IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CRIMINAL APPEAL NO. 169 OF 2009

BETWEEN

PAUL KUTOSI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu (Tanui & Warsame, JJ.)

dated 1st December, 2005

in

H.C.CR.A. NO. 502 A OF 2003)

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JUDGMENT OF THE COURT

The appellant, ***Paul Kutosi,*** *("Kutosi" or "appellant")* comes before us on a second appeal against his conviction on one count of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. It had been alleged that on the 13th day of June, 2003, at Kilimani area in Kisumu District within former Nyanza Province, the appellant, jointly with others not before the court, robbed ***Dones Wasonga Otieno*** of his motor vehicle registration number KAN 420Z *("the motor vehicle")* make Toyota Corolla, cheques, pharmaceutical samples and two mobile phones – makes Ericson and Motorola all valued at Kshs.1,143,500/= and at or immediately before or immediately after the time of such robbery, used actual violence against the said Dones Wasonga Otieno (*"Wasonga" or "the complainant")*. Upon his conviction, the appellant was sentenced to death. His appeal to the High Court was dismissed, hence this appeal.

As this is a second appeal, only matters of law may be raised – see ***Section 361*** of the Criminal Procedure Code. We have said so, in many of our decisions including the case of **Mriungi -V- Republic [1983] KLR 455** - where the following passage is found:

> **"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent on the evidence that no**

reasonable tribunal could have reached that conclusion, which would be the same thing as holding that the decision is bad in law."

The issues of law raised in the memorandum of Appeal drawn up by his advocate, M/S Wasuna & Company, and argued by learned counsel, Miss Sechele, are two fold:

"1) That the High Court failed to re-evaluate and reanalyze the evidence as a whole before confirming the appellant's conviction.

2. That the appellant's evidence was disregarded."

We shall carefully examine these two grounds presently, but first, we would like to consider the concurrent findings of fact made by the two courts below.

At about 8.00pm., on 12th June, 2003, the complainant, who was driving his aforesaid motor vehicle dropped a friend at Milimani Hospital in Kilimani area of Kisumu. As he was about to drive away, he realized a gun was aimed at his neck by an attacker. He then saw two other assailants who immediately opened the car doors, pushed his head down and forced him to the back seat. They demanded Ksh.2. Million from him and as they drove away they tied his hands and blindfolded him. He was subsequently transferred to another motor vehicle and after being driven for sometime, he was abandoned. The thugs took his wallet, cheques, two mobile phones and drug samples. The complainant did not identify his attackers.

The complainant reported his ordeal at Kondele and Central Police Stations in Kisumu.

On 21st June, 2003 **Nelson Odinga Omolo (PW4)** *("Omolo")* saw a motor vehicle with registration mark KAP 622Z which registration mark belonged to his brother-in-law's motor vehicle which had also been stolen but the motor vehicle was not his brother-in-law's. He reported to IP Ezekiel Kiche Onyando (PW2) ("IP Kiche") of Awasi Police Station.

IP Kiche, PC Isaiah Maroo *(PW5) ("PC Maroo")* together with another police officer, set out to investigate Omolo's report. As they emerged from the police station, when they were about 50 meters away, the people in the motor vehicle spotted them and as they drove away fired at the police officers. The police officers gave chase as the motor vehicle was driven towards Ahero. They did not, however, catch up with them despite deflating one of the vehicle tyres. The officers then alerted police officers at Boya and Ahero Police Stations who allegedly joined the chase ahead of them.

The people turned off into a side road, abandoned the vehicle and escaped on foot but not before removing the number plates from the motor vehicle.

IP Kiche claimed that police officers from Ahero and Boya gave chase and his team joined them catching up with the attackers near River Nyando where exchange of fire occurred. The attackers according to IP Kiche jumped into the river as the fire exchange continued. In the end one of the attackers was killed and the appellant apprehended.

PC Maroo gave similar evidence as IP Kiche but added that they chased the attackers from Awasi upto Otho market where the attackers turned off from the main road, abandoned the car and ran away on foot. He claimed that the team chased the assailants upto Nyalenda Primary School where a further exchange of fire occurred and police officers from Boya and Ahero joined them. According to PC Maroo, the entire team went upto Nyando River where one of the assailants was shot dead and the appellant was arrested.

The prosecution also called ***Edwina Atieno Okoth (PW7)*** *("Edwina")* who testified that on the same date, 21st June, 2003, at about 10.00 am she was at her home at Ahero when she saw two people pass by on their way towards Nyando River. She identified the appellant as one of them. A short while after they had passed, police officers went to her and enquired of her whether she had seen the people pass by, to

which she responded in the affirmative. The police officers then ran after the people. Because of its significance we shall revert to this evidence later in this judgment.

PC George Adagala (PW10) of Nyanza Provincial Criminal Investigations Department took photographs of the scene at the Nyando River and the motor vehicle which he produced at the trial. The motor vehicle was later released to the complainant.

The appellant and another who was acquitted at the trial were charged as already stated.

In his unsworn statement, the appellant stated that on 17th June, 2003 he travelled from his home in Busia to attend a funeral of a relative in Boya area near Ahero. He arrived at the relative's home, attended the burial and left the next morning for Busia but did not make it as he was arrested soon after leaving the relative's home. He was then led to an abandoned car and asked if he knew anything about it which he denied. He further alleged that he was then beaten and his clothes torn. He was also asked for Kshs.10,000/= to gain his freedom but as he did not have the money, he was taken to Boya Police Station and later to Kondele Police Station where he was charged as already stated.

The learned trial magistrate *(O.A. Sewe, CM)* convicted the **a**ppellant on the evidence of identification given by IP Kiche and PC Maroo which evidence was, according to the learned magistrate, buttressed by the application of the doctrine of recent possession. In the magistrate's view the appellant was found in possession of the complainant's motor vehicle.

The High Court (B.K. Tanui J. and M. Warsame, J. *(as he then was)* considered the evidence on identification and possession and concluded as follows:-

> **"....**
>
> **We are of the view that since the incident which led to the arrest of the appellant took place during the day and since PW2 and PW5 saw the appellant before the chase had started, we are satisfied that the circumstances viewed and taken together gives a clear indication that the appellant was one who drove the motor vehicle from Awasi at a high speed. The face of the appellant was not covered or disguised in any way, therefore we are satisfied that there was no mistaken identity as regards the appellant. He was arrested in possession of the stolen motor vehicle soon after he made an attempt to escape from arrest of the police at Awasi. This part of the evidence as tendered by PW2 and PW5 is in our view credible because the two police participated in the chase right from the beginning to the time the appellant was arrested."**

So, the learned Judges of the High Court believed the testimony of IP Kiche and PC Maroo on both the identification of the appellant and on that of being found in recent possession of the stolen motor vehicle. They eventually dismissed the appellant's appeal.

Miss Sechele submitted before us that given the circumstances obtaining at the time, IP Kiche and PC Maroo could not have positively identified the appellant. Counsel contended that there was no way the two witnesses could have linked the people who they purportedly saw at Awasi and who drove away in the complainant's vehicle and the people who they found at Nyando River. In counsel's view, there was no nexus between the finding of the car and the arrest of the appellant. Furthermore, she submitted, it was necessary for an identification parade to have been held to corroborate the testimony of the two police officers.

Mr. Sirtuy, the learned Principal Prosecution Counsel, conceded the appeal because, according to him, the evidence of identification was not positive and that the doctrine of recent possession was improperly applied.

We have carefully considered the grounds of appeal argued before us, the record of appeal and the submissions of counsel. As we have stated many times in the past, before a court of law can convict an

accused person solely on the evidence of visual identification, which he denies, the court must consider with the greatest care such evidence and should only act upon such evidence if it is satisfied that the identification is positive and free from the possibility of error. To reach that conclusion the surrounding circumstances must also be considered. **(See R. -V- Turnbull [1976] 63 Cr. App. P.132).**

In the case of **Roria -V- Republic [1967] EA 583,** the predecessor of this Court stated as follows:

> **"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 Section 4 of Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts."**
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> **'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 identify.'"**

And in the case of **Wamunga -V- Republic [1988] KLR 424,** this Court stated thus:

> **"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."**

We have considered the record to determine whether the trial court was alive to the requirement to exercise great caution and to examine carefully the evidence of identification which was adduced before it and whether the High Court did revisit the same evidence, analyzed the same, re-evaluated it and after doing so, came to its own

independent conclusion giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify. In that regard the evidence of IP Kiche, PC Maroo and Edwina has caused us great anxiety. Although both IP Kiche and PC Maroo claimed that they identified the appellant when Omolo reported that he had sighted a suspected stolen motor vehicle at an Awasi Petrol Station, the following obtaining circumstances suggest to our minds that such identification could not be free from the possibility of error. The appellant or the people who the two witnesses purportedly identified at the petrol station when they emerged from their police station were not known to them. Further, immediately the two police officers emerged from the police station, the suspected thieves immediately reversed their motor vehicle and sped off as they exchanged fire with the officers. The distance between the police officers and the suspected thieves was about 50 meters. Although it was during the day, the said police officers only saw the suspected thieves for only a fleeting moment and the escape commenced as gun fire was exchanged and the suspects sped away in a car.

We have also noted that prosecution witnesses who had closer contact with the suspect and for an appreciable period were unable to identify the same suspects. Those witnesses were ***Bernard Okech ("Okech"), Owango (PW6)*** and ***Okelo Odumbe (PW8) ("Okelo").*** Owango was a mechanic by profession and carried out his trade at Awasi. On 21st June, 2003 at about 9.30am, two people took the suspected stolen car for a tyre pressure check and he redirected them elsewhere in the same area. It is illustrative that even though Owango was in close proximity with the suspects and even talked to them, he did not identify the appellant as one of them at the trial.

Okelo was on the same date working as a motor vehicle mechanic at Awasi Kenol Petrol Station. The suspected stolen motor vehicle was driven to the petrol station for a tyre pressure check. The occupants talked to him and as the tyre pressure equipment was not at the petrol staiton, Okelo led the suspects elsewhere where the tyre pressure of three tyres was checked but before the third tyre was checked the suspects left at high speed amid gun shot exchange. Notwithstanding that Okelo not only talked to the

suspects but also led them to another facility where the tyre pressure of the car was checked, he did not identify the appellant as one of those suspects.

In our humble view, the evidence of IP Kiche and PC Maroo on the identification of the appellant could have been unimpleadable if the two officers trained their eyes upon the suspects from the time they were sighted upto the time of their arrest at Nyando River. Our consideration of the record reveals that the chase was not continuous but was broken more than once.

IP Kiche testified that when the suspects spotted them they reversed their motor vehicle and drove at a high speed towards Ahero. The officers fired at them and punctured the rear tyre. Then in his own words:

> **"They however did not stop and continued driving away. We circulated the information to other officers controlling posts and stations. They were driving towards Ahero. I and PC Njeru got assistance from members of the public who gave us a lift in that [their] motor vehicle. We chased the motor vehicle.**
>
> **At a place called Otho they diverted and left the main road. Already officers from Ahero had got the message and were ahead of us chasing the motor vehicle. The suspects abandoned the motor vehicle …..**
>
> **They had removed the No. plate of the motor vehicle but the mirrors showed the Reg. No as KAN 420Z."**

IP Kiche continued as follows:

> "**The officers from Ahero and Boya gave chase on foot. We also joined them and on reaching river Nyando we caught up with them and an exchange of fire again ensued, they jumped inside the river still firing at us in that process Accused 1 was arrested inside the river while swimming."**

The above evidence demonstrates that the chase by IP Kiche's team was broken when the suspects left the main road and officers from Ahero and Boya gave chase on foot.

The evidence of PC Maroo suggests that the chase by him and IP Kiche and that of officers from Boya and Ahero was one unbroken chain until the appellant was arrested at Nyando River.

However that evidence considered together with that of Edwina demonstrates beyond peradventure that both IP Kiche and PC Maroo did not keep the appellant in their sight until he was arrested. Edwina testified that while at her home at Ahero, two people passed by her home on their way towards Nyando River. The appellant was one of them. Edwina did not state that the two people were running or that they, in any way appeared suspect. She continued that after the people had passed, police men passed by her house and enquired of her whether she had seen two people pass to which she responded in the affirmative.

It is illustrative that the police men did not give any description of the two people for Edwina to confirm that they were the people the police officers were after.

In any event if the police officers had kept the suspects they were chasing in their sight, there would have been no necessity to make enquiries of Edwina whether some two people had passed by her house. It is plain, in our view, that the testimony of Edwina provided the best demonstration of the break in the chase.

In our humble view the officers of Boya and Ahero who were ahead of of IP Kiche and PC Maroo would have furnished the link in the chain.

There is also another aspect of the evidence of IP Kiche which, to us, buttresses our view that the chase of

the suspects was not continuous. When the motor vehicle was first sighted at Awasi, it had the false registration mark No. KAP 622Z but when it was found abandoned the motor vehicle's Number plates had been removed. The removal of the number plates suggested that the suspects had the time to do so which would not have been possible if police officers were following them closely.

With regard to the evidence of recent possession, our analysis above demonstrates that the prosecution did not furnish a credible nexus between the appellant and the finding of the motor vehicle. Having found that the evidence of identification given by IP Kiche and PC Maroo was not free from the possibility of error, the prosecution did not demonstrate beyond reasonable doubt that the suspect who they saw driving away at a high speed from Awasi was indeed the appellant. The motor vehicle was found abandoned and there was no credible evidence that any witness indeed saw the appellant abandon the vehicle.

In all those premises, we accept the submissions of learned counsel for the appellant that the two courts below committed an error of law and principle in considering the issue of identification. The two courts below with respect do not appear to have considered the discrepancies we have discussed above with respect to the issue of recent possession. We entertain doubt as to whether the appellant would have been convicted and his conviction confirmed if the discrepancies had been considered. We resolve that doubt in favour of the appellant. The appeal was therefore rightly conceded by Mr. Sirtuy. We allow the appeal, set aside the order of the High Court dismissing the appellant's appeal, quash his conviction and set aside the sentence of death meted out to the appellant by the trial magistrate. The appellant is set at liberty forthwith unless otherwise lawfully held

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF NOVEMBER ,2014.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL