REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 59 OF 2014

BEWTEEN

MALI MALI OLE MOIYARE ……...……...…… APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Sergon &

Makhandia, JJ.) dated 13th January, 2010

in

H.C.CR.A No. 304 of 2007)

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JUDGMENT OF THE COURT

1. ***Mali Mali Ole Moiyare,*** the appellant, was charged with the offence of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code,*** Chapter 63, Laws of Kenya**,** in the Senior Principal Magistrate's Court at Nanyuki. The particulars of the charge were that on 5th October, 2006 at Nanyuki Township in Laikipia District within Rift Valley Province, the appellant jointly with others not before the court robbed Lestiman Kiloku of cash Kshs. 35,000/= and/or immediately before or immediately after the time of such robbery wounded the said Lestiman Kiloku.
2. The appellant pleaded not guilty to the charge. The prosecution called a total of five witnesses. It was the prosecution's case that on 4th October, 2006 PW1, Lestiman Kiloku (Lestiman), in the company of PW3, Leyan Meshame (Leyan), travelled from Doldol to Nanyuki to sell Lestiman's cattle. Lestiman sold two cows for Kshs. 38,000/=; he spent some of the money and was left with a balance of Kshs. 35,000/=. Thereafter, they rented a room at a lodging in Lenana House in Nanyuki. While Lestiman and Leyan were chewing *miraa* in a bar, the appellant joined them. The appellant was known to both Lestiman and Leyan. Lestiman used to see the appellant in Doldol while the appellant was a friend to Leyan. After a while the appellant requested Lestiman and Leyan to allow him to sleep in the room they had rented. Lestiman and Leyan agreed and the three of them slept in the said room. In the morning they all woke up and headed to the Doldol stage.

Leyan was left at the stage to guard their luggage while the appellant took Lestiman to buy flour.

3. Lestiman testified that while they were walking, the appellant suddenly produced a rungu and hit him on the face, shoulder, head and on the left arm. Lestiman lost consciousness. While at the stage, Leyan heard screams near the flour mills and he ran there. He found Lestiman lying down unconscious bleeding from the nose and head. Upon regaining consciousness, Lestiman noticed that the Kshs. 35,000/= which was in his coat was missing. Leyan testified that Lestiman told him that it was the appellant in the company of four others that had robbed him. They reported the incident to the police.
4. On 11th October, 2006 while Lestiman was in Nanyuki town he spotted the appellant at Doldol stage and informed police officers that were patrolling the area that the appellant had robbed him. The appellant was arrested, arraigned in court and charged with the offence of robbery with violence.
5. In his defence, the appellant gave a sworn statement and called two witnesses. He testified that on date of his arrest he went to Nanyuki on his way to Nairobi. While at the Nairobi stage in Nanyuki he was arrested and charged with the aforementioned offence. He denied committing the offence. He maintained that he did not know Lestiman and Leyan. DW2, Tinyima Kipei, and DW3 , Dickson Lolobobokuboku , testified that the appellant left Doldol on 10th October, 2006 to travel to Nairobi to follow up on his pension. However, both witnesses were not able to account for the whereabouts of the appellant on 5th October, 2006.
6. Upon considering the evidence on record, the trial court convicted the appellant and sentenced him to death. Aggrieved with the decision, the appellant preferred an appeal in the High Court. The High Court (Sergon & Makhandia, JJ.) vide a judgment dated 13th January, 2010 dismissed the appeal. It is that decision that has provoked this second appeal based on the seven grounds which can be aptly summarized as follows:-

- ***The learned Judges erred by upholding the lower court findings without making a finding that the charge sheet was defective in its particulars of the offence under Section 296(2) of the Penal Code.***

- ***The learned Judges erred by upholding the lower court findings without making a finding that PW1's statement in court was that he was attacked by a single person contrary to the particulars of the charge sheet.***

- ***The learned Judges erred by upholding the lower court findings which were based on a single identifying witness.***

- ***The learned Judges erred by failing to find that the prosecution had failed to call crucial witnesses.***

- ***The learned Judges erred by upholding the lower court findings by rejecting the appellant's defence alibi.***

7. Mr. Ng'ang'a, learned counsel for the appellant, submitted that the issue for determination was whether the offence was proved against the appellant. He argued that the offence was not proved beyond reasonable doubt. This is because there was no evidence from an independent witness as to what occurred. According to Mr. Ng'ang'a, it was not possible that no independent witness witnessed the incident which allegedly occurred in broad daylight involving six people. He went on further to state that if the complainant knew where the appellant lived he would have led the police to his house. He submitted that the two lower courts did not consider the appellant's defence.
8. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal, submitted that the prosecution's case was proved to the required standard. He submitted that the complainant was attacked and robbed in broad day light and was able to identify his assailant. He went on to further state that the offence could be proved by any number of witnesses – that it was not the number of witnesses, but the quality of evidence that mattered. Mr. Kaigai submitted that once the complainant regained consciousness he identified the appellant as one of his attackers in his initial

report. He argued that the two lower courts considered the appellant's defence and rejected the same.

9. By dint of ***Section 361*** of the ***Criminal Procedure Code*** we are restricted to only consider matters of law in this second appeal. In ***Chemagong -vs- Republic (1984) KLR 213*** at page 219 this Court held,

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)."***

10. It was the appellant's contention that there were discrepancies between the charge sheet and the prosecution's case. Firstly, the appellant contended that the particulars in the charge sheet did not indicate whether the robbers were armed and if so, what kind of weapons they were armed with. Secondly, the appellant contended that the charge sheet indicated that Lestiman was attacked by a number of robbers while in his own evidence, Lestiman testified he was attacked by the appellant. This court has decided in several cases that discrepancies are not considered material in a case if they do not cause prejudice to the appellant or if it is inconsequential to the conviction and or sentence. These kind of discrepancies are considered curable under ***Section 382*** of the ***Criminal Procedure Code*** which provides,

> "***Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

11. The test for making a decision on cases with discrepancies was established in ***Joseph Maina Mwangi -vs- Republic - Criminal Appeal No. 73 of 1993*** wherein this Court held: -

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of 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 sentences."***

In this case the aforementioned discrepancies are curable under Section 382 of the Criminal Procedure Code. This is because during the plea taking and trial, it was clear to the appellant the nature of the offence he was charged with. From the evidence it was clear that Lestiman was attacked by four robbers and the appellant hit him with a rungu severally until he lost consciousness. Further, the discrepancies were inconsequential to the appellant's conviction.

12. Both lower courts made concurrent findings of fact that the appellant was positively identified by Lestiman as his attacker. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. See this Court's decision in ***John Njoroge Mwangi -vs- Republic - Criminal Appeal No. 55 of 2007***. The evidence on what transpired was given by Lestiman; there was no other independent eye witness account. It was the appellant's contention that the learned Judges erred in relying on the evidence of a single witness. This Court has stated severally that there is no particular number of witnesses who are required for

proof of any fact unless the law so requires. See ***Section 143*** of the ***Evidence Act.*** In the well-known case of ***Abdallah Bin Wendoh and another –vs- Regina, (1953) 20 EACA 166***, the predecessor to this Court had this to say:-

> ***"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness <u>but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification</u>, especially when it is known that the conditions favouring a correct identification were difficult. 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 of identification, although based on testimony of a single witness, can safely be accepted as free from possibility of error." Emphasis added.***

Further, in the case of ***Kariuki Njiru and 7 others –vs- Republic- Criminal Appeal No. 6 of 2001***, this Court stated:-

> ***"The law on identification is well settled, and this Court has from time to time said that <u>the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error</u>. The surrounding circumstances must be considered (See R. vs. Turnbull (1976) 63 Civil Appeal R.132). Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all***.

13. How then does a court test the evidence of a single witness with the greatest care? In ***Benson Mugo Mwangi –vs- Republic – Criminal Appeal No. 238 of 2008,*** this Court expressed itself as follows:-

> ***"Thus on the issue of identification, provided the trial court tests the evidence of a single witness with the greatest care, a conviction can be based on the evidence of a single witness. What then is meant by the clause "testing the evidence of a single witness with the greatest care"? In our view the first consideration in testing the evidence of a single witness is to consider as to whether the witness is honest and reliable. The integrity of the witness is of paramount importance before a court directs its mind to his evidence. If the witness gives the impression at the time he is testifying that he is not an honest witness or is a witness of doubtful integrity, then, without much a do, the court cannot rely on his evidence to convict. This Court had been faced with such a situation in the case of Ndungu Kimanyi –vs- Republic, (1979) KLR 282. It laid down the minimum standards of a witness upon whose evidence the court can rely to enter a conviction as follows:-***
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> > ***"We lay down the minimum standard as follow;- The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."***
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> ***Once the court is certain in its mind that the witness is honest, the court must proceed to consider whether the circumstances prevailing at the time and place of the incident favoured proper identification. The matters to be considered are matters such as the time when the offences took place, i.e. whether it was at night or in broad daylight."***

14. In this case both lower courts found Lestiman to be a truthful witness and we see no reason to interfere with the same. We concur with the following findings of the High Court:-

"There is no doubt that the incident took place in broad daylight. P.W.1 had spent more than 10 hours with the appellant chewing miraa. The appellant was introduced to P.W.1 by P.W.3 who was well known to the appellant. We believe the evidence of PW1 and PW3 that the appellant had escorted the complainant (PW1) to buy cheap posho meal. We are satisfied that the learned Senior Principal Magistrate properly received the evidence of PW1 as a single identifying witness upon warning herself. We are also unable to fault her on the manner she received the evidence. We are convinced that the appellant was placed at the scene of crime. Having come to the conclusion that the appellant was with PW1 and PW3 the night of 4th October, 2006 and the morning of 5th October, 2006, we hold that the appellant's conduct of disappearing after escorting PW1 is consistent with the behaviour of a person with guilty conscience."

Further, Lestiman identified the appellant as one of his attackers in his initial report. We find that the identification of the appellant was positive and free from error.

15. We have perused the record and cannot help but note that the trial court considered the appellant's defence. On the issue of alibi, we find that it carries no weight. This is because the appellant's witnesses only gave an account of where the appellant was going on 10th October, 2006, that is to follow up on his pension benefits in Nairobi. The appellant was arrested on 10th October, 2006. Both witnesses did not give an account of the whereabouts of the appellant on the date of the incident on 5th October, 2006. Consequently, no defence of alibi arises.
16. The upshot of the foregoing is that the appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 30th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR