IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 32 OF 2008

BETWEEN

STEPHEN THIGA MAINA ….……………...……...................... APPELLANT

AND

REPUBLIC ………......……………………..…....…………… RESPONDENT

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

(Ojwang & Dulu, JJ.) dated 4th March, 2008

in

H. C. Cr. A. No. 182 of 2006)

****

JUDGMENT OF THE COURT

The appellant was charged in the subordinate court at Thika with one count of robbery with violence contrary to ***section 296 (2)*** of the Penal Code in that on 13th May, 2005 at Makongeni Estate, Thika, with others not before court while armed with a dangerous weapon namely AK 47 rifle, they robbed Joseph Muthagya of various personal and household goods together with cash. That during or after such robbery the robbers threatened to use actual violence against Joseph Muthagya.

After due trial the appellant was found guilty, convicted and sentenced to suffer death. He appealed to the superior court (Nairobi Criminal Appeal No. 182 of 2006) on the grounds that his identification could have been mistaken and that the evidence laid before the subordinate court was insufficient, inconsistent and contradictory. Further that his defence had not been considered.

The superior court heard the appeal (Ojwang, Dulu, JJ) and dismissed it on 4th March, 2008 - hence this second appeal. The appellant initially filed a memorandum of appeal but later his counsel Ms. E. B. Arati filed supplementary record of appeal with three grounds on 30th April, 2012, which she argued before us. The grounds to paraphrase were:

> ***(i) that the learned judge failed to consider that there was no proper identification;***

(ii) that the appellants constitutional rights were violated against section 72 (3) (b) of the old Constitution (Articles 49, 50 (e) of the Constitution 2010); and

(iii) that the identification parade was not carried and according to the law.

Ms. Arati combined grounds (i) and (iii), on identification and argued them together while she abandoned ground (ii) on breach of fundamental rights. Ms. Arati basically submitted that the crime having taken place at about 6.00 am at the home of the complainant (James Muthagya, PW 1), it was not until two days later when this witness espied the appellant at a local market playing pool that he got the police to arrest him. That he testified that the appellant wore a blue beret on the day of the offence which beret had no particular mark. We heard that even after leading the police to arrest the appellant, the complainant later went to point him out on an identification. Learned counsel termed that exercise as irregular, adding that probably had the complainant's wife (Naomi Kathina Mwema, PW 2) gone to and identified the appellant on the parade, that would have added value to the evidence on identification. Ms. Arati's position was that during this early morning incident by people armed with a rifle, visual identification particularly by the complainant, could not be relied upon.

In her part Mrs. F. Njeru, Prosecution Counsel, opposed the appeal maintaining that the crime having taken place in the morning and in the house where the attackers themselves had put on electric lights, the complainant and his wife Naomi, saw the appellant well and identified him, even as Naomi did so from the dock. That the complainant testified that the appellant at the time of his arrest, was dressed the way he was on the day of the crime, in a blue beret. Learned counsel added the robbery took long enough during which time the attackers talked to the complainant asking him whether he worked with a company called Del Monte. And that the appellant signed the identification parade form without protest of any irregularity.

This being a second appeal, we are alive to the general requirement that we focus only on points of law raised. In ***Karingo vs Republic*** ***[1982] KLR 231*** this court stated as follows in the second appeal whose facts are not relevant here:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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."***

In this appeal the only ground raised was one of identification. This is not a point of law but of fact. Identification is an act based on one of the five human senses – the sense of sight. All we can examine on this second appeal is whether there was evidence that led the subordinate court to find that it was established and whether the superior court made a concurrent finding. If that is satisfied then the ground of identification does not fall to be determined by this Court because:

> ***"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 and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law." (see*** *M'Riungu vs Republic* *[1983] KLR 455).*

In this appeal the learned trial magistrate devoted a reasonable part of her judgment to determine whether all the conditions considered were conducive to positive identification of the appellant – the time of the robbery 6.00 am in the morning, with electric lights switched on by the robbers in the house where the complainant and his wife (PW 1, 2) had opportunity to see the robbers including the appellant well; the robbers not appearing to be in a hurry and even engaging their victims in a conversation. The robbers did not wear masks. The learned trial magistrate concluded that the two witnesses were truthful and that they were not mistaken in the identification of the appellant.

On the first appeal the superior court reviewed as closely as possible the evidence given on this aspect of identification in the subordinate court. This the superior court did because identification was a ground of appeal before it and it concluded:

> ***"We are convinced, that conviction had properly been arrived at, on the basis of truthful evidence especially on the identification of the appellant herein as one of the robbers."***

And so with the concurrent finding of both the subordinate court and the first appellate court that identification of the appellant was positive, we have no reason to disturb that finding of fact.

As to the part of identification parade, it does not appear to have been necessary or of value since the complainant simply went on the parade to pick out the appellant whom he had first identified at the scene then pointed him out to the police at the time of his arrest. Accordingly we dismiss this ground on account of identification. It did not amount to a point of law in this appeal.

Although the ground on breach of fundamental rights was abandoned, it appears prudent that we remark on it in passing, perhaps to aid in other appeals where it may arise and unnecessarily exercise the minds of counsel and the court thereby wasting judicial time.

In the case of ***Julius Kamau Ng'ang'a vs Republic*** ***Criminal Appeal No. 50 of 2008***, while addressing points raised under ***sections 72 (3) (b), 77 (1)*** of the now repealed Constitution or their equivalent in the Constitution 2010 – breach of right to personal liberty (unlawful detention while in police custody) and rights of an accused person awaiting trial, this Court said:

> ***"In our view the right of a suspect to personal liberty before he is taken to court under section 72 (3) (b) are clearly distinct from the rights of an accused person awaiting trial under section 77 (1).***
>
> ***The main difference is that the breach of right to personal liberty is not trial-related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right. If, by illustration, police breach the right to personal liberty of a suspect by unreasonable detention in police custody there is a right to apply to the High Court for a writ of Habeas Corpus to secure release (see section 389 (1) (a) of Criminal Procedure Code and section 84 (1) of the Constitution).***
>
> ***In addition, section 76 (2) provided a remedy by way of damages to a person who is unlawfully arrested or detained."***

The court remarked further that it was not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. And that is the clear state of the law now obtaining.

In sum this appeal is dismissed.

Dated and delivered at Nairobi this 14th day of June, 2013.

E. M. GITHINJI

……….......……….

JUDGE OF APPEAL

J. W. MWERA

……......………….

JUDGE OF APPEAL

F. SICHALE

…….........……………

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR