REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, VISRAM & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 194 OF 2007

BETWEEN

BERNARD KAGUMA WAMUNYU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ)

in

H.C.CR.A.NO.1343 of 2002)
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JUDGMENT OF THE COURT

In the trial Court of the Senior Principal Magistrate, at Kiambu, the appellant, ***Bernard Kaguma Wamunyu*** was found guilty after a trial and was convicted for the offence of robbery with violence contrary to ***section 296(1)*** of the Penal Code and sentenced to death. Dissatisfied with the verdict he appealed to the superior court but his appeal was dismissed. The appellant has therefore come to this Court by way of a second and final appeal.

The background facts of the prosecution case were that on the night of 18th July 2002 the ***complainant (PW1)*** and his ***wife, PW2*** were asleep in their house at ***Githioro Village***, near ***Sasini farm***, in ***Kiambu District***, when a group of about eight people broke into the complainant's house, switched on the lights inside the house, demanded money and in the process assaulted the complainant in an episode which took ten to twenty minutes. The complainant testified that the appellant was one of his attackers. The appellant was well known to the complainant and his wife because he used to sell meat in the locality and for this reason the couple was able to recognize him with the assistance of the house lights as the robber who, during the incident was wearing a jeans trouser and jeans jacket. When the alarm was raised the appellant was arrested the same night while in the Sasini Coffee Plantation by guards, Samuel Karanja Wairimu, (PW4) and Aineah Simiyu Makakha (PW5). He had no shoes and was thereafter taken by the said guards to the police station just at the time when the complainant was reporting the matter at the same police station. PW1 and PW2 identified the appellant to the police and he was subsequently charged with the offence as described above.

The appellant's defence is that he sold meat up to 9.30 pm on the material night and thereafter he went for a drink with a friend and while going home drunk he strayed into the Sasini Coffee plantation by following a shortcut which passed through the plantation. It was then that he was arrested by the two guards inside the plantation.

In the appeal before us the appellant was represented by ***Mr Onalo,*** advocate while the State was represented by ***Mr O'mirera Moses***, Senior Principal State Counsel.

n his submissions, Mr Onalo raised three legal points namely lack of proper identification, failure to consider the alibi defence which the appellant raised. In this regard he abandoned the constitutional ground appearing in the memorandum of appeal.

On the issue of identification Mr Onalo stated that even the judgment of the superior court did acknowledge that PW1 and PW2 had done the alleged identification under difficult conditions and yet it failed to hold that it was not a safe identification; that after the arrest by the guards the appellant was taken to the police station, detained for three days and he was only identified by the complainant and his wife at the police station after the three days; that PW9, the investigating officer had said that in the circumstances there was no need of an identification parade and that the superior court had found that the circumstances surrounding the identification were difficult. Concerning the defence the trial court was faulted by the superior court for suggesting that the appellant needed to call a witness to support his alibi. That in effect meant that the trial court was shifting the burden of proof to the appellant to prove his innocence.

Mr O'mirera, learned Senior Principal State Counsel, in his brief submissions in support of the conviction and sentence stated that on the issue of identification the two courts below had made concurrent findings of fact and therefore this Court had no reason to interfere; that both courts below believed the evidence of PW1and PW2 on identification in that the circumstances of identification were conducive because the house lights were on and the duration of the robbery was between ten to twenty minutes. In addition the appellant was after his arrest, immediately identified by the complainant and his wife at the police station after being ushered there by the two guards PW4 and PW5. Besides prior to the appellant's identification at the police station PW1 had given the description of the appellant's clothing at the material time and this placed him at the scene of the crime and at the same time displaced his defence as a whole including the defence of alibi. Finally, that the alleged shift of the burden of proof by the trial court was properly addressed and its effect correctly addressed by the superior court whereupon it was found not to have occasioned a miscarriage of justice.

On our part, we have considered the grounds raised above, together with the submissions of counsel for the appellant and the State. On the legal points raised we agree with the submissions of the learned Senior Principal State Counsel that on the issue of identification we are bound by the concurrent findings of the courts below. In particular we note that the identification was by recognition and the trial court did believe the evidence of PW1 and PW2 on the point of recognition. 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. This included the clothing he wore at the material time and at the point of arrest.

Again on the issue of alibi the same was properly addressed by the two courts below. In particular they considered the conduct of the appellant at the time of arrest by the guards and that he was arrested as he ran from the scene of crime without shoes and he could not satisfactorily explain what he was up to – see ***section 111*** of the Evidence Act.

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 and arrest. In this regard it is apt to repeat what was held in ***M'riunga v 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.

We re-echo those holdings here.

All in all we find no merit in the appeal and the same is hereby dismissed.

DATED and delivered at Nairobi this 8th day of April, 2011.

S.E.O. BOSIRE
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JUDGE OF APPEAL

ALNASHIR VISRAM
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JUDGE OF APPEAL

J.G. NYAMU
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JUDGE OF APPEAL