REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, AGANYANYA & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 51 OF 2008

BETWEEN

MICHAEL KINUTHIA MUTURI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang & Omondi, JJ.) dated 8th May, 2008

in

H.C.CR.A. NO. 144 OF 2006)

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JUDGMENT OF THE COURT

The appellant herein was tried before Makadara Senior Resident Magistrate (Ms. S. Karani) on two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. It was alleged in the charge sheet laid before that court that on the 20th November, 2004, at Kamulu, in Embakasi, Nairobi the appellant, jointly with others not before court, being armed with a dangerous weapon, namely a toy pistol, robbed ***Michael Amwoma Ogomba*** of cash Shs.160/=, Identity Card and an ATM card and at or immediately before or immediately after the time of the robbery threatened to shoot the said Micheal Ogomba. The second count was in respect of the same offence against Ogomba's wife, ***Irene Kemunto***. After hearing four witnesses, the trial court held that the offence was proved beyond reasonable doubt and convicted the appellant on both counts. She sentenced them to death and ordered that the sentences would run concurrently. His appeal to the superior court (Ojwang and Omondi, JJ.) was dismissed, hence this second and final appeal before us, which may only be on matters of law as there were concurrent findings of fact.

The concurrent findings of fact made by the two courts below were that at about 9 p.m. on 20th November, 2004, Michael Amwoma Ogomba (PW1) (Michael) was walking home in Ruai with his wife Irene (PW2) and his cousin ***Teresa Bonareri*** (PW3). It was a moonlit night. Suddenly Irene saw some three people walking behind them. Michael told the two women to keep walking ahead as he slowed

down to check them out. He greeted them and they responded. One man however passed him and he recognized him as the appellant who was from the same neighbourhood and used to patronize his wine and spirits shop in Ruai. The appellant went past the two women and stopped in front of them brandishing what looked like a pistol and asked Irene: "*Mama what do you see this is?*" He demanded money and Irene said she had none but poured out the contents of her handbag. The appellant started rummaging through the items, took her Nokia phone and some coins. He rebuked her for saying she had no money when the bag had some. Irene recognized him as the appellant whose parents had bought a neighbouring plot. In the meantime the other two accomplices had held Michael and started frisking him. They took his wallet containing his Identity Card, ATM Card and some Shs.160/=. Then he looked at the direction of the women and saw the shiny pistol held by the appellant in his left hand as he rummaged through Irene's bag with the right hand and he decided to pounce on the appellant. He grabbed the pistol and started wrestling with him. As they did so, the two women broke into loud screams attracting neighours who were about 50 meters away. The two other accomplices came to the assistance of the appellant and pulled Michael away from him but Michael was left holding the pistol as the three assailants fled from the scene. He found that it was a toy pistol. Teresa confirmed the robbery and the manner it was carried out but she could not identify any of the assailants as she was a visitor in the area.

The neighbours who responded to the screams joined Michael in following the assailants but they were gone. The following day Michael took the toy pistol to Ruai Police Station and reported the incident to ***Sgt. Patrick Mwatia*** (PW4) who recorded it in the Occurrence Book (OB). It was Michael"s recollection, and he was supported by Irene, that he told the officer who recorded the OB that he knew two of the persons who attacked and robbed them and even gave out the name of the appellant. He was not shown what the officer recorded nor was it read back to him and he did not sign the OB. But Sgt. Mwatia had recorded that the reportee was attacked by unknown persons. Nevertheless in his sworn evidence, Sgt. Mwatia recalled that Michael said he had identified one boy who was a neighbour, although he did not give his name. That is the boy who had a pistol and wrestled with Michael. Later that evening in the company of vigilantes from the village, Michael headed for the home of the appellant to apprehend him but the appellant jumped over the fence and his mother said he was not in the house. Michael sought the assistance of the police and Sgt. Mwatia joined them to effect the arrest. On arrival at the house Sgt. Mwatia stated that he found the boy outside with his family and he was identified by Michael before he arrested him. A search carried out in the house did not reveal anything. Michael's recollection however was that they found the appellant hiding in his mother's bedroom and he was arrested.

In his defence, the appellant concentrated on the day of his arrest on 21st November, 2004 when he said he left Ruai Shopping Centre to go home at 9 p.m. It was a moonlit night. On his way home he saw many people behind him holding bows and arrows saying *"stop"*. He ran home. Later at 11 p.m. he heard a knock on the gate and on looking he saw policemen and civilians surrounding the home. He was arrested and later charged with an offence he knew nothing about.

Upon evaluation of all the evidence the trial court believed Michael and Irene on their assertion that they recognized the appellant at the scene of the robbery. The trial magistrate stated in part: -

"I found the prosecution witnesses to be consistent and forthright. I must state there were slight contradictions for instant (sic) if accused arrested inside bedroom or outside their compound, or in the accused's house was actually surrounded or not by the complainant and his vigilante group. However, I must state have (sic) critically examined the slight inconsistencies I still find they do not touch on the matter in issue and I do not consider them fatal to the prosecution's case. I am satisfied by the identification of P.W.1 and P.W.2 of the accused person. In as much as it was by moonlight the entire robbery incident having taken a while, I believe as the accused was someone known to P.W.1 and P.W.2 they were able to identify him accurately by the moonlight which I believe was also bright enough as it is by the same moonlight P.W.1 was able to tell that P exh. 1 was not a real gun but a toy pistol."

The superior court also reassessed and re-evaluated the evidence particularly with respect to the conflicting evidence relating to the first report made by Michael, the intensity of the moonlight which enabled Michael and Irene to recognize the appellant, the stressful circumstances under which the visual identification was made, and it concluded as follows: -

"However our finding is that in the present case, it was not a fleeting glance – in fact P.W.1 and P.W.2 had a chance to see the appellant before the conditions became stressful, before they came under attack and even had a chat with him – and it was this visual perception – which was aided by moonlight and proximity of appellant to the witnesses. The evidence of P.W.1 is corroborated by that of P.W.2 in terms of events and even opportunity for identification – we find that visibility was proper and effective.

.....

We find that the failure to give the name of the appellant to the police officer is cured (1) by the explanation given by the appellant that he did not check the police record to confirm what was written (b) the evidence of P.W.4 confirms that complainant had actually said he knew his attackers."

As for the appellant's defence, the superior court found that there was no shifting of the burden of proof to the appellant since he only testified about the day of his arrest, 21st November, 2004, and gave no *alibi* or any evidence in relation to the date of the robbery, 20th November, 2004.

Those findings aggrieved the appellant who raised five issues of law through learned counsel Mr. Ondieki. The first issue of law was identification. Mr. Ondieki submitted in essence, that the circumstances surrounding the robbery were not conducive to positive identification since it was at night and there was no evidence on the intensity of the moonlight. Furthermore, he observed, Irene was disqualified as a witness after the trial court noticed that she was sitting in court when Michael was testifying and therefore, only the evidence of Michael on identification can be considered. As it was the evidence of a sole witness, the trial court should have warned itself on the dangers of relying on such evidence but it did not, which was fatal. The conflicting evidence on the first report made by Michael merely compounded the issue and called for exclusion of the evidence, Mr. Ondieki concluded.

For his part learned Senior State Counsel Ms. Jacinta Nyamosi, contended that the recognition of the appellant by the two witnesses cannot be faulted because he was a frequent visitor to their shop in Ruai. The two also took time with the assailants and there was ample opportunity to recognise the appellant. Ms. Nyamosi further submitted that the apparent conflict in the evidence on the first report did not water down the entire evidence.

We have considered the issue of identification and we think it is lacking in merit. The fundamental flaw in the submissions of counsel for the appellant is that the disqualification of Irene meant that her evidence on identification ought to be disregarded thus leaving only the evidence of Michael. The record is clear that the two witnesses testified on the first day of the hearing and were cross-examined at length. Their evidence was complete except one aspect on which the appellant applied, and the trial court accepted, that the two witnesses be recalled and be cross-examined on the *"first report"* made to the police. That evidence was taken on a different date when the OB was produced and Michael was further cross-examined. The court then made the following remark:

"Note: PW2 has been sitting in court while PW1 (was) testifying. She is disqualified from giving evidence here in this matter beyond what she has testified."

The earlier evidence given by Irene was thus not expunged and there was no error therefore in considering it. It follows, therefore, that the evidence of Michael on identification of the appellant did not stand alone, as erroneously submitted by Mr. Ondieki. It is also our view that the finding on identification depended solely on the credibility of those two witnesses and the trial court was expressly positive that they were credible. That court was a better judge of the witnesses' credibility and we have no basis to interfere with the finding. The ground of appeal fails.

The second issue of law raised by Mr. Ondieki was that there were critical witnesses who were not called by the prosecution. They included the elders (vigilantes) who accompanied Michael in pursuit of the assailants and in the arrest of the appellant, and also the investigating officer. Conceding that those persons were not called to give evidence, Ms. Nyamosi contended that they were unnecessary to prove

the prosecution case which was fully proved by the witnesses produced in court.

The issue of the number of witnesses who are necessary to prove a fact is covered in ***section 143*** of the Evidence Act, which states as follows: -

"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."
There will be instances, of course, when the failure to call some witnesses will attract adverse inference and that is when the evidence on record is barely sufficient to prove the case. In **Bukenya & others vs. Uganda 1972 EA 49**, the predecessor of this Court stated: -

"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

Emphasis is added.

The evidence on identification in this case was not "*barely sufficient*" and we therefore decline to fault the prosecution for their failure to call more witnesses to establish that fact. As for the investigating officer, it is indeed the case that none was called. In the circumstances of this case however the failure to call the investigating officer was not fatal since the arresting officer also testified that he conducted a search which yielded no incriminating evidence against the appellant. He was also the one who recorded the "*first report*". The words of Sir Udo Udoma CJ in **Bwaneka vs. Uganda [1967] EA 768** at page 771, may perhaps be recalled here:

"The prevailing practice of not calling police officers during trials in magistrate's courts to testify as to the part they played in deciding ultimately to arrest and charge an accused person is most unsatisfactory. It gives the impression that the police do not seem to realize that it is their duty to control and conduct all prosecutions in the magistrates' courts in criminal cases. Generally speaking criminal prosecutions are matters of great concern to the state and such trials must be completely within the control of the police and the Director of public prosecutions. It is the duty of the prosecutors to make certain that police officers, who had investigated and charged an accused person do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person. Criminal prosecutions should not be treated as if they were contests between two private individuals."

Following that decision, this Court, in **Harward Shikanga alias Kadogo & Another vs. Republic** Cr. A. 102/07 stated**:**

"We think that in all cases it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution."

And more recently in **Reuben Gitonga Nderitu v. Republic Cr. A. 349/07 (ur),** the Court stated:-

"Secondly, with regard to the complaint that the investigating officer was not called to testify is also neither here nor there. It is not mandatory that he be called, unless there is an allegation that he would have said something adverse to the prosecution case. There is no such argument here, nor do we believe his evidence would have added value to the overwhelming evidence before the court."

So too in this case. The omission to call the investigating officer attracts no adverse inference. That reasons that ground of appeal also fails.
The third issue of law raised was the claim that the superior court did not re-evaluate the evidence as it was its duty to do. Mr. Ondieki submitted that if this was done, the contradictions relating to the exact place where the appellant was when he was arrested would have been noted and held against the prosecution. We think there is no basis for that assertion. The superior court was fully conscious of its duty to reassess and re-evaluate the evidence afresh and did in fact do so. At all events we do not find the exact place where the appellant was at his arrest sufficiently material to displace the fact of his arrest or other evidence on record relating to his culpability. We reject the ground of appeal.

The fourth ground was that the burden of proof was shifted to the appellant. In support of that submission Mr. Ondieki referred to statements in the trial court's judgment such as:

"Put on his defence the accused gave unsworn evidence and called no witnesses."

and
"Lastly I note the accused gave unsworn evidence and called no witness to corroborate his evidence."

In our view, the first statement was a mere statement of fact and should attract no censure. It would appear, however, that the second statement was a misdirected view that the appellant had some duty to call evidence in support of his story. The same issue was raised before the superior court which was of the view that all it amounted to was that the appellant's testimony was not related to the date of the robbery but to the date of arrest, and therefore it did not displace the prosecution evidence on record. The rights of the appellant under ***section 211*** of the Criminal Procedure Code were explained before he testified and we find no substance in the submission that there was any onus of proof placed on him. We rejected that ground of appeal.

The last issue of law relates to an application made by the appellant in the course of the trial to have Michael (PW1) recalled for the second time, which application was rejected on the basis that it was unprocedural. The appellant had applied once for recall in respect of the *"first report"* and his application was granted. The second time round the recall was shortly before the prosecution closed its case and before the ruling on whether a *prima facie* case had been established, but no reason was given. In Mr. Ondieki's submission, the rejection of the application was contrary to the principles of fair trial contained in ***section 77 (2) (c) (d)*** and ***(e)*** of the former Constitution. Those sub-sections provide for provision of time and facilities to prepare the defence, the right to defend either in person or through counsel of own choice; and provisions of facilities to examine witnesses. As a result, he submitted, the trial was a nullity and the appellant ought to be acquitted on that ground alone as a retrial would be unjust because of the lengthy period spent in custody so far. Ms. Nyamosi for her part contended that a fair trial was accorded to the appellant including his right to recall and cross-examine if he wished to. She submitted, however, that there ought to be a limit to the number of applications for recall and the trial court made no error in rejecting the second application.

We have anxiously considered this issue as it relates to fundamental rights of individuals, especially the right to a fair trial. The first observation to make is, of course ,that the issue was raised for the first time before this Court, although it lay squarely under ***section 84*** of the Constitution (now repealed). The appellant was not legally represented before the trial court and may well have had certain limitations. He was however fully represented by counsel in the superior court but again the issue was not raised.

We have considered the provisions of the Constitution cited in aid of the ground of appeal and have examined the entire record of appeal. We are satisfied that the appellant was accorded the protection of the law as required under **section 77** of the Constitution. The only complaint, at any rate was about recall of a witness for the second time without stating the reason for that recall. The law which guided the trial was the Criminal Procedure Code which gives the power under ***section 150*** to recall witnesses or summon new witnesses under some circumstances. That power is, however, fairly circumscribed and will only be exercised when it is essential to a just decision of the case. As the predecessor of this Court stated in **Maalim v R [1964] EA 672** at page 676: -

"In East Africa much learning in many conflicting cases has been expended on the interpretation of this section, and of similar section in the Procedure Codes of other East African territories. It is however a remarkably simple section, and means no doubt precisely what it says. It is the duty of the court, *inter alia*, to recall and re-examine any persons, at any stage of a trial, if his further evidence appears to it essential to a just decision of the case. This does not, we apprehend, mean that an appellate court is bound to uphold as correct every re-call or examination merely because the judge of the court below has said *"it appears to me that to call (or to re-call) so and so is essential to a just decision of the case."* Plainly an appellate court can inquire whether the examination of a witness under the section was indeed essential to that end, and may inquire whether the examination was or was not calculated to do injustice to the accused. If injustice is in fact done to an accused by the examination, if by the examination the defence is put to an unfair disadvantage, then clearly the examination has militated against a just decision of the case however certain the court was of the need to conduct the examination."

We think in this case the trial court acted within its powers and duty to reject further applications for recall and that no injustice, embarrassment or unfairness resulted to the appellant from the course taken by the court. It is instructive that even in his defence the appellant said nothing to justify the recall of the witness. We are of the further view that even if the trial court erred in some irregularity, it was not fatal to the conviction. The last ground of appeal fails too.

All in all we find no merit in this appeal and we order that it be and is hereby dismissed save for a correction on the order on sentence. As stated earlier, the trial court sentenced the appellant to death on two counts and ordered the sentences to run concurrently. That order was upheld by the superior court in error as the sentence of death cannot be executed simultaneously. We set aside the order and substitute therefor an order that the appellant is sentenced to death on the first count but the sentence on the second count is left in abeyance. It is so ordered.

Dated and delivered at Nairobi this 13th day of April, 2011.

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR