IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, MUSINGA & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 643 OF 2010

BETWEEN

BENSON MADARA ……..…….....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya atNairobi (Ojwang & Dulu, JJ) dated 6th March, 2008

in

HCCR.A NO. 611 OF 2004)

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JUDGMENT OF THE COURT

This is a second appeal by ***BENSON MADARA***, the appellant herein, against the conviction and death sentence for robbery with violence contrary to ***Section 296 (2) of the Penal Code*** upheld by the Judge of the High Court *[Ojwang J {as he then was} and Dulu, J]*, sitting as the first appellate court. The appeal originates from an original trial, conviction and sentence in the Chief Magistrate's Court at Kibera, Criminal Cr No. 174 of 2004.

The particulars of the charge were that on 4th January, 2004, at Dam Village, Kangemi in Nairobi, the appellant acting jointly with others not before the court and while armed with a pistol, robbed ***DANIEL NDIRANGU MWANGI*** of a Siemens C36 mobile phone and cash in the sum of KShs.7,000/= all valued at KShs.12,000/= and at or immediately before or immediately after the time of such robbery, used actual violence upon the said Daniel Ndirangu Mwangi.

The appellant denied the charge and in the trial, the prosecution called a total of six witnesses. The appellant gave unsworn evidence and did not call any witnesses. The trial court considered the evidence and found that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him to suffer death as by law provided.

Aggrieved by the decision of the trial court, the appellant filed an appeal in the High Court. The High Court considered the evidence tendered before the trial court and concluded that the prosecution had proved its case beyond reasonable doubt. The learned judges upheld the appellant's conviction and

sentence.

Aggrieved by the High Court's decision, the appellant preffered this appeal.

Submissions by counsel

At the hearing of the appeal, the appellant was represented by learned counsel, Ms Betty Rashid while the respondent was represented by learned counsel, Ms Jacinta Nyamosi, the Assistant Director of Public Prosecutions, [ADPP]. Ms Rashid relied on the Supplementary Memorandum of Appeal filed on 15th May, 2013, which raises the following grounds of appeal: that the learned Judges of the High Court erred in law by; failing to adequately analyse and evaluate all the evidence on record to arrive at their own conclusion; failing to observe the contradictions in the evidence tendered by the witnesses; and in upholding the conviction and the sentence when the particulars of the charge sheet were defective and without positive identification of the appellant.

Ms Rashid submitted that her main ground of appeal is the issue of identification. She argued that according to evidence, the incident took place at about 8.30 pm in a rural setting and there was no electric lighting on the road. Counsel further submitted that the record shows that there were many people walking on the road and the appellant testified that he saw people running *„helter skelter?* and was thereafter, arrested. Counsel submitted that the appellant was not at the ***locus in quo*** and that upon search, nothing was recovered from him.

Ms Rashid submitted that the evidence was that there was light from a pressure lamp but there was no evidence to indicate the brightness of the lamp or its location in relation to the *kiosk* and whether there was enough light to light up the *kiosk*. Counsel submitted that there was not enough light for the witnesses to identify the appellant.

Ms Rashid further submitted that the vital contradiction between two witnesses who claimed to be at the ***locus in quo*** goes to show that the lighting was not adequate for them to say that they identified the appellant or that he was at the ***locus in quo*****.** Counsel submitted that it was easy to pick on the appellant as he had been arrested by PW2. She further submitted that there were many people on the road going about their own business. Regarding the wooden cash box termed as "home bank", Ms Rashid submitted that there was a misconception that it was recovered from the appellant or that he threw it down.

She pointed to the evidence of PW2 [the arresting officer] who testified that he did not recover anything from the appellant.

Ms Rashid submitted that from the evidence of PW2, the appellant was arrested by someone who was not at the ***locus in quo,*** for the sole reason that he was running. She also submitted that the assertion that the "home bank" was recovered from the appellant is a misdirection as no witness is on record saying so. She submitted that this was a misdirection on the part of the trial court. Counsel further submitted that PW1, PW2, PW3 and PW4 testified that they did not know the appellant before the incident on 4th January, 2006. She submitted that due to the inadequate lighting the witnesses could easily have mistaken the appellant for someone else.

Regarding the appellant's alibi defence, Ms Rashid relied on the authority of ***PETER SANGURA MABAL V R, CR NO. 32 OF 2004,*** which held that:

> ***"Where the appellant raised the defence of alibi – the prosecution has the duty to thoroughly investigate and prove the alibi put forward by the appellant."***

Mrs Rashid urged us to allow the appeal.

The ADPP, Ms Nyamosi, opposed the appeal. On the alibi defence, she submitted that this should have been tested and was dealt with by the prosecution who placed the appellant in the ***locus in quo*** though the evidence of PW1, PW2, PW3 and PW4 who all testified that the appellant was at the ***locus in quo*****.**

On the issue that the trial court misdirected itself regarding the home bank, Ms Nyamosi submitted that PW3's evidence was very clear when she testified that the appellant dropped the "home bank" when he ran away. She submitted that this appeal turns on the issue of identification and that PW1 clearly stated that he was able to identify the appellant and graphically described the role that he played in the robbery. Ms Nyamosi submitted that there was no doubt regarding the identification of the appellant as one of the assailants who took part in the robbery with violence on the material night.

Ms Nyamosi pointed out that PW3 testified that there was light from a pressure lamp and that she was able to identify the appellant. PW4 also testified that she was able to identify the appellant and took part in the chase which led to his arrest and that she never lost sight of the appellant. Ms Nyamosi submitted that from the evidence, it was clear the time between the robbery incident and the arrest was very short. PW4 confirmed that she did not lie down as directed by the robbers and she was, therefore, able to clearly see and identify the appellant. Ms Nyamosi urged us to dismiss the appeal as the findings of the two courts below could not be faulted.

Analysis and determination

This is a second appeal and by dint of ***Section 361 (1) (a) of the Criminal Procedure Code,*** this Court has jurisdiction to consider only matters of law. It is also trite law that a second appellate court cannot interfere with the concurrent findings of the two courts below unless such findings are based on no evidence. This Court stated this principle in ***KARINGO V R, [1982] KLR 213*** at page 219 in the following words:

> ***"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."***

We have carefully considered the record of appeal, the rival submissions by counsel by either side, principles of case law relied upon by either side and we proceed to make our determination as hereunder.

As the determination of this appeal turns mainly on the question of identification, a brief summary of the prosecution evidence is imperative.

The brief facts of the case are that, on 4th January, 2004, at about 8.30 pm the complainant, ***Daniel Ndirangu Mwangi,*** **[PW1],** a shop-keeper at Dam Village, Kangemi, was in his shop with his wife and a neighbour, ***Jane Wanjiru Gathii.*** Two people entered the shop through the open door while three remained outside. One of the two who entered the shop drew a pistol, and ordered those in the shop not to move. The assailant who had a pistol, was wearing a whitish shirt and a cap. When the two men ordered those in the shop to lie down, PW1 sought to know the reason, and, for this, he was hit on the head with the pistol. PW1, his wife and Jane Wanjiru Gathii lay down. In the meantime, the two men inside the shop searched the shop's cash-box, and grabbed KShs.4,000/=, and also took a separate wooden box [home bank] in which PW1 had kept KShs.3,000/=. The assailants grabbed PW1's mobile phone, a Siemens C-36, and took off. PW1 stood up, raised alarm by screaming and followed the thugs. He chased after one of them up to a distance of about 1km away. One of the assailants was arrested by security guards. PW1 got to the place where the arrest had been effected and indicated that the man arrested was one of the robbers and was one of the two who entered the shop. PW1 testified that the man arrested was wearing no mask and he was, therefore, able to observe his face. He stated there had been a pressure lamp inside the shop, which enabled him to see that the man arrested was not the one who had the pistol, but was the man who took his money. PW1 testified that the man arrested was the one urging him to respond fast to the demands of the robbers, and was the one who was now under trial [the appellant herein]. PW1 stated that the man arrested was handed over to Police Officers at Kabete Police Station. The security guards who had arrested the appellant herein told PW1 that when arresting the appellant, the appellant dumped a "home bank" near where he was arrested.

According to the evidence of Francis Ogalo, (PW2), a security guard, he knew the appellant herein. He

stated that he was on duty on 4th January, 2004 when he heard people screaming and went to the gate to see what was happening. He saw five people running away, and three others chasing them. He held one of those being chased, by the jacket and on realizing that the man had a toy pistol, he pressed on his security remote-control device, got back up support and the appellant was arrested. PW1 testified that it was at the point of arrest, that a "home bank" was recovered. PW1 arrived when PW2 had already arrested the appellant and he identified the appellant as one of those who had robbed him.

According to the evidence of Fridah Nkiathe, (PW3), on the material day, she was in the shop with PW1 and a friend, watching television, when several people entered the shop and ordered all those in the shop to lie down. Two men, one brandishing a gun, entered the shop leaving three others outside. She testified that she was hit by one of assailants, who ordered all of those present to lie down. PW3 testified that the attackers took money, a mobile phone and a "home bank". She further testified that when the attackers started pulling at the television, her husband [PW1] screamed in protest and the assailants ran away. PW3 testified that she was not able to identify some of the attackers but stated that the appellant was one of the assailants who stood outside the shop. She added that she did not see the appellant well enough to tell what he was carrying, as she was lying down. She testified further that PW1 and a neighbour chased after the assailant as they were running away. She identified the wooden box in court as the "home bank" that was stolen from the shop. She testified that she saw one of the attackers hit PW1 with a pistol. On cross examination, PW3 testified that the appellant had been standing in the shop, and had been coming in and going out of the shop, while two of the assailants remained in the shop for the duration of the robbery attack. PW3 further testified that she had been forced to lie down and from that position she was able to see the appellant's face. She added that there was a pressure lamp in the shop which lit both the inside and the outside of the shop and that the appellant was wearing a brown shirt at the time of robbery.

Jane Wanjiru (PW4), was in PW1's shop on the material day and time and was watching television. She testified that a young man entered the shop and ordered those in the shop to lie down and surrender all their money. She testified that the assailant was holding something which looked like a gun. She testified that the shop was lit when two of the intruders entered the shop and that she did not lie down but the assailants did not notice as they were pursuing PW1 with demands and she witnessed PW1 being hit on the head by the assailants. She testified that the assailants took money and a box and ran away. She further testified that three of the assailants were standing at the window of the shop, issuing threats while two assailants carried out the robbery inside the shop. PW4 further testified that she saw the three assailants among them, the appellant. She added that she screamed and the intruders ran away and she and others followed them in hot pursuit; that they were assisted in the arrest by security personnel who arrested the appellant. She further testified that she pointed out the appellant to PW2 and the "home bank" was found close to where the appellant was arrested.

On cross examination, PW4 stated that she followed the appellant and was present when he was being arrested. That she identified the clothes the appellant was wearing, the same clothes that the appellant was wearing in court (a brown shirt).

P.C. Samuel Ireri, (PW5), of Kabete Police Station, testified that on 4th January, 2004 at 8.00 pm the appellant was taken in by security guards, PW1 and members of the public. PW1 reported that the appellant was arrested after stealing from his shop. The appellant was taken to the police station with exhibits and a wooden box which was said to belong to PW1. PW5 re-arrested the appellant.

Dr. Zephaniah Kamau (PW6), a Nairobi Area Police Surgeon, testified that he examined PW1 on 10th January, 2004, six days after the robbery incident. On his upper part of PW1*'s* head, PW6 found a scar which in his opinion had been caused by a blunt object and the same fell within the category of *"harm"*.

The record shows that PW1 was able to identify the appellant and he also described the role that the appellant played in the robbery. PW3's evidence is clear that the pressure lamp light was sufficient and that she was able to identify the appellant from the clothes he was wearing.

On the issue of identification, the trial court in its judgment stated that:

> ***"Having considered all the above, I am satisfied that the accused person's identification was positive. He was identified by 3 people who saw him and there was light that would have made the witnesses see him. His arrest as he ran away also goes to give more support to the prosecution case. PW2 said that he had no struggle with accused and another who had a toy gun, showing again that accused was in the group of robbers. Accused claims therefore, that he was mistaken to [sic] the thief is thus dismissed as untruthful."***

On the issue of identification, the High Court in its judgment stated that:

> ***"This court has found no shortcoming with PW1's evidence of identification, and the evidence of other witnesses is substantially consistent with it. The evidence of the medical doctor (PW6) further fortified that of PW1, PW3 and PW4 who saw a member of the gang hitting PW1 on the head with a gun. Apart from the reliable evidence of PW1, PW3 and PW4 who, in light emitted by a pressure lamp, saw the appellant as one of the robbers, the chase- and-arrest scenario, in which the alarm led PW2 to effect arrest, and several witnesses then soon arrived to identify the appellant as one of the robbers, provides a powerful corroborative circumstances which, when viewed together tells only a true tale: that the appellant was one of the robbers and was in flight from the*** *locus in quo****. This is proof, in our opinion, that the appellant was well identified as one of the five robbers of [sic] the material night."***

On the issue of identification, we are guided by the case of ***CLEOPHAS OTIENO WAMUNGA V R, [1989] KLR 424*** where this Court set out the

guidelines as follows:

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.***

We are alive to the requirements of the law on a satisfactory identification of a person as the perpetrator of a crime. The evidence of visual identification must be carefully tested so as to avoid a miscarriage of justice. See ***KELVIN KIMATHI NYAGA & OTHERS V R, NYR CR NOS. 109 & 116 OF 2012.***

Evidence on identification must be watertight to result in a conviction. See ***RORIA V R, (1967) EA 585.***

With the above legal principles for guidance, we proceed to consider the evidence that was adduced in the trial court.

PW1, PW3 and PW4 testified that they had clearly seen the appellant committing the crime of robbery with violence, with others not before court. The role that the appellant played in the robbery was described during the robbery. PW4 testified that there was light in the shop and that she did not lie down as ordered by the robbers and she was clearly able to see the appellant in the ***locus in quo.*** PW4 did not lose sight of the appellant and was involved in the chase and arrest that apprehended the appellant. We are satisfied that PW1, PW3 and PW4 clearly identified the appellant and that PW2 arrested him with the assistance of PW1 and PW4.

On the issue of alibi defence, we find that the appellant was positively identified by PW1, PW3 and PW4 as one of the robbers.

In the recent case of ***VICTOR MWENDWA MULINGE V R, [2014] eKLR***

this Court had this to say on the issue 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 R, [1983] KLR 501* ***… 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 the present appeal, the question is: did the alibi defence raise a reasonable doubt in the prosecution case? From the facts on record it appears that the prosecution made a strong and watertight case against the appellant.

The evidence of the prosecution witnesses corroborate each other and form a clear and logical sequence of events establishing the appellant's guilt.

Taking all the facts into consideration, it is our opinion that the alibi defence did not shake the prosecution's case. The two courts below cannot be faulted for holding as they did.

Whatever differences there may have been in the prosecution case, consisting of minor discrepancies and inconsistencies, they were not of a material nature and did not dilute or weaken the probative value of the evidence on record.

The findings of the trial court and the High Court were based on sound evidence. In the circumstances, there is no basis for interfering with these findings. Accordingly, we find that this appeal is devoid of merit and dismiss it in its entirety.

Dated and delivered at Nairobi this 31st day of July, 2014.

E. M. GITHINJI

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR