IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO.AZANGALALA & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 222 OF 2011

BETWEEN

KEVIN OTIENO MULECHI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega (Chitembwe & Thuranira, JJ.) dated 8th November, 2012 In H.C.CR.A. NO. 226 OF 2010)

JUDGMENT OF THE COURT

The night of 8th/9th November, 2009 is a night that will ever be remembered by ***Fredrick Njehu Kiongera (PWl) (Fredrick), Joseph Njoroge (PW2) (Joseph)*** and ***Joseph Likari Kungu (PW3) (Kungu)*** in their lives. On that night between 9pm and 10pm, Fredrick and Kungu boarded a bus No. KBD 366P Nissan UD with a nickname UGWE travelling from Nairobi to Kakamega. Joseph was the driver of that bus. There were other travellers in the same bus as it was a public service vehicle, Joseph, who was the driver puts the number of all passengers at 60 as at the time the bus left Nairobi. At Kangemi, two passengers were picked and Joseph said inspection was done, personally by police or by their inspection team. The bus proceeded on its journey with no hitches and with Joseph as its driver. It stopped at Nakuru, but no passenger was picked there. Some passengers were dropped at Kericho and Kisumu whereas no passengers were picked at those stations. At Stand Kisa, Joseph was instructed to put lights on and he complied. No one alighted, but while there trouble started. Joseph says his co-driver was attacked, boxed and hit with a metal bar and then one of the attackers who sat behind Joseph commanded him to drive the bus non-stop to Mukumu. He was ordered to do that for the sake of his life and that of the family. He complied and never looked behind and thus did not identify any of the attackers neither did he get to know what weapons they had. In the meanwhile and as Joseph was driving non-stop to Mukumu, Fredrick, then a lecturer at Masinde Muliro University, who was a passenger in the same vehicle and who was seated two seats behind the driver and had been sleeping said that at about 3.00am at Chavakali, he was woken up by kicks and boxing by attackers. He was ordered, together with other passengers to move to the back of the bus. He took his bag and complied. He witnessed that as the bus was moving, one of the attackers was with the driver while four others were at the back of the bus. The attacker had a metal bar. He was ordered by one of the thugs to give him his phone and money. He was searched thoroughly and during that search, Fredrick said he saw one of the attackers very well as he was searching him. That attacker took his wallet which was in his hind trouser pocket and in which were Fredrick's ATM cards for KCB, Equity, and Cooperative Bank. He also took his ID Card and Ksh.6,000/=. Fredrick pleaded with the person not to take his

wallet and valuable documents but it was taken as the attacker threatened violence on him. Fredrick said he saw his attacker very well and identified him as the appellant. Fredrick said the ordeal lasted about thirty minutes. Kungu was then an accountant with KWFT South B. His evidence on the incident starts with the events at Mbale and was a narrative of the genesis of the entire robbery. According to him, five people stood up one of who had been sitting with him. These people ordered everyone to go behind and one went to the driver. Those thugs told all the passengers to remove all they had, ie phones, wallet and money. The person who had been sitting with him asked him to produce the phone which he *(the thug)* had seen him with, and which he had hidden in the socks. Despite the thugs persistence, the phone was not taken by him as he did not find it but they took his wallet, his ID card, Kasneb ID, his child's documents and Ksh.3,000/=. He was beaten by them. Kungu identified the appellant as the person who had sat next to him in the bus as they boarded the bus in Nairobi and as the person with whom he had had conversation while the bus was travelling from Nairobi. The thugs continued harassing the passengers upto Mukumu. They alighted at Mukumu and told the passengers to report them to the police. At about 9.30am, on 9th November, 2009 ***CPL Jadiel Odero*** *(PWS)* then based at Mudete Police Post, Vihiga District was, together with OCPD Vlhiga going to Kakamega on duty. When they reached Chavakali junction they were stopped by a driver of a matatu vehicle from Kakamega to Kisumu. On information from that driver, they stopped and together with traffic police at that junction, they arrested four of the occupants of that vehicle all of whom were seated in the middle seat with a bag between them. They took the bag as well. On checking inside the bag, they found a toy pistol, seven (7) mobile phones, four (4) wallets, two (2) jackets, one black and the other cream in colour, one (1) black marvin, one (1) shirt, one blueT shirt and one black torch. CPL Jadiel and OCPD took them to Kakamega Police Station.

On 17th November, 2009, ***IP Pauline Mwangi*** *(PW4)* conducted an Identification parade in respect of the appellant in which the appellant was positively identified by Fredrick and Kungu. The appellant, together with four others were thereafter charged with twelve counts each of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code and the appellant was further charged with an alternative charge of handling stolen property contrary to ***Section 322*** of the Penal Code in that on 13th November, 2009, along Kisumu/Kakamega road in Kakamega South District he dishonestly handled one brown wallet belonging to Fredrick Njehu knowing or having reason to believe it was stolen or unlawfully obtained. They denied all the twelve counts and the appellant further denied the alternative count, and the trial proceeded with prosecution calling five witnesses.

At the close of the prosecution's case, the trial court found no ***prima facie*** case made out against the appellant and the other four accused in respect of counts 2, 5, 6, 7, 8, 9, 10, 11 and 12 and all were acquitted and released in respect of those counts. In respect of counts 1, 3 and 4, the learned Chief Magistrate found no case to answer in respect of the other accused persons, acquitted them of the same and released them but she found that the appellant had a case to answer in respect of those three counts namely counts 1, 3 and 4. He was put on his defence in respect of those counts. The particulars of the three counts were that:

> *"1. On 9th day of November, 2009 along Kisumu/Kakamega road, between Stend Kisa and Ilesi areas of Western Province while in a bus Reg. No KBD 366P Nissan UD christened UGWE jointly with.others not before court while armed with dangerous weapons namely iron bars and imitation firearm, robbed Joseph Njoroge Ksh.SOO/= (Five hundred only) and at the time of robbery threatened to use actual violence to the said Joseph Njoroge.*
>
> *2. .... (spent)*
>
> *3. On the 9th day of November, 2009 along Kisumu/Kakamega road between Stend Kisa and Ilesi areas while in a bus Reg. No. KBD 366P Nissan UD christened UGWE, jointly with others not before court while armed with dangerous weapons namely iron bars, and imitation 9f firearms, robbed Fredrick Njehu a wallet containing Ksh.7,000/= ·(seven thousands shillings only), ATM card or Cooperative Bank, ATM card of Equity Bank, all*

valued at Ksh.B,SOO/= (Eight thousand five hundred only) and at the time of the robbery threatened to use actual violence to the said Fredrick Njehu.

4. On the 9th day of November, 2009, along Kisumu/Kakamega road between Stend Kisa and Ilesi areas, while in a bus Reg. No. KBD 366P Nissan UD christened UGWE, jointly with others not before court while armed with dangerous weapons namely iron bars and imitation firearm robbed Joseph Kungu his wallet containing Ksh.3,000/= (Three thousand only), National ID Card, KASNEB ID/Card, medical records of his son, all valued at Ksh.6,000/= (Six thousands shillings) and at the time of the robbery threatened to use actual violence to the said Joseph Kungu."

In his defence, given on oath, the appellant contended that he knew nothing about the charges. He left Nairobi on 6th November 2009 for a funeral at Namirama which was to be held on 7th November, 2009. On 13th November, 2009, his uncle sent him to Kisumu. He was arrested at a certain junction and was taken to Police Station and was thereafter charged with the offence he knew nothing about. The wallet was his and it had his ID card inside it. He complained against the identification parade maintaining that he was forced to sign the parade forms. He thus denied the charges.

The learned trial Magistrate, in a judgment dated 25th October, 2010 but delivered by another Magistrate on 28th October found the appellant guilty of the three offence, sentenced him to death on the first count but.left the sentence on the other two accounts in abeyance. In convicting the appellant, the learned Chief Magistrate addressed herself thus:

I *find that the case of the accused depends wholly on the correctness of the identifications of the accused which the accused alleges to be mistaken. Being guided by the case of Karanja & another V Republic (2004 2 KLR 424, I hereby warn myself of the special needs for caution before convicting the accused* in *reliance on the correctness of the identification. I have considered the light* in *the bus as the passengers were frisked by the attackers. I have also considered the closeness that was there between the attackers and the passengers and the attackers (sic) as the frisking took place. More* so *PW1 who says it's the accused who searched him and took away his properties. He pleaded with him to leave his wallet and documents but nothing doing.*

Also considered* is *the evidence of PW3 who actually sat with the accused all the way from Nairobi. He has said they were talking as they travelled. My finding* is *that the journey* was *long enough to enable PW3* identify *him. The wallet* in *court plus contents do not belong to the accused person. Bearing all this* in mind, *even with the accused's defence I come to the conclusion that the accused person was* one *of those people who robbed PWl, PW2 and PW3* on *the said night"

The appellant moved to the High Court vide High Court Criminal Appeal No. 226 of 2010. That appeal was dismissed by the High Court stating in so doing that:

"The evidence of the two passengers (PWl and PW3) is corroborative and unshaken in cross-examination.

PW4, IP Paullo Mwangu was the officer who carried out the identification parade. According to PW4 the parade was carried out at the cells basement. PWl and PW2 (sic) identified the appellant in the identification parades carried out. We are satisfied that the identification parade was carried out in a regular manner............................... Although the circumstances of identification in the bus were difficult, the evidence of the identification parade and the arrest and recovery leave no doubt of any mistake.

The evidence of PW3 is that he sat next to the appellant from Nairobi to Mbale. This was ample time to note the appellant and identify him."

That court then proceeded and rejected the appellant's defence. It dismissed the appeal, hence this appeal before us premised on eleven (11) grounds which are in a nutshell that in the circumstances obtaining at the time of the alleged robbery visual identification, or recognition could not be relied upon to convict the appellant; that the superior court failed in its duty as a first appellate court to analyse and evaluate the evidence afresh; that the first appellate court erred in accepting that the identification parade met the legal threshold required of it before basing a conviction on it; that failure to call vital witnesses such as the driver and the conductor of the matatu was fatal to the case and the trial court as well as first appellate court should have found so; that defence of alibi was not given proper consideration by the first appellate court; that the High Court erred in lowering the standard of proof in the case; that the trial court erred in shifting the burden of proof to the appellant; that the learned Judges of the superior court failed to give the benefit of doubt created by contradictory evidence by prosecution witness to the appellant; that the learned Judges failed to appreciate that the charges were duplex.

Mr. Gichaba, the learned counsel for the appellant addressed us at length on the above grounds contending that the identification parade was not proper as it did not conform to the provisions of Forces Standing Orders in that no attempt was made to ensure that members of the parade were as far as possible of the same height; that as none was able to state who was the owner of the bag from which most of the allegedly stolen properties were recovered, the court should not have relied on that evidence and that the matatu crew were not called as witnesses at the trial. He thus urged us to allow the appeal. On his side, Mr. Abele while conceding that the identification parade was not properly conducted, nonetheless submitted that even after the evidence of identification parade is removed from the record, the remaining evidence on identification and being in recent possession of stolen property were enough to sustain appellant's conviction. Kungu sat with the appellant all the way from Nairobi upto Mbale and thus had enough time to identify the appellant. Besides that there was light from the bus and from the moon as said in evidence by Fredrick. He ended his submission by stating that failure to call some witnesses cannot be a ground against conviction if the evidence on record was enough for conviction.

The evidence on record in this case clearly shows that the appellant was convicted on the main because he was visually identified as one of the attackers who frisked the passengers in the subject bus in the morning of 9th November 2009. The law as to the principles upon which the court would convict on such evidence is now well settled. Before a court of law can convict an accused person on the evidence of visual identification which he denies the court must consider with the greatest care such evidence for as is stated in the well known case of **R. vs Thrnbull (1976) 63 Cri. App. R 132**, mistakes are sometimes made by witnesses in identification to the extent that even in cases of recognition, still care is required for those mistakes can and sometimes do extend to close relatives and friends. In the case of **Roria v Republic (1967) EA 583**, the predecessor to this Court stated:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C said recently in the House of Lords, in the course of a debate on S. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:**
>
> **There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten if there are as many as ten - it is in a question of identity."**

In reaction to these sentiments, this Court, in the case of **Wamunga vs Republic (1989) KLR 424** set out what the courts need to do in such cases. It said *inter alia:*

> ***"Evidence of visual identification* in *criminal cases can bring about miscarriage of justice and it* is *of vital importance that such evidence be examined carefully to* minimize *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."

As this is a second appeal, ours is to ensure that the trial court was alive to the need to exercise caution and to examine with great care the evidence of identification that was before it and further to ensure that the first appellate court did revisit the same evidence, analyse it, evaluate it and after doing so came to its own independent conclusion having given room to the fact that the trial court had the advantage having seen the demeanor of witnesses and having heard the same witnesses. It is not within our jurisdiction to delve into the facts that were before the two courts and upon which they made concurrent findings, except where it is demonstrated to us that they considered matters they should not have considered or failed to consider matters they should have considered or that looking at the decision as a whole justice was perverted. In such cases such commission or omission become matters of law and therefore within our jurisdiction.

In this case, Ndungu sat next to the appellant from Nairobi to Mbale. All that time the bus had its inside lights on before the joumey started. It must have had its lights on when it stopped at Kangemi to pick two passengers and also when the inspection was done. It again stopped at Nakuru and when it dropped people at Kericho and Kisumu, it must have had its lights on as those people were being dropped. Kungu who sat together with the appellant said he saw the appellant well and when one considers that he also said that they were also talking to each other, his evidence on identification cannot be doubted. Further, we note that it was Kungu who gave a graphic genesis of the entire saga for whereas Joseph, the driver started feeling something was amiss at Stand Kisa and Fredrick was woken up with kicks and boxes at Chavakala, Kungu's evidence was that:

"At Mbale five people stood up, one of them had been sitting with me. They ordered everyone to go behind. One went infront to sit with the driver. ...."

This was the commencement of the commotion and · of the ordeal the passengers suffered. Clearly Kungu was awake and witnessed it all from the beginning. We think, even with the greatest care, this evidence would be considered credible. But that was not all for the appellant. Fredrick said there was light in the bus at the time of the incident and there was also moonlight. Only one attacker concentrated on him. He gave that attacker Ksh. 500/= on his first round of frisking him. After that, the thugs approached him a second time and he saw the appellant well. This provided a further opportunity for Fredrick to see the appellant again. We think this was also credible evidence on identification of the appellant.

We agree with Mr. Gichaba and Mr. Abele that the identification parade was not conducted in compliance with Order No.6 (iv) (d) of the Forces Standing Order which states:

"6 (iv)Whenever it is necessary that a witness be asked to identify an accused! suspecteperson, the following procedure must be followed in detail:

(a) (b)

(c)

(d)The accused/suspected person will be placed among at least eight persons as far as possible of similar age, height, general appearances and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent."

On cross-examination, Fredrick said of the members of the parade:

"There were (8-10) members of the parade. There were tall and short people."

and Kungu said as follows concerning the parade:

"the numbers of the parade were a **mixture** *of all* **sizes** *of people."*

and lastly, IP Pauline Mwangi who conducted the parade had this to say on the same subject:

"I used the height to **determine** ***the members. They were fellow suspects."***

Whereas, we accept that it would be impossible to get at least eight people of exactly the same height, complexion, similar age, general appearance and class of life, nonetheless, the officer conducting the parade should make some effort to put in the parade members who are almost meeting the same criteria and not as was done here where the witnesses saw obvious differences in height and sizes of members of the parade. We do agree both the trial court and the High Court erred in considering the parade satisfactory. It was not.

However, there was yet another added evidence against the appellant which was in our view properly accepted. That was evidence of being in possession of recently stolen property namely a wallet that Fredrick said the appellant took from him and which was found in a bag that was between the suspects in the matatu at the time of their arrest. Fredrick said in evidence concerning the wallet as follows:

> *"I was told to rise up. I saw him well. As he searched me he came* across *my wallet which was in my hind trouser pocket. The wallet had my ATM cards for KCB, Equity, Coop bank, cash 6000/=, ID card. I pleaded with him to leave me the wallet and valuable documents. He shouted at me that he'd hit me with the rod he had. He then took them. I saw him very well. Accused 1 is the person who took my wallet. I can see this wallet (MFI- 1). This is my wallet."*

CPL Jadiel recovered a bag which was in the matatu placed between the four people they arrested as a result of information received from the driver of the matatu. Inside that bag there were four wallets. Fredrick identified one of the wallets as his wallet. The appellant in his defence said that wallet was his, but if that were so then one may ask how that wallet came to be in the bag found in the matatu noting that the appellant in his defence raised alibi defence as according to him he was arrested on 13th November, 2009 and not on the morning of 9th November, 2009, when four people were arrested in a matatu with the alleged bag placed between them? Whether the wallet belonged to the appellant or to Fredrick was a matter of fact and the two courts considered that aspect as it was their duty to do. We cannot fault them in their concurrent findings.

Lastly, the two courts below considered the alibi defence and rejected it and in our view rightly because as we have stated, if the appellant was claiming the subject wallet to be his and that wallet was found in the matatu in a bag that contained stolen items then what explanation could he offer if he was not one of the thieves for *"his wallet"* to be among the items stolen from the complainants. How did it end up there?

We think we have said enough to indicate that in our view the trial court was clearly alive to its duty and indeed stated so referring to a relevant decision on the matter. The Magistrate warned herself of the need to consider the evidence of visual identification with greatest care and did just that. The High Court equally revisited the evidence afresh, analysed it, evaluated it and arrived at its own independent conclusion as is required of it. Even without the identification parade evidence, we think Kungu's evidence on identification amounted to recognition for prior to the incident, Kungu and the appellant had sat together and had talked to each other for a long time from Nairobi to Mbale, a long distance, before the appellant stood up together with others to carry out robbery on them. By the time the appellant stood up to commit robbery on the passengers, Kungu had known him by appearance for well over six hours we reckon a bus would take to cover that distance and thus in his case this was recognition. Further there is the aspect of wallet we have discussed above.

This appeal lacks merit. It cannot stand. It is dismissed.

Dated and Delivered at Kisumu this 4th **.day of July, 2014.**

J.W. ONYANGO OTIENO.

JUDGE OF APPEAL

F.AZANGALALA

JUDGE OF APPEAL

S. Ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR