IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MUSINGA & M'INOTI JJ.A.)

CRIMINAL APPEAL NO. 281 OF 2007

BETWEEN

GEORGE KAMAU MUHIA...APPELLANT

AND

REPUBLIC..RESPONDENT

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

at Nairobi (Ojwang and Dulu, JJ) dated 10th July, 2007

in

H.C.CR.A. NO. 619 OF 2007

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<u>JUDGMENT OF THE COURT</u>

The appellant, ***George Kamau Muhia***, was charged on 12th August, 2004 before the Principal Magistrate's Court, Kikuyu, jointly with ***Daniel Macharia Mwangi*** and ***Ndung'u Mburu Nungari***, with robbery with violence contrary to ***section 296 (2) of the Penal Code***, Cap 63 Laws of Kenya. The particulars of the offence were that on 6th August, 2004 at Dagoretti, Central Province, jointly with others not before the court, and while armed with dangerous weapons, namely knives and axes, they robbed ***Samuel Kamau Ngugi*** of a Motorolla T 190 mobile phone, a Casio wrist watch, a wallet containing a national identity card and Kshs.500/- all valued at Kshs.9,500/-, and at or immediately before or immediately after the time of the said robbery, they used actual violence on the said ***Samuel Kamau Ngugi***.

The main facts of this appeal, as established by the evidence that was adduced by the prosecution, are that on 6th August 2004, at about 7.00 pm, ***Stephen Kamau Ngugi (PW2),*** was at Dagoretti stage when he was attacked by a group of people, among them the appellant. One of the attackers was armed with an axe, which he used to hit ***PW2*** on the right elbow. In the course of the robbery, the appellant held ***PW2*** by the neck and struggled with him for about 4 minutes, during which time ***PW2*** bit the appellant on his thumb. The attackers then robbed ***PW2*** of the properties specified above, threw him into a ditch and fled.

The lighting at the scene of the robbery was provided by the full headlights of a Nissan *Matatu* motor

vehicle which was parked barely three meters away. ***Yakub Mutua (PW3)*** testified that when he saw ***PW2*** being attacked by a group of people, he switched on the full lights of his *Matatu* vehicle and hooted. He could clearly see ***PW2***, who he knew as his client. Among the attackers, he was able to identify the appellant, whom he had known as a watchman for a period of 6 months before the robbery.

On the same day, ***PW2*** reported the robbery at the ***Dagoretti Centre Police Post.*** When he visited the police post the next day, he found that the appellant had been arrested by the police and that he had an injury on the left thumb. The appellant then led the police to his accomplices, ***Daniel Macharia Mwangi*** and ***Ndung'u Mburu Nungari***, who were also arrested and charged jointly with the appellant. None of the stolen property was recovered from the accused persons.

The evidence of ***Dr. G. K. Mwaura (PW1)*** was that on 14th August 2004, he examined the appellant and found that he had a tooth bite on his left thumb, resulting in loss of the nail. On 9th August, 2004, the doctor also examined ***PW2*** and found he had tender and painful injuries on his right elbow and at the back of the head. He expressed the opinion that the injuries were inflicted by a blunt object and classified the same as harm.

In his defence, the appellant gave an unsworn statement and called no witness. The substance of his defence was that he had spent 9th August 2004 working and that he had gone to Dagoretti only at 9 p.m. He was arrested on the following day as he went to work.

On 17th November, 2004, the appellant was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. His co accused were acquitted after the trial court found that they had not been properly identified.

Aggrieved by that verdict, the appellant filed an appeal in the High Court contending that he had not been positively identified; that the prosecution evidence regarding his injured thumb was contradictory; that the evidence of ***PW3*** was inadmissible by reason that ***PW2*** was his client; and that his defence was not adequately considered. On 10th July 2007, the High Court dismissed the appeal and upheld both the conviction and sentence, thus precipitating this appeal.

The appeal before us is premised on four grounds, namely that the appellant was not properly identified; that the prosecution did not prove the ingredients of the offence charged; that the first appellate court had failed to re-evaluate and analyse the evidence as it was duty bound to do; and that the appellant's defence was not adequately considered.

Before us, ***Mr. Obok***, learned counsel who appeared for the appellant, argued all the grounds of appeal globally. Learned counsel submitted that the appellant was not properly identified because the offence was committed at 7.00 p.m. and the circumstances were not conducive for proper identification. Counsel argued further that ***PW2*** did not know the person whose thumb he had bitten and that the doctor, ***PW1***, had not identified the appellant in court. Taken as a whole, counsel submitted, the circumstances did not favour positive identification of the appellant and it was therefore desirable that an identification parade be conducted, which was not done.

Counsel next latched onto what he saw as contradictions in the prosecution case, so as to advance the argument that the case against the appellant was not proved beyond reasonable doubt. He submitted that from the appellant's evidence, he had bitten the robber's *right* thumb, while from the evidence of ***PW1*** the appellant's injury was on the *left* thumb. Counsel also submitted that there was contradiction between the evidence of ***PW2*** who said that he had been attacked by *seven* people and ***PW3*** who testified that he saw *four* people attacking the appellant.

Mr Obok submitted that the first appellate court had not, or had not properly re-evaluated and analyzed the evidence before the trial court so as to reach its own independent conclusions, and that had it done so, it would have noted the contradictions and concluded that the prosecution case not proved beyond reasonable doubt.

Ms Murungi, learned ***Senior Assistant Deputy Public Prosecutor***, who appeared for the respondent opposed the appeal and supported the conviction and sentence. She submitted that the appellant was properly identified in the glare of the full lights from the Nissan *Matatu*. In addition, counsel contended, the appellant was recognised by ***PW3*** who knew him before the robbery. In counsel's view, in the circumstances of this case, there was no need to conduct an identification parade. As for the contradictions in the evidence, ***Ms Murungi*** submitted that they were not material, but mere curable discrepancies.

We have perused the record of the trial court and that of the first appellate court, the two judgements and we have considered the submissions by counsel, who regrettably did not cite any authority in support of their respective positions. Be that as it may, it is now well settled that the court has a duty to examine with great care and attention evidence of identification where it is relied upon to found a conviction. In ***<u>REPUBLIC VS. ERIA SEBWATO</u> (1960) EA 174,*** this Court stated as follows on the issue.

> ***"…When evidence alleged to implicate an accused is entirely on identification, that evidence must be absolutely watertight to justify a conviction..."***

And in ***<u>WAMUNGA VS REPUBLIC</u>*** **(1989) KLR 424, 426,** this Court expressed the same view in these terms:

> ***"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

While it is true that the offence was committed at 7.00 pm, both the trial court and the first appellate court were conscious of their duty to consider the evidence of identification with care. The two courts considered the source of the lighting, namely the full lights of the *Matatu* that was parked barely 3 meters from the scene of the robbery, and were satisfied that it was sufficient illumination to identify the appellant. More importantly, the courts below considered the evidence of ***PW3,*** who from the *Matatu* was able to recognise the appellant. The critical evidence of ***PW3*** was that he had known the appellant as a watchman for 6 months before the robbery. The first appellate court held, correctly in our view, that the evidence of ***PW3*** was evidence of recognition, which is more reliable than evidence of identification.

In ***<u>ANJONONI & OTHERS VS REPUBLIC</u>*** **(1976-80) 1 KLR, 1566, 1568,** this Court distinguished recognition from identification in the following terms:

> ***"This was, however, a case of recognition, not identification, of the assailants; 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."***

If there ever was any doubt about the identification of the appellant as one of the robbers, that doubt was removed by the circumstantial evidence of the appellant's injured thumb. That evidence, taken together with the evidence of ***PW1*** that he had bitten the thumb of one of the robbers, and that of ***PW2,*** that he had recognised the appellant from the full lights of his *Matatu* as one of the robbers, renders the conviction of the appellant safe. In ***<u>ABDALLA BIN WENDO V R</u>*** **(1953) 20 EACA 166**, the former Court of Appeal for Eastern Africa expressed itself as follows, on how evidence of identification can be bolstered by circumstantial evidence:

> ***"Subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule 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. <u>In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence or identification, although based on</u>***

the testimony of a single witness, can safely be accepted as free from the possibility of error." (Emphasis added).

In the circumstances of this appeal, we do not think that there is any substance in the complaint that an identification parade was not held. It would have served no purpose to conduct an identification parade since ***PW3*** had already recognised the appellant as a person he had known for at least 6 months. In ***GITHINJIVS REPUBLIC (1970) EA 231,*** the High Court held that:

> ***"Once a witness knows who the suspect is, an identification parade is valueless."***

In ***AJODE VS REPUBLIC*** **(2004) 2 KLR 81,** this Court approved the same reasoning in the following words:

> ***"Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition."*** (Emphasis added).

The appellant's complaint that the prosecution evidence was undermined by inconsistencies pertaining to which of his thumbs was injured and the number of robbers who had attacked ***PW1***, is with due respect, not material contradiction or discrepancy, which would weaken the evidence of the prosecution, taken as a whole. In the circumstances of the robbery, it was possible for ***PW1*** to mistake which of the appellant's thumb he had bitten. The medical evidence as well as the evidence of ***PC Josephat Muhia, PW5,*** who arrested the appellant, was consistent that the injury was on the appellant's left thumb. In the opinion of ***PW1***, that injury was consistent with a teeth bite. Nor do we think, in the circumstances of this appeal, that much turns on whether the appellant was robbed by *seven* or *four* robbers. As was stated by this Court in ***JOSEPH MAINA MWANGI VS REPUBLIC, Civil Appeal No. 73 of 1992:***

> ***"An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code, viz, whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."***

We are also satisfied that the first appellate court carefully re-evaluated the evidence before the trial court and arrived at its own independent conclusions. The judgment shows that the court reminded itself of the duty it bore to re-evaluate the evidence and even cited in that regard the case of ***OKENO VS REPUBLIC (1972) EA 32***. The court further warned itself that the evidence of identification had to be watertight and cited the case of ***KIARIE VS REPUBLIC (1984) KLR 739*** for that proposition.

Ultimately, we find no basis for interfering with the concurrent findings of the trial court and the first appellate court. The appeal lacks merit and the same is hereby dismissed.

Dated and delivered at Nairobi this 13th day of June, 2014

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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