REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 324 OF 2007

BETWEEN

ROBERT KIMANI MWANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang' & Dulu, JJ.) dated 10th July, 2007

in

H.C.Cr.A. No. 629 of 2004)

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JUDGMENT OF THE COURT

The appellant was convicted by Nairobi Principal Magistrate *(Mrs. Oseko)* on one count of robbery with violence contrary to ***section 296(2)*** of the Penal Code and one count of being in possession of an imitation firearm contrary to ***section 4(2)(a)*** of the Firearms Act. It was alleged in the charge of robbery that on the 23rd day of October, 2003 at Buru Buru Phase V in Nairobi, jointly with others not before the court while armed with offensive weapons, to wit, a toy pistol, they robbed Peter Kimeu Kitulya of a motor vehicle Registration No. KAQ 109Z, make Toyota Hiace valued at Kshs.1,945,560 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to ***Peter Kimeu Kitulya.*** About 1½ hours later on 24th October, 2003 at Westlands, Nairobi, he was found in possession of an imitation firearm, namely a toy pistol, which was the subject matter of the second charge. Upon his conviction he was sentenced to death on the first count and to serve 7 years imprisonment on the second count, the latter sentence being held in abeyance pending execution of death sentence. The appellant was aggrieved by the conviction and sentences and he appealed to the High Court (*Ojwang & Dulu, JJ.)* but the appeal was dismissed. He now comes before us on this second and last appeal which may only lie on matters of law – ***Section 361*** of the Criminal Procedure Code. As this Court has stated before, it would be slow to interfere with concurrent findings of fact by the two courts below unless such findings were based on no evidence at all or on a perverted appreciation of the facts or where it is shown demonstrably that the courts acted on the wrong principles in making the findings.

The facts of the case came from seven prosecution witnesses and the appellant. They may be restated briefly as follows:-

Peter Kimeu Kitulya (PW1)(Peter) was employed as a driver by M/s Wells Fargo, a private security firm in Nairobi. On 23rd October, 2003, he was assigned the duty of dropping off employees of Standard Bank, Moi Avenue Branch to their places of residence upon completion of their work. At 11.00 p.m. that night he left the Bank with several employees and two security escorts, among them, Barnabas Orwa (PW2) (Orwa) driving motor vehicle registration No. KAQ 109Z, a Toyota Hiace. On arrival at Buru Buru Estate, Phase V, one of the employees alighted and went into her house. As Peter was attempting to turn the vehicle to proceed on, some two men emerged from a gate nearby and headed towards their vehicle. One of them was holding an object with a sharp end looking like an axe. The axe-wielding man went to the driver's door and ordered everyone to get out. The other man went to the passenger door telling everyone to alight and at the same time enter the vehicle – *"Shukeni, ingieni"* (alight, board). The passengers did not respond or move as the orders were confusing. The assailant then went to a Peugeot car which was parked nearby with its lights on and came back with a pistol which he pointed at Peter's face demanding that he alights from his vehicle. That is the person Peter identified as the appellant herein. The axe-wielding assailant in turn went inside the vehicle and demanded money from the passengers. As Peter tried to move to the co-driver's seat the appellant opened the driver's door and grabbed his leg. He removed Peter's shoes and ripped off his name tag. As the appellant did this, Peter pressed a remote panic button fitted in the vehicle which activated an alarm at the control room of his employer. He was ordered to get out of the vehicle and lie down on the lawn while the appellant went in and took control of it. As Peter lay down he saw all the other passengers lying down on the ground and they all saw the vehicle being driven away. They shortly rose up and sought assistance from some guards of another security firm nearby who called Pangani Police Flying Squad Control Room and reported the incident.

The Control room circulated the registration number of the stolen vehicle and the signal was received by ***Sgt. Maloan Mwangangi*** (PW3) and ***Pc. Onesmus Kamathi*** (PW4) who, with other flying squad officers were on patrol duties along Waiyaki Way in a police car. In the meantime, when Peter had earlier pressed the panic button, it activated a computerized car track equipment which registered at the control room of Wells Fargo and recorded the movement of the motor vehicle which was later printed out and produced in evidence by the Operations Manager, ***Charles Okwanyo*** (PW5). The Controller in Wells Fargo office was therefore able to trace the location and movement of the stolen vehicle and advise the flying squad officers accordingly. The officers caught up with the stolen vehicle as it headed towards Westlands at about 12.45 a.m. and they drove behind it. At the Westlands roundabout, the vehicle went into a ditch and some street boys started pushing it as the driver tried to reverse it. The officers stopped their car and advanced towards the stolen vehicle. They saw two people run out of the vehicle and disappear but the driver did not manage to do so. He was the appellant. The officers arrested him and on searching his person, they found a toy pistol in his trousers. They also found a metal object which, in their experience, was used by thugs to create an explosive sound when hit on hard surface.

The arresting officers took the appellant, the stolen vehicle and the recovered items, the same night, to ***Cpl. Fredrick Mbingo*** (PW7) of Pangani Flying Squad who commenced investigations in the matter. Cpl. Mbingo subsequently organized an identification parade which was conducted by ***IP. Richard Mose*** (PW4). The identifying witnesses were Peter and Orwa both of whom picked the appellant out as the robber they saw at the scene of robbery at Buru Buru for 20 minutes through the aid of security lights from a nearby house. They had also described the clothing the appellant had worn and his size and skin colour. The two witnesses also identified the toy pistol and the metal object used in the robbery which were produced in evidence.

In his brief unsworn statement in his defence, the appellant said he lives in Mlango Kubwa and on the material date he had gone to work near Unga House Westlands. When he received his salary, he went to drink in a club and was enjoying his drink when he was arrested.

The two courts below were persuaded that the prosecution had proved beyond reasonable doubt, that the appellant was positively identified by both Peter and Orwa at the scene of the robbery and were both able to pick him out in an identification parade two days after the robbery. The courts also found corroborative evidence from the arresting officers, Sgt. Mwangangi and Pc. Kamathi, who found the appellant in possession of the vehicle, the toy pistol and metal object identified by Peter and Orwa as having been

used in the robbery. The High Court expressed itself thus:-

"We have carefully considered all the evidence tendered in this case; and we find that it all points unambiguously to the hands of the appellant in the staging of the robbery which took place at Buru Buru on 23rd October, 2003. Both PW1 and PW2 were eye-witnesses who saw the appellant, accompanied by another and the two supporting themselves with offensive or dangerous weapons, extorting upon the complainant and others, and thereafter depriving PW1 of the motor vehicle he was driving, and converting it to the appellant's own purposes. PW1 and PW2 were in a position to see and to note the larcenous activities of the appellant, in conditions of clear lighting. Those are the circumstances in which the appellant robbed the subject motor vehicle from PW1, and drove it off. There was still more identification. The appellant was arrested as he endevoured to leave the driver's seat; so he remained the thief both at the beginning and at the end; and in these circumstances, the ordinary course of nature dictates it be deemed that the appellant was the thief continuously, from the time of theft to the time he was arrested. There was still more identification of the appellant as the robber. Both PW1 and PW2 attended a well-conducted identification parade, and, with accuracy, pin-pointed the robber, namely, the appellant herein".

Those are the findings the appellant challenges in a memorandum of appeal and a supplementary memorandum of appeal, both drawn by him in person and containing in all 12 grounds. At the hearing of the appeal however, learned counsel appointed by the Court for him, ***Mr. Ogesa Onalo***, abandoned all the grounds except four. Three of the four grounds related to the issue of identification which is always an issue of law, and were argued as one, while the second ground related to the defence of the appellant.

On the first ground relating to identification, Mr. Onalo submitted that the evidence thereon was erroneously evaluated and believed. That is because, firstly, the two witnesses on identification, Peter and Orwa were not consistent in their description of the appellant. While Peter described the appellant as "*short, brownish … wearing a yellow greenish flowered shirt"*, Orwa described the same man as "*brown, short and not fat … wearing a spotted dotted shirt bluish yellow. His teeth were spaced"*. Secondly, the identification of the appellant by Orwa at the identification parade was of no probative value since Orwa had testified that he had been summoned to Westlands when the stolen vehicle was recovered and he saw the appellant there. Thirdly, there were no parade forms produced by the parade officer in respect of Peter who purportedly attended such parade two days after the robbery. In sum therefore, Mr. Onalo submitted, the finding made by the two courts that the appellant was positively identified at the scene of the robbery was not supported by the evidence on record and there was no attempt made to scrutinize the parade officer's evidence.

On the second issue, Mr. Onalo submitted that the defence of the appellant that he was nowhere near the stolen vehicle when it was recovered was not displaced by the prosecution. It could only have been displaced if the investigators examined finger prints on the vehicle to eliminate doubts, but did not. On those two grounds, Mr. Onalo called for the acquittal of the appellant.

In response to those submissions, learned Senior State Counsel ***Mr. Monda*** conceded that there was no proper evaluation of the evidence on visual identification of the appellant at the scene of the robbery and that the evidence of the parade officer was not fully explored. Nevertheless, Mr. Monda submitted, any lingering doubts on identification were cleared when barely two hours after the robbery, the appellant was found in possession of the stolen motor vehicle together with the instruments used in the robbery. In his view, the evidence leading to the recovery of the stolen vehicle was consistent and cogent and was properly evaluated by the two courts below. The defence of the appellant was also evaluated and found incapable of displacing the prosecution evidence.

We have carefully considered the two issues of law raised by the appellant and the submissions of counsel thereon. There is considerable merit in the submission of Mr. Onalo, which was conceded by Mr. Monda, that there was no consistency in the evidence of the two witnesses, Peter and Orwa on identification of the appellant at the scene of the crime, and if that was the only evidence on record, there would be no firm basis for the finding made by the two courts below that the appellant was positively identified. But that is not the end of the case. There was cogent evidence from Peter that he pressed the panic button installed in

the stolen vehicle which triggered off a computerized process of tracking it and eventually led the arresting officers to the spot where the appellant was arrested. The appellant was in possession of the vehicle as well as items identified as having been used at the robbery which took place about 1½ hours earlier. Those were concurrent findings of fact which we have no reason to interfere with and we hold the view that there was no error of law in evaluating it. So too the defence put forward by the appellant. We think it was properly re-evaluated by the High Court and found wanting and incapable of displacing the prosecution evidence.

On the totality of the evidence on record we are persuaded that the appellant was properly convicted and the appeal is lacking in merit. We order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 30th day of September, 2011

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI
.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR