IN THE COURT OF APPEAL

AT NAKURU

(CORAM: VISRAM, KARANJA & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 366 OF 2009

SIMON MBUGUA MUKUNA …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nakuru

(Koome & Mugo, JJ) dated 14th May, 2009

in

H. C. Cr. A. No. 31 of 2007)

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JUDGEMENT OF THE COURT

The appellant, ***Simon Mbugua Mukuna***, together with three others were jointly charged with two counts before the Principal Magistrate Court at Molo. In the first count, they were charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code**.** The particulars of the offence state that:

"On the 17th day of March 2006, at Lukalia farm Elburgon in Nakuru District within Rift Valley province, while armed with pangas, axes and rungus jointly robbed Fredrick Mudaki Baranga of one bicycle make NEEIAM, one naiwa radio cassette, one mobile make C-117, one spear, one spot light and cash Ksh.2000/= all valued at Ksh.8,220/= and immediately before or immediately after the time of such robbery used actual violence on the said Fredrick Mudaki Baranga." The appellant was also charged on a second count with the offence of stealing contrary to ***section 275*** of the Penal Code and an alternative charge of handling stolen property contrary to ***section 322 (2)*** of the Penal Code**.** The Principal Magistrate at Molo acquitted the 2nd, 3rd and 4th accused while the appellant

was found guilty. The appellant was aggrieved and filed an appeal before the High Court at Nakuru (Koome, J and Mugo, J). The appeal was dismissed and the conviction and sentence of the trial court upheld on 14th May 2009.

The brief facts giving rise to this appeal are that on 17th March, 2006, Fredrick Mundari Barasa (PW 1) was at his house at Mutamaiu Farm together with his servant Nicholas Lingoshi (PW 2). At about 1:30 am while his servant was leaving for his quarters, they realized a big stone had been placed by the door. PW 2 went round with a torch to find out who had placed the stone. He informed PW 1 that there were people hiding behind the house. It was the evidence of PW 1 that the robbers broke his door while he was inside and demanded to be given money. PW 1 gave them Kshs.2000/=. They also robbed him of a bicycle belonging to his son, a spear and a mobile phone. As to whether he was able to identify the assailants, PW 1 said he was not. However, he raised alarm and his brother Wilson Barasa Jeremiah (PW 3) responded.

PW 2 testified that on 17th March, 2006 while leaving PW 1's homestead, they saw a big stone placed by the door. He went round with a torch and upon flashing it, he saw the appellant armed with a *panga.* The appellant confronted him while telling his accomplices to finish him. Since he was armed with a *panga* he decided to chase the two assailants but two others emerged and he decided to retreat for fear of his life.

PW 2 was very categorical that he saw the appellant when he flashed his powerful torch and that he recognized him as he used to buy milk in their household. Immediately after the robbery, PW 2 informed PW 3 that he was able to recognize one of the robbers and they reported the matter to PC Nelson Mwita (PW 4) and PC Patrick Muturi (PW 5). PW 4 recorded the statements by the witnesses. In fact PW 2 led the police with PW 3 to the house where the appellant was living with his grandfather. However they were informed the appellant had left for a place called Keringet the previous day.

The appellant was arrested on 20th March, 2006 on information that he and others were trying to stage a robbery in the neighbourhood. The neighbours raised an alarm and PW 2 responded. PW 2 found the appellant hiding under the store and with the help of members of the public he was escorted to the police station at Mutamaiu Police Post. The appellant was interrogated by PW 4 and PC Patrick Muturi at the police station where he revealed the names of his accomplices and led the police to the recovery of the spear. He later led the Police to a house where he said he had left the bicycle. They however found the house locked but as they were searching around, they found the 2nd and 4th accused persons with the bicycle. At the Salgaa shopping center they also recovered the radio but the mobile phone was never recovered.

The appellant was put on his defence and he gave an unsworn statement. He stated that on 10th March, 2006 he left Witimu farm in Elburgon where he was staying with his grandfather from Keringet and returned on 24th March, 2006. On 28th March, 2006, he visited his girlfriend at Mutamaiu farm where he slept until the following morning. At about 6:00 am as he was leaving, her parents came out and to avoid being noticed, he ran and hid under the store. His girlfriend's mother then started screaming thereby attracting people who arrested him claiming he was involved in a robbery. He was taken to Mutamaiu police post and later transferred to Elburgon Police Station where he was joined by other people whom he did not know. The same people were charged with him with the same offence.

In his submissions, Mr Maragia Ogaro, learned counsel for the appellant, relied on supplementary memorandum of appeal. He submitted that there was no proper identification of the appellant by the prosecution witnesses since the incident occurred at night and PW 2 would not have been able to see who the assailants were. Mr. Ogaro further submitted that on the day the offence is alleged to have been committed, the appellant was not at his grandfather's house but had travelled to Keringet. He argued that the lower court ought to have considered the appellant's complaint that he was physically assaulted and forced to give names of people he considered to be his accomplices and that he was not aware of the implication of the same. He submitted that the High Court erred in law in failing to note and consider that the evidence of recovery was based on a confession and the trial court having relied on it breached the provisions of ***section 25 (A)*** the Evidence Act Cap 80 Laws of Kenya.

On the other hand, Ms. Norelyne Idagwa, learned State Counsel, in her brief submissions conceded the appeal stating that the evidence submitted was based on suspicion. She further submitted that the stolen items were recovered from a house whose owner was not identified while PW 1 said the radio belonged to his neighbour.

We have considered the grounds raised above, together with the submissions of counsel for the appellant and the State. On the question as to whether the appellant was positively identified, we note that the two courts below made concurrent findings. The High Court re-evaluated the evidence and observed that PW 2 was categorical in his evidence that when he came face to face with the gang of robbers he was carrying a powerful torch which he flashed and saw the appellant whom he said he was able to recognize as he used to buy milk in their household. In the case of ***Gikonyo Karuma vs Republic*** ***[1977] KLR 23*** the court stated:

*"**We are aware of four reported decisions of the Court of Appeal on the subject of conviction depending on the identification of an accused by a single witness. In Abdullah bin Wendo vs. R [1953] 20 EACA 166 the court said that (subject to certain exception) a fact was possible of proof by the testimony of a single witness but this did not however lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that that the conditions favouring identification are difficult. In such circumstances other evidence, circumstantial or direct pointing to a guilt is needed."***

Further more, immediately after the robbery PW 2 informed PW 3 that he was able to identify one of the robbers. In his interrogation by PW 4 and PC Patrick Muturi, he revealed the names of his accomplices and led the police to the recovery of the bicycle. The court stated that;

"We find the evidence of PW2 regarding the identification of the appellants by way of recognition consistent. The evidence by PW4 and PW5 that it is the appellant who led them to the recovery of stolen items is also credible and this is further evidence that directly pointed at the appellant as one of the people who committed the offence."

The appellant also raised the issue of *alibi* that he had travelled to Keringet and could not be at the scene of crime when the offence was committed. We agree with the lower court that the evidence of the appellant's identification was overwhelming, also that there was no cause for the prosecution witnesses to incriminate the appellant falsely. We do not see any possibility of a mistake in the appellant's identification. Therefore, the appellant's *alibi* that he had travelled to Keringet could not possibly be true. See ***Anjononi and Others vs. Republic*** ***[1980] KLR 59.***

Lastly, as regards the issue of the alleged failure to consider the appellant's defence, both courts below did specifically consider it and we find no reason for any intervention on our part since the defence was displaced by the overwhelming prosecution evidence on recognition which placed the appellant at the scene of crime.

On all the critical grounds raised by the appellant our analysis reveals that the two lower courts did make concurrent findings of fact and those findings include a finding on the important issue of identification. In this regard it is apt to repeat what was held in ***M'riunga vs Republic*** ***[1983] KLR 455*** that 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 court(s) and resist the temptation to treat findings of fact as holdings of law or mixed law and fact and should not interfere with the decision of the trial court or first appellate court finding of fact and law unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion – in other words, that the decision is bad in law.

For the above mentioned reasons we **dismiss this appeal**. In the absence of Okwengu, JA, this judgement is written under ***Rule 32 (2)*** of the Court of Appeal Rules.

Dated and delivered at Nakuru this 12th day of April, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR