifted from the scene, the method used in lifting such finger prints and if the possibility of errors (sic) and if they actually marched those of the appellant.**

**5. The Superior Court erred in law by upholding the decision of the lower court where the prosecution failed to discharge the burden of proof.**

**6. The Superior Court erred in law in admitting the fingerprint evidence when the expert witness failed to instruct the court on the criteria of his science so that the lower court may itself test the accuracy of his opinion and also form its own independent opinion by applying this criteria to the facts proved.**

**7. The Superior Court erred in law by failing to consider the alibi of the appellant.**

**8. The Superior Court erred when it failed to note and appreciate the gaps and inconsistencies in the prosecution case**.

When, learned counsel for the appellant, Mr. Amondi appeared before us on 18th February 2014, he stated that he would abandon ground No. 3 and consolidate the rest of the grounds which he argued together. Counsel contended that, the appellant was convicted on the basis of indirect evidence fingerprint identification lifted from Motor vehicle **KAZ 903 T**, and that the fingerprints match those of the appellant. Counsel further submitted that the learned judges erred in law and in fact in failing to evaluate the evidence of the fingerprint expert and thereby wrongly concluded that the appellant committed the crime, and should have ensured that the laid down standards are followed by an expert, as held in **Mutonyi v Republic** [1983] KLR 455. Counsel submitted further that the standard required is that the expert witness should demonstrate the extent of his scientific experience in the field of fingerprinting. Counsel inferred that the evidence of PW9 did not demonstrate to the Court that he was a skilled finger print expert; that the prosecution did not present PW9's qualifications or any professional trainings attended. Learned counsel pointed out that PW9 testified on 16 similar characteristics but not on any of the four fingers nor the thumb, and questioned the standards that were applied). Was it that which is applied in the United Kingdom, Kenyan or which one in particular? Counsel also contended that there were numerous contradictions in the evidence, in that PW9 had testified that he was not sure of the source of the prints and was unable to tell whether the prints had been tampered with. In counsel's view, it was possible that the prints could have been lifted from any source other than the motor vehicle. Additionally, PW10 had made reference to a Toyota and not the stolen vehicle which was a Datsun, and as such, if the evidence was questionable then the inconsistency should be interpreted in favour of the appellant. Counsel concluded that the evidence was insufficient, and that the prosecution had failed to discharge its burden.

Mr. Abele, Assistant Deputy Prosecution Counsel, supported the conviction by the trial court and contended that the case had been proved to the required standard; that the High Court had properly analyzed and evaluated the evidence, based on expert witness evidence which was competent and reliable. With respect to PW9's competency, counsel pointed out that PW9 was a Form 4 graduand, which could not be held against him; that he attended CID training school where he was trained as an expert in fingerprinting, having acquired 16 years of experience as a fingerprint expert. Counsel further submitted that PW9 had demonstrated how he arrived at his findings, having laid a basis for the expert opinion; that if the evidence was unsatisfactory, this ought to have been challenged by another expert. Counsel submitted that the difference in make of the motor vehicle, as to whether it was a Toyota or a Datsun was not material. Finally counsel concluded that the fingerprint tampering was not canvassed during the trial, and could not be raised in this Court. Counsel urged the court to uphold the conviction and sentence.

Learned counsel Mr. Amondi added that, no formal report accompanied the finger prints evidence, and without this it was not possible for the High Court to have reached its determination.

We have considered these submissions carefully, considered the record of appeal. This is a second appeal and therefore only matters of law may be considered- **see section 361(J)(a) of the Criminal Procedure Code**. Indeed in **M'Riungu v. R**. **[1983] KLR** this Court agreed with the views expressed in an English case as follows:

?**That where a right of appeal is confined to questions of law only an appellate court has**

**loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law."**

From the submissions, the only issue raised in this appeal was the fingerprint evidence of the appellant. On this, the learned judges in their judgment stated thus:

**"The appellant made no attempt in his defence to explain why his fingerprints should be found in a vehicle which had just been stolen from the complainant.... The evidence of fingerprints expert is admissible under section 48 of the Evidence Act."**

In the instant case we are required to determine whether PW9 was eligible to testify as a fingerprint expert, and whether the appellant had been properly identified through the fingerprint evidence adduced by PW9.

We will begin by reiterating the case of **M'Riunga vs. Republic** (supra) where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law and should not interfere with the decision unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion - in other words, that the decision is bad in law.

Having said that, the High Court evaluated the evidence, was satisfied that PW9 testified as an expert witness and stated thus;

***"The prosecution sought to discharge the burden placed on it by way of fingerprint evidence. In our view, PW9 gave evidence as an expert.***

*"Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge from facts reported to him or discovered by him by tests, management and the like" (see Mutonyi -vs Republic 1982 KLR ".*

***….We are satisfied that that the evidence of the fingerprints expert [PW9] was satisfactory if judged by the aforementioned standards."***

From the evidence, PW9 testified that he had been attached to criminal records Nairobi C.I.D Headquarters, for the last 16 years,· and in 2000 he was gazetted a fingerprint expert for the purpose of testifying on fingerprint evidence in court. Thereafter, PW9 went on to lay a basis for the expert opinion, and testified that on 25th July 2005, he had received print No 8 of 2005, the suspect's prints, which was identified as right forefinger of the appellant. He requested the DCIO Kisii to supply him with the control print from the appellant which was delivered on 2nd November 2006. PW9 stated that when the prints were enlarged, and the control print was compared to the print lifted from the motor vehicle, it was found that 21 characteristics in the two prints tallied, leading him to the conclusion that the prints lifted from the motor vehicle belonged to the appellant. The evidence was not challenged by another expert or even by the appellant in the trial court and remained uncontroverted.

With regard to whether the appellant was properly identified through the fingerprint evidence in the **Mutonyi case** (Supra) which was referred to by Learned counsel for the appellant, the High Court stated that:-

***?…an expert witness who hopes to carry weight in a Court of Law, must before giving his expert opinion:***

***1. Establish by evidence that he is specially skilled in his science or art.***

***2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also from its own independent opinion by applying this criterion to***

***the facts proved.***

***3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.***

***We are satisfied that the evidence of the fingerprints expert (PW9) was satisfactory if judged by the aforementioned standards."***

And in the case of ***David Njeru Kibuthu vs Republic*** **[2005] eKLR** a similar process was followed in obtaining and testifying on fingerprint evidence and this Court stated thus,

***?….in the case of Mwendwa and Kinyua there is the additional evidence of the fingerprints provided by Chief Inspector Wilson Karani (PW9) and Sampson Maraka (PW6) who described himself as a finger print expert attached to CID headquarters in Nairobi.PW 9 described the house of the complainant for finger prints at about 10.30 am on the day of the robbery and was able to lift prints from the following places in the house:-***

***Lift No 1 Palm print found on a table in the sitting room***

***Lift No 2 Palm print found on a table in the sitting room***

***Lift No 3. Palm print found on a door in the sitting room***

***Lift No 4 Finger print found on the telephone hand (sic)***

***Lift No 5 Finger print found on the toilet cover***

***Lift No. 6 Finger print found on the toilet cistern***

***Lift No 7 Finger print found on a toilet door***

***Lift No 8 Palm print found on the table in the same bedroom***

***Lift No 9 Palm print found on a shelf in the children's bedroom***

***Lift No 10 Palm print found on a table in the children's room***.

***PW9 went on to say that he submitted these prints to the Criminal Records Office, (CRO) together with elimination of fingerprints from some suspects namely, Kibuthu, Mwenda, and Kinyua which prints had been brought to him by the OCS C.LP. Kamiti who was with him at the scene. Later, on the 25th April 1994, PW9 received a report from the C.R.0 which showed that Lift No.2 was identical with the fingerprints of Kinyua, Lift No 4 and 8 were identical with those of Mwendwa. Lift No 9 was that of Dr. Mustaq the complainant.***

***This evidence was accepted by both the trial court and the superior court as showing without any doubt that Mwendwa and Kinyua had been in the house of the complainant and that there was no evidence that either of them had either been in or near the house on any previous occasion. We are satisfied with the fingerprint evidence that they were both in the house on the night of the robbery and were indeed part of the gang which robbed the complainants."***

From the evidence, when we consider that requisite standard to be applied in admitting the evidence of expert witnesses, we are satisfied that PW9 was a qualified and experienced, and was a fingerprint expert duly authorized to provide fingerprint evidence to the court, in the instant this case. Additionally, when the laid down principles are applied to the evidence in the instant case, it is clear that, the appellant robbed the subject motor vehicle from the complainant on the night of the robbery, and when it was recovered abandoned the next morning, the appellant's fingerprints were found on the top of the cabin and

on the windscreen of the motor vehicle. The appellant did not provide any explanation as to why his fingerprints were found on the stolen motor vehicle, which further pointed to the appellant as one of the robbers, having regard to **Section 111 of the Evidence Act**, where the burden of proof is placed upon the appellant to explain how the fingerprints came to be on the complainant's motor vehicle, particularly where such facts would be well within his knowledge.

Turning to the issue of the difference in make of the stolen motor vehicle, where PW 7 had indicated that the subject motor vehicle was a Datsun, while PW 10 had described it as a Toyota, Mr. Amondi contended that such an inconsistency, was significant and questioned the credibility of the evidence.

We have considered the difference in the description of the stolen motor vehicle, and from the record, we find the discrepancy to be minor and inconsequential to the main issue which was that, the appellant robbed the complainant of the subject motor vehicle, where his finger prints were found. Furthermore, it has not been shown that the minor inconsistency was sufficient to dislodge the evidence, so as to render the prosecution's case unsafe. We therefore consider this issue to be without merit.

On the question of whether, there had been tampered with the fingerprints, from the evidence, this was not raised in the trial court and therefore we consider this to be an afterthought.

For the aforestated reasons, we find no reason to interfere with the concurrent findings of the two courts below, and we find that the appellant's appeal is without merit, and we order that the same be and is hereby dismissed. We so order.

**DATED and delivered at Kisumu this 2nd day of May, 2014.**

**J.W. ONYANGO OTIENO**

**…….**

**JUDGE OF APPEAL**

**P.O. KIAGE**

**……**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**……**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**