IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 13 OF 2004

BETWEEN

SIMON MAINA GICHUHI ….……..…… APPELLANT

AND

REPUBLIC ……...……..…...…… RESPONDENT

(Appeal from a Judgment of the High Court of Kenya

at Nairobi (Mbogoli & Mutito, JJ) dated 30th July, 2003

in

H. C. CR. A. NO. 656 OF 1998)

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JUDGMENT OF THE COURT

The late Isaac Lugonzo ("the deceased") returned to his home in Muthaiga, Nairobi from work at about 6.30 pm on 21st March, 1996. After spending some time with his family he left for Muthaiga Golf Club in his motor vehicle registration no. KWE 642 returning again at about 9.00 pm. Before he could drive through his gate, he was attacked by people who had followed his car. The robbers shot him, and quickly disappeared with his motor vehicle, his watch and an umbrella. The watchman heard the commotion, ran to the house, alerted the deceased's wife, and together with her, and two cooks approached the gate where they found the deceased lying on the ground bleeding profusely. The deceased's wife reported the matter to the Muthaiga Police Station, and rushed the deceased to the Aga Khan Hospital where he was pronounced dead at about 11.00 pm on the same day.

Meanwhile, PC James Kinyua (PW 11) (PC Kinyua) was on patrol with the Assistant Chief of Korome in the Gachie trading centre area during the night of 21st March, 1996. At about 3.00 am, they spotted a motor vehicle driven at high speed, enter the compound of Thingita Bar in Gachie. They followed the car, and asked the manager of the aforesaid bar to open all the occupied rooms. There were only three rooms occupied that night. The occupants of two rooms voluntarily opened and responded to questions. However, the occupants in room 24 refused to open and instead began abusing the

officers. The bar manager used duplicate keys to gain entry to the room, from where the officers recovered a Rado watch, an umbrella, and a Baretta pistol. The two men, Simon Maina Gichui, the appellant, and John Mwangi Kinoga (Kinoga) were arrested and charged with five counts, including robbery with violence contrary to *section 296 (2)* of the Penal Code, and two other counts of unlawful possession of a firearm contrary to *section 4 (2) (a)* of the Firearms Act. After a full trial before the Chief Magistrate's Court at Nairobi the appellant was convicted of the offence of robbery with violence contrary to *section 296 (2)* of the Penal Code and sentenced to death, while Kinoga was found not guilty and set free. The appellant was also found guilty of the other two offences related to unlawful possession of firearms and ammunition and was sentenced to five years imprisonment.

The learned trial Magistrate fully recognized that the evidence against the appellant was circumstantial, and came to the conclusion that it was overwhelming, conclusive and pointed at the appellant to the exclusion of all others. She observed as follows in her judgment:

"PW 11 and 12 said they recovered the pistol from the 1st accused. They also recovered the umbrella. A watch was also recovered on the first accused. The umbrella and the watch were identified as belonging to the deceased. The pistol according to the ballistics expert was the one used in the robbery and killing of the deceased. Blood samples of the 1st accused were taken. Blood samples of the accused 1 were taken surprisingly both accused 1 and the deceased were of the same blood group which was blood group A. The 1st accused clothes i.e. his long trouser was slightly stained with blood group A which was his own blood group and that of the deceased. So from recoveries and the stains of blood on the 1st accused clothing point to no other conclusion then that on the material night he robbed and killed the deceased.

The deceased's wife PW 1 said the umbrella and the watch were her late husband's. She could not point to any identifying mark on any of these items to confirm that they actually belonged to her late husband. PW 2 the deceased driver likewise said the umbrella was always in the deceased motor vehicle. He knew the umbrella as he said he had seen it over a long period of time. He could not point to any identifying mark or for that matter none of them produced a receipt for the same umbrella. PW 3 the bar (sic) and whom she had served. She took no further interest in the umbrella. PW 11 and PW 12 said they recovered the umbrella on the 1st accused and treated it as prisoner's property until further investigations revealed that it was not any such (sic) item."

After his conviction and sentence, the appellant appealed to the superior court (Msagha & Mutitu, JJ) which also came to the conclusion that his appeal lacked merit, and dismissed the same. The appellant now comes before this Court on a second and final appeal. That being so only matters of law fall for consideration – *see section 361* of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v. R [1984] KLR 611*.

The appellant drew up the memorandum of appeal in person filed in Court on 11th August, 2003 citing six grounds of appeal. However, at the hearing of this appeal before us, his learned counsel, Mr. C. O. Kanyangi, abandoned grounds 1 to 5 and relied only on the sixth ground as follows:

"6. That, the appellate judges erred in law while not attaching any due consideration to my defence in light of the prosecution case as per law enjoins (sic) in section 169 of the C. P. C. That since I can't recall all that transpired during the deliverance of the judgment, I hereby request this Hon. court to serve me with a certified copy of the court proceedings and its judgment to enhance (sic) me produce more firm ground (sic) and further request to be present during the hearing date of this appeal."

The point of law that Mr. Kanyangi said he would argue is that the superior court failed to re-evaluate the evidence on record and arrive at a conclusion of its own. He submitted that the evidence in this case was purely circumstantial and had the learned Judges analyzed the same, they would have found that there was no evidence linking the appellant to the offence; that the recovery of a watch and umbrella

was insufficient to uphold the conviction; that there was no evidence the appellant fired the shot that killed the deceased; and that the two courts below had misapplied the doctrine of recent possession.

In supporting the conviction and sentence, Ms. Ouya, learned Assistant Director of Public Prosecutions, argued that there was overwhelming evidence linking the appellant to the offence, especially the items that were recovered from the appellant soon after the incident, including the pistol which was found to be the one from which the fatal shot was fired.

In view of the singular complaint that the superior court did not re-evaluate the evidence, it is imperative that we set out the crucial evidence.

Not unlike the trial court, the superior court also reconsidered the evidence, evaluated the same, and drew its own conclusions. Here is how it delivered itself:

"The recovery of the umbrella, the watch and the pistol is important in that the chain of events would not be sustained in the absence of that fact. PW 11 and PW 12 encountered strangers in the local bar and later when they gained access into the room where these strangers were sleeping, a search led to the recovery of the pistol that was on the person of the appellant. He also had in his possession the umbrella aforesaid which was at first treated as his personal property. He also had the watch which he claimed to be his.

The wife of the deceased and his driver identified both the umbrella and the watch as belonging to the deceased. There were no special marks on these items and the learned trial magistrate was correct in her handling what was said to be evidence of the name of the deceased on the umbrella. In the end she said that on the basis of the fact that PW 1 and PW 2 had seen the umbrella for a long time (sic) I accept their evidence as being that the umbrella belonged to the deceased.

The relationship between the deceased and these two witnesses is instructive. Personal knowledge of the wife and the driver is a key factor and with respect, we agree, the approach adopted by the learned trial magistrate was reasonable.

Her handling of the evidence in respect of the watch is also important. She related this to the defence of the appellant. She addressed the issue of the name and quality of the watch and the price the appellant alleged to have paid for the same watch. Both PW 1 and PW 2 testified and said the watch belonged to the deceased. On our part, we have no doubt whatsoever that the prosecution proved the watch belonged to the deceased and entirely therefore agree with the learned trial magistrate in resolving that issue.

These two crucial possessions that belonged to the deceased were found in the hands of the appellant on the same night the deceased was robbed and killed. That was recent possession and therefore the inescapable conclusion was that the appellant was one of the robbers. We hasten to add that PW 11 and PW 12 were subjected to lengthy and searching cross-examination but remained firm on the issue of recovery of these items.

The evidence of the ballistic expert and the Government chemist sealed this case. It was proved the gun that fired the shot that killed the deceased was the one found in the possession of the appellant. That placed him at the scene. Further his clothes had blood stains of the same blood group as that of the deceased. We note that the appellant's blood group was the same as that of the deceased. However, he had no injuries that could be associated with the blood stains. Again that evidence is incriminating and the only conclusion is that he had an encounter with the deceased."

For our part, we are satisfied that both the courts below took into account all the relevant factors in coming to the conclusion that the appellant was guilty of the offence charged. The crucial evidence on record shows that the appellant was arrested within a few hours of the incident; that he was found in possession of the watch and an umbrella which were positively identified both by the wife and driver of the deceased as belonging to the latter; that he was found with a Baretta pistol which was found to be the one from which the fatal shot was fired; and that his clothes had blood stains of the same blood group as that of the deceased. All these crucial facts were taken into account by both the courts below, as was the

defence of the appellant that the watch belonged to him.

Selle v. Associated Motor Boat Co. Ltd. [1968] EA 123 and *Okeno v. R. [1972] EA 32*, are among decision of this Court and the Court of Appeal for East Africa, before it, which lay down the duty of a first appellate Court. Sir Clement De Lestang, V. P. expressed the view of the Court of Appeal for East Africa on the principles to guide the court, in the first of the two cases, as follows:-

"Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholau (1955) 22 E.A.C.A 270)."

Having reviewed the record carefully, and heard argument, we are satisfied that the superior court complied with the requirements laid down in the above cases.

In the result and for reasons outlined above, we come to the conclusion that the appellant's appeal has no merit, and we order that the same be and is hereby dismissed.

Dated and delivered at Nairobi this 19th day of March, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

…….……

JUDGE OF APPEAL

ALNASHIR VISRAM

…….……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR