IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Criminal Appeal 60 of 2006

BETWEEN
SAMMY KANYI MWANGI ……..……APPELLANT
AND
REPUBLIC …….RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nakuru (Apondi & Musinga, JJ.) dated 6th February, 2006
in

H.C.CR.A. NO. 290 OF 2003)
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JUDGMENT OF THE COURT

On the 5th day of February, 2003 at about 11.30 pm, ***Susan Njeri Hinga*** (PW2) (Susan) had closed her hotel business at Elburgon town and was heading to her residence in Kasarani area. Walking along the same way but behind her was her brother-in-law, ***Maina Muigai Geoffrey*** (PW1) (Maina) who was accompanied by an Administration Policeman (AP) on his way to guard duties at Timsales Timber factory situated on that route. They caught up with Susan and walked together up to the main gate of Timsales, where the AP branched out and the two proceeded on. After walking for an undisclosed distance, Susan and Maina saw three people walking behind them. The three had appeared from a side road, or a fence of DEB school shining torches, and holding pangas and rungus. They stopped Susan and Maina and ordered them to lie down and produce all the money they had. Maina lay down and gave them Shs. 250/= but one of the robbers took another Shs. 50/= from his trouser pocket and removed his wristwatch and mobile phone. When Susan hesitated in obeying the order to lie down, one of the robbers cut her jacket and she gave them Shs. 80/= and they took her radio. The assailants then left but one of them told Susan to scream as she *"usually did"*. Maina confessed that he never identified any of the assailants but Susan said she recognised one of them, later adding that she also knew the other two. They made a telephone call from a booth and informed Elburgon Police Station about the robbery. ***Pc. Thadius Okumu*** received the call at the station but says nothing about any names or descriptions of the assailants being given to him.

Four days later on 9th February, 2003, at about 1 am, in a totally unrelated incident, ***Cpl. Richard Rotich*** of Elburgon Police Station received information that some persons were intending to cause chaos at a church in town. Cpl. Rotich went there and picked up six persons and took them to the station. One of them was ***Sammy Kanyi Mwangi*** (the

appellant). Susan was later summoned to the station and was shown the arrested persons in the cells. She picked out the appellant as one of the persons who had robbed her four days earlier and the appellant was promptly charged in court on two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, allegations he vehemently denied.

In his defence, he pleaded an *alibi* that he had been away since 5th January, 2003 assisting his grandmother at Kiambogo in tilling her farm and only returned home on 7th February, 2003. On his return, he was hired by one Joseph Maina to work in his farm together with others in harvesting maize. The tractor they were using however broke down a few metres from a church where some people were worshipping at night and they decided to warm themselves on a fire lit outside the church. Before long, policemen came and collected them together with the tools they were using in harvesting the maize. He was locked up for several days and was taken to court five days later to answer charges he knew nothing about. His mother, ***Jane Wanjiru*** (DW2) supported his *alibi* that he had gone to assist his grandmother and that he was engaged in maize harvesting on 7th February, 2003 when their tractor broke down and he was arrested with others. The appellant intended to call another witness to support his alibi evidence and sought an adjournment to do so, but the witness was reported to have died and so he closed his case.

At the end of the trial, the court, R. Kirui SRM, relied on the sole evidence of Susan that she recognized the appellant at the scene of the robbery stating that *"she knew him before and there were security lights at the scene from Timsales gate"*. The conviction of the appellant was based on that evidence and the appellant's *alibi* was rejected in the following words:-

> **"The accused denied committing the offence saying he had gone to Kiambogo to see his grandmother on 5.2.2003. But he did not call his grandmother or anybody who saw him at Kiambogo. His mother DW2, said she sent him there on 5.2.2003 but differed when he said he returned on 5.2.2003 which was the same day. Furthermore she is not expected to be independent as she had every reason to support her son. Therefore if he went to Kiambogo then he went and returned the same day as his mother said or he went there after the robbery which took place on the same day at 11.30 p.m."**

The appellant was sentenced to hang on each of the two counts of robbery.

In dealing with the first appeal, the superior court (Apondi and Musinga, JJ.) said nothing about the *alibi* defence of the appellant, believing as it did, the finding by the trial magistrate that the eye witness account of Susan was sufficient on the identity of the appellant as one of the assailants. The superior court also said nothing about the sentence, although the appellant was sentenced to die twice!

This is a second appeal and only issues of law may be raised for consideration. The court is bound to pay homage to concurrent findings of fact made by the two courts below and will not interfere with those findings unless they were based on no evidence at all or on a perversion of the evidence or considering the evidence as a whole no reasonable tribunal properly directing itself to the evidence could make such findings.

The main points of law raised by the appellant in his memorandum of appeal as argued by learned counsel Mr. Job Kiplagat Kurgat, were, firstly, the identification of the appellant which was the sole basis for his conviction; and

secondly, the failure to consider sufficiently or at all the *alibi* defence put forward by the appellant. Mr. Kurgat submitted that there was no basis for the unquestioning reliance on the sole evidence of Susan without any warning as the law requires. That is because the purported recognition of the appellant was made through some light without any evidence on the distance of the source of light from the scene, the intensity of that light or how long the witness had to look at the robbers. It was also contradictory to state that there was sufficient light from another source while it was necessary to use torches during the robbery. If there was positive recognition of all three assailants as asserted by Susan, Mr. Kurgat wondered why Susan did not go to the police station to give their names and/or descriptions, but only made a telephone call reporting the robbery. None of the other two assailants have been arrested, and the appellant was not arrested as a result of any report given to the police by Susan he observed. Instead Susan was merely called to the police station, not for an identification parade, but to look at several persons arrested for other alleged offences four days later and she pointed at the appellant. The witness, in Mr. Kurgat's view, ought to have stated how she had known the appellant before and for how long; whether as a friend, neighbour, businessman or any other association, but there was no evidence of that and therefore no basis for the belief expressed by the courts below. The superior court in particular did not analyse and re-evaluate the evidence on the issue of identification and therefore failed in its duty as the first appellate court, he concluded.

For his part learned State Counsel Mr. Vincent Obondi Nyakundi was of the view that the torches held by the robbers were flashed to scare the complainants but there was satisfactory lighting from the Timsales gate. Furthermore, even if Susan did not know the appellant by name, she recognized him, especially when he spoke to her. The evidence of identification was therefore acceptable and could sustain the conviction.

We have considered the evidence on record and the submissions of both counsel. The law is clear that a fact may be proved by the testimony of a single witness and there is therefore no compulsion for the prosecution to summon a multiplicity of witnesses. But this Court has consistently been cautious about reliance on such evidence particularly in cases relating to identification and in **Abdala bin Wendo & Another v R (1953) 20 EACA 166**, it emphasized:

> **"…the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

The reason for that is not difficult to appreciate as stated in **Roria v Republic [1967] EA 583**,thus:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDENER, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:**
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> > **There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten if there are many as ten – it is in a question of identity."**

That danger is greater, and therefore the duty heavier for the court to satisfy itself that in all the circumstances it is safe to act on the identification, where the only evidence is from one witness. The approach on issues of identification was also emphasized in the case of **Francis Kariuki Njiru & 7 others vs. Republic Cr. Appeal No. 6 of 2001 (UR)** where this Court stated:

> **"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:**
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> > **"…….If is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."**

We have carefully considered the evidence on record in the appeal before us and we are not satisfied that the principles enunciated by this Court in those authorities were followed. Neither the trial court nor the superior court found it necessary to caution itself on the desirability of testing the evidence of the sole witness with the greatest care. There was no evidence adduced and no enquiry made on the proximity and brightness of the source of light purportedly relied on for identification of the appellant. Indeed grave doubts arise from the assertion that Susan recognized the appellant at the scene and yet failed to mention his name, any form of description or make any effort to facilitate his arrest. On the whole we find the complaints raised by the appellant in this appeal meritorious and we would allow the appeal on the first ground.

We also think the second ground is meritorious that there was no proper consideration of the appellant's *alibi*. The trial court merely shifted the burden of proof to the appellant while the superior court said nothing about it. With respect this was erroneous. In **Sekitoleko v. Uganda [1967] EA 531**, which has been applied before by this Court, the Chief Justice Sir Udo Udoma had this to say in relation to *alibi* evidence:

> **"(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else *(R.v. Johnson, [1961] 3 All E.R. 969* applied; *Leonard Aniseth v. Republic* [1963] E.A 206 followed);**
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> **(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself;"**

In our view, the alibi pleaded and substantially proved by the appellant, who had no burden to discharge on it, was not displaced by the prosecution and it raises reasonable doubts as to his involvement in the crime charged. We would also allow the appeal on this ground.

The upshot is that the appeal is allowed. The conviction of the appellant is quashed and the sentence of death is set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Those shall be our orders.

Dated and delivered at Nakuru this 28th day of May, 2010.

S.E.O. BOSIRE
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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