IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CRIMINAL APPEAL NO. 14 OF 2011

BETWEEN

PAUL MBUTHIA KINUTHIA……..…...……...APPELLANT

AND

REPUBLIC …… RESPONDENT

(An appeal against the decision of the High Court of Kenya at Nakuru (Wendo & Ouko, JJ.) dated 14th February, 2011

in

(H.C.CR.A. No. 37 of 2007)

****

JUDGMENT OF THE COURT

[1] On 12th April, 2006, at about 7 pm Michael Maritim Sang (PW1) was attacked by two unknown assailants and robbed of his bicycle and pair of shoes. His evidence before the Senior Resident Magistrate at Molo court was that at the material time, when the robbery occurred, he was working as an employee of Sarkish Flora Farm. On the 12th April, 2006, at about 7 pm while he was pushing his bicycle make *"hero jet"* towards the gate of his employer, he was accosted by two assailants. One of the attackers suddenly held his neck and pushed him into a ditch. One of the attackers hit him severally on the face while sitting on his stomach. The other attacker ordered him to remove his shoes which he did. The attackers took off with the pair of shoes and the bicycle valued at Ksh. 4,950/=. Michael testified that he never identified the assailants.

[2] After the assailants disappeared, Michael reported the matter to the security guards at the gate of Sarkish Farm. They took him to Menegai Health Centre where he was treated for the injuries sustained. Michael also met Shadrack Tonui (PW2) a colleague at work at the gate and told him how he was

violently robbed of his bicycle and shoes and that the attack happened a few meters from the gate of Sarkish Farm. Shadrack followed the route the attackers had taken, and sure enough he saw two people pushing a bicycle which he recognized as that of the complainant. The bicycle was being pushed by the appellants' co accused before the trial court who was acquitted of the charge of robbery with violence. When Shadrack enquired who among the two the owner of the bicycle was, the co-accused said it belonged to the appellant and he gave it to the appellant. The appellant said the bicycle was his and he even showed Shadrack where he used to reside, Shadrack accompanied the appellant and his co accused to a nearby homestead. They found the landlord of the plot who identified the appellant as a tenant and ordered them to leave the bicycle and the shoes at the homestead and to bring the owner of the bicycle the following day. The landlord was not called as witness during the trial.

[3] The following day, as Michael was walking towards the scene of the attack, somebody told him that the people who had attacked him resided at a nearby plot and that they were caught with the bicycle shortly after the attack. Michael entered the plot, he was shown the bicycle and the pair of shoes which were stolen from him, he identified the bicycle and went away with it. The police were later informed; Michael and Shadrack led the police to the plot. They did not find the attackers, at the plot, so they went to Fontana Company where the appellant used to work. They found the appellant with Michael's shoes when he was arrested.

[4] Police charged the appellant together with George Nyokoroko with the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***. The particulars of the offence stated that on the 12th day of April, 2006, along Eldoret Nakuru road, at Salga, in Nakuru, jointly while armed with lethal weapons, namely fists robbed Michael Maritim Sang of a bicycle Make Hero-jet, and a pair of shoes all valued at Ksh. 4,950/= and immediately before the time of such robbery wounded the said complainant. They also faced an alternative charge of handling stolen goods contrary to ***Section 322 (1)*** of the ***Penal Code***. The particulars stated that on the same day of 12th April 2006, at San Mariko Farm in Nakuru, otherwise than in the course of stealing, dishonesty retained one bicycle make Hero- jet and a pair of shoes knowing or having reasons to believe them to be stolen goods.

[5] The appellant denied the offence but after trial before the Senior Resident Magistrate's Court at Molo, he was found guilty, convicted and sentenced to death. The trial court also relied on the evidence of a police officer by the name Charles Wachira PW3, who was the arresting officer. This witness told the court that they were led to Fontana Company where they arrested the appellant by somebody who he did not name. They arrested the appellant with the shoes which the complainant identified as he had sprinkled white floor on them before he was robbed. The other evidence that had a bearing to the offence was by Hosea Kiptoo Rotich, a nurse at Rongai Health Centre who completed the P3 Form that showed the injuries inflicted upon the complainant during the attack. The appellant gave unsworn statement of defence, and did not call any witness. He denied having committed the offence and just gave an account of how he was arrested from his place of work on 13th April, 2006. As aforesaid, his co- accused was acquitted.

[6] Aggrieved with the conviction and sentence, the appellant appealed unsuccessfully before the High Court. Wendo and Ouko JJ. dismissed the appeal by concluding as follows:-

> ***"After evaluating the evidence afresh, we are in agreement with the trial magistrate that the appellant was found in recent possession of the complainant's property and he failed to give any reasonable explanation as to how he came to be in possession of the same, we find no good reason to interfere with the conviction***".

[7] This is the judgment that provoked the present appeal which was argued before us by Mr. Nyamwange learned counsel for the appellant. Relying on the appellants' homegrown grounds of appeal, counsel took issue with the evidence of identification and recovery of stolen goods which he argued did not meet the threshold of proof beyond reasonable doubt; that it was the appellant who robbed the complainant; that he was found in recent possession of the recovered items. The offence occurred at 7 pm, and the two attackers were not identified by the complainant. Although Shadrack testified that he walked with the two assailants, he did not give details of how he identified them. It is not clear from the evidence

whether he recognized the assailants because they were known to him before, or how he was able to identify the appellant the following day from his place of work. If he had identified the appellant, how was it done as the offence occurred at night. There was no evidence adduced to show the strength of the light illuminating the place where the assailants were found. The police too did not mount an identification parade, and the landlord who had kept the bicycle was not called as a witness.

[8] Submitting on the evidence of recovery of stolen items, counsel drew our attention to the contradictory evidence of how the pair of shoes were recovered from two different places. According to Michael, he recovered the bicycle and shoes from the homestead of the landlord on the following morning after the attack. Shadrack also testified that on the same day they went to the landlord's place, they were told the appellant was at his place of work, they visited the said place of work with police, arrested the appellant with the complainant's pair of shoes. The same pair of shoes could not have been at the landlord's house and at the same time, on the appellant's feet in a different location. Clearly according to counsel for the appellant, his client was convicted on the basis of contradictory evidence which the High Court ought to have reconciled in their duty as the 1st appellate court.

[9] Further, the bicycle was not recovered from the appellant. It was only Shadrack who testified that the bicycle belonged to the appellant; his evidence is also not safe because he did not say how he was able to identify the appellant. It was only the landlord who allegedly recovered the bicycle and said the appellant was his tenant who could have given evidence of identification. The landlord was a crucial witness in this matter. He was the only one who could have shed light on the identity of the appellant and the stolen bicycle which was not found in possession of the appellant.

[10] Mr. Chirchir, learned Senior Principal Prosecuting Counsel, opposed the appeal and supported the conviction and sentence meted against the appellant. He submitted that PW2 saw two people pushing a bicycle and when he enquired the owner of the bicycle, the 2nd accused handed it over to the appellant. The bicycle was kept at the home of the appellant's landlord where it was recovered the following day and it was identified by the complainant. Although the landlord was never called as a witness, both courts below were concurrent in their findings that there was overwhelming evidence that the appellant was found with the stolen items. Even if the landlord was called to testify, he would have repeated the evidence of PW2. Counsel urged us to find no merit in this appeal and confirm the conviction and sentence which in his view are supported by sound evidence.

[11] This is a second appeal, and that being so as it has been restated in a long line of authorities by this Court, only issues of law turn for our consideration. In ***Kavingo – v – R, (1982) KLR 214***, it was stated that a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In ***David Njoroge Macharia – v- R, [2011]e KLR*** it was stated that under ***Section 361*** of the ***Criminal Procedure Code*****:**

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic, (1984) KLR 213)"***

[12] The appellant was convicted on the basis that he was the one found in possession of stolen items immediately after the robbery. The circumstances under which the appellant was found with the stolen items, that was whether there was positive identification of the appellant; and whether the High Court properly discharged its duty of re-evaluating the evidence; these are the two points of law we have identified for our determination. First of all, no one saw the appellant commit the offence, the appellant was convicted based on the evidence that he was found in possession of items that were robbed of the complainant shortly thereafter.

[13] Counsel for the appellant raised the issue of identification and whether the stolen items were found in the appellant's actual or constructive possession. It was only PW2 who testified that he saw the appellant and the 2nd accused person pushing the bicycle, it was about 7 pm. The 2nd accused person said

the bicycle belonged to the appellant, he gave it to him and it was kept at his landlord's place until the following morning when the complainant identified it. Although the evidence of the person who identified the appellant during the arrest is not clear, it was PW2 who perhaps identified the appellant during the arrest. However he did not adduce evidence on how he was able to identify him. In the ancient case of ***Abdala Bin Wendo- vs- R, (1953)20 EA CA 166***, it was stated that where the conditions for identification are difficult, there is need for other evidence, circumstantial or direct pointing at the guilt of the accused to be produced. Also in ***Gerald Kuria Matahe –vs- R,- Criminal Appeal No. 69 of 2008***, the Court held that there was need for an inquiry to be made on the proximity and brightness of the source of light. See Court of Appeal decision in ***Ogeto v-vs- Republic, [2004] 2KLR***, this Court held that:

> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".***

[14] In ***R –vs- Turnbull & Others, (1973)3 ALL ER 549,*** the court considered what factors the court should take into account when the only evidence turns on identification by a single witness. The court said:-

> ***"…the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way…? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?....Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".***

[15] Based on the evidence on record and the above authorities, we find the evidence of identification by PW2, who was the sole identifying witness in this matter, was problematic. He is the only one, who testified that he found the appellant with stolen items, yet no description of the appellant was given and no evidence was led on how he was able to identify him. We are alive that the prosecution determines the number of witnesses to call in a particular case, also there is no specific number of witnesses that are prescribed. However, the circumstances of this case required the prosecution to summon the landlord who allegedly kept the bicycle and from whose possession the stolen items were recovered. Failure to summon him lends credence to the submission by counsel for the appellant that "***the Court can only draw an adverse inference that had the witnesses been called their evidence would have been adverse to the prosecution case".*** See the holding in the case of ***BUKENYA & OTHERS V UGANDA, (1972) EA 549***.

[16] Finally, we have to address the issue of whether the appellant was found in possession of stolen items. There is conflicting evidence that the shoes were found in the landlord's house and at the same time, on the same day the same shoes were found on the appellant's feet. This was not resolved by the High Court and thus in our humble view, the learned Judges overlooked an essential aspect of their duty to reevaluate the evidence and reconcile the contradictions. Failure to reconcile contradictions affects the credibility of the evidence as the matters stood in this case, the evidence is not clear whether the stolen items were found in actual or constructive possession of the appellant. In ***OKENO V. R., [1972] EA 32 at p. 36***, the predecessor of this Court stated:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R., [1957] EA 336) and to the appellant court's own decision on the evidence. The first appellate court must itself weigh conflicting***

evidence and draw its own conclusions. (SHANTILEL M. RUWAL V. R., [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must take its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see PETERS V. SUNDAY POST [1958] EA 424".

[17] For all the aforestated reasons, we find this appeal has merit, it is allowed with the result that the conviction against the appellant is quashed, and the death sentence is set aside. Unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

Dated and delivered at Nakuru this 23rd day of October, 2014.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

J. OTIENO-ODEK

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR