REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL 145 OF 2006

SIMON MWANGI GATHUA.......................................APPELLANT

AND

REPUBLIC..RESPONDENT

(An appeal from a judgment of the High court of Kenya at Nairobi

(Mutungi & Ochieng, JJ.) dated 2nd June, 2005

in

H.C.CR.A. NO. 240 OF 2002)

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JUDGMENT OF THE COURT

For the second and final time, **Simon Mwangi Gathua**, challenges his conviction by Thika Principal Magistrate, Betty Rashid, for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. It had been alleged in the charge sheet laid before that court that the appellant, on 26th day of August, 2000 at Muchatha village in Thika District jointly with another not before court robbed **Samuel Ngugi Njoki** of one pair of shoes, a belt and cash Kshs.1800/= all valued at Shs.4650/=, and at or immediately before or immediately after the time of robbery wounded the said Samuel Ngugi Njoki. On the same facts there was a second count in relation to **Simon Kariuki Kinuthia** from whom property worth Shs.3290/= was stolen and injuries inflicted on him. There was also a third count of possession of narcotic drugs contrary to **section 3 (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act** in that the appellant was found in possession of one bundle of bhang weighing 200 grams which was not in medical preparation. The appellant was convicted on the two counts of robbery with violence and sentenced to death but was acquitted on the third count. His appeal to the superior court was dismissed, hence this appeal.

The appeal raises one issue of law in a supplementary memorandum of appeal couched in the following manner:

"*That in the circumstances of this case, the identification and/or recognition of the appellant as the attacker and robber was not positive, nor was it credible and/or free from error.*"

That is the ground urged by learned counsel for the appellant Mr. Mogikoyo after abandoning all other grounds raised by the appellant in person in his original memorandum of appeal. We shall revert to the submissions of counsel on that ground.

At about 9 p.m. on 26th August, 2000, the two complainants **Simon Kariuki Kinuthia** (Simon) (PW1) and **Samuel Ngugi Njoki** (Samuel) (PW2) were walking home from Juja to their village in Gachororo. Along the way, they met two men coming from the opposite direction who asked them why they were walking at night and ordered them to sit down. At first Simon and Samuel thought the two men were police officers on patrol. But immediately one man stabbed Simon on his groin and again on the chest when he tried to stand up. As they struggled, the other man had also set upon Samuel and hit him on the face and stabbed him at the back as Samuel tried to fight back. Simon's assailant had a torch with him and it was Simon's evidence that as they struggled, he twisted the assailant's hand which held the torch and at that moment it shone on Samuel's assailant whom he immediately recognized as the appellant, a person he had known since 1994. Samuel also recognized the appellant at that moment as his old schoolmate from the same village. He even called out his name. He also noticed that the appellant was wearing a green T-shirt. The two complainants were overpowered and the assailants stole the items of property listed in the charge sheet. Within an hour or two, Simon and Samuel arrived at Juja Police Station where they reported the incident and gave out the name of the appellant to **Pc. Francis Musyoka** (PW3). The following day Pc. Musyoka with other officers went looking for the appellant and found him at his house in the village. It was Pc. Musyoka's evidence that when they found the appellant, he was wearing a green T-shirt which had some blood stains on it but it was not subjected to any tests by the Government Chemist. It was also his evidence that the appellant was wearing a belt which was identified by Samuel as his since he had the initials of his name (SN) inscribed on it. Other stolen properties which are not relevant to the charges were also collected from the appellant's house.

Medical examination conducted by a clinical officer, **Mukoma** (PW4) confirmed that the two complainants sustained stab wounds on their bodies and they were subsequently treated.

In his defence, the appellant simply said he was resting at his house on Sunday 27th August, 2000 when he saw some people patrolling local brew houses. They approached him and asked him some questions about a quarrel which took place on 25th August, 2000 but he knew nothing about it save for a family land dispute. He was then arrested and charged with the offence of robbery. He was shocked to find out that a family member (Samuel) was testifying against him. He also asserted that the two complainants were implicating him because they were implicated in a murder case involving his mother.

Upon assessing the evidence on record, the trial magistrate was in no doubt that the two complainants were able to, and did in fact, identify the appellant through torch-light which shone on him. They were indeed able to recognize him instantly, Simon having known him since 1994, and Samuel having gone to school with him. Samuel's brother was also married to the appellant's uncle's daughter (the appellant's cousin). Furthermore, the evidence of recognition did not stand alone. The trial magistrate found support for it in the recovery of Samuel's belt from the person of the appellant. The defence of the appellant was dismissed as an afterthought.

The superior court found no misdirection in the manner of assessment of the evidence and in dismissing the first appeal stated:

"**Our review of the evidence on record from the lower court shows that the appellant was identified when his fellow robber, not before the court, flashed the torch on him (appellant) as he struggled with P.W.1. That torch flash also enabled P.W.2 to clearly see the appellant. Further, from the torch flash, P.W.1 and P.W.2 clearly saw the appellant and recognized him as one they knew very well before the robbery incident. It is in fact after the mentioning of the appellant's name by the complainants to the police that he was arrested as one of the two robbers who robbed and injured both P.W.1 and P.W.2. That was not all. In his own defence testimony, the appellant says that P.W.1 was married to his cousin. Clearly there is no way that P.W.1 could be mistaken when he saw the appellant, from the torch flash, at the scene of the robbery.**"

The superior court further found that the recovery of the belt belonging to Samuel, satisfied the doctrine of recent possession and thus fortified the finding on positive identification.

The contention by the appellant through Mr. Mogikoyo, is that the concurrent finding made by the two courts below on identification of the appellant had no basis in fact. That is because the co-existing circumstances surrounding the evidence of identification by recognition militated against positive identification. The circumstances include darkness, suddenness of the attack, viciousness of the attack and a struggle between the complainants and the attackers. The complainants' whole energy, in Mr. Mogikoyo's view, was directed at defending themselves and it could not be said with any certainty that the torch light facilitated positive identification. Furthermore there was no cogent evidence about the brightness of the torchlight; how long it was shone on the attackers or the distance between the torch-bearer and the other attacker. In those circumstances, he submitted, the visual identification of the appellant was not watertight. Nor was the recognition, considering that the two attackers spoke to the complainants but they could not identify the appellant by voice, if as claimed, they knew him before.

Finally on the recovery of the belt, Mr. Mogikoyo submitted that it was not watertight since the arresting officer's evidence was not supported by other officers present who were not called to testify and the mark "SN" purportedly found on the belt meant nothing as it was not explained. He also criticized the reference to the green T-shirt worn by the appellant as of no relevance to the offence since the witness, Samuel, did not explain how he could tell the colour in darkness, and there was no government Chemist report to confirm the allegation that the T-shirt was blood stained. In support of his submissions Mr. Mogikoyo relied on this Court's decisions in **Kiarie v. Republic** **[1984] KLR 739** and **Maitanyi v. Republic** **[1986] KLR 198**. We have considered those submissions and the authorities cited.

As stated earlier, there was a concurrent finding by the two courts below that the appellant was not only visually identified by the two complainants but also recognised as one of the villagers. On a second appeal where only the issues of law may be raised, interference with such finding is severely circumscribed. Only when the finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding, will the court interfere – see, **Ephantus Mwangi & Another v. R.** **(1983/84) 2 KLA 118**. As stated in the ***Kiarie case*** (supra) however, it is not every misdirection or non-direction that would entitle the court to interfere thus:

"**Misdirection as to the evidence to be of any avail to an appellant must be of such nature and the circumstances of the case must be such that the jury would not have returned their verdict had there been no misdirection."**

- See *Archibold, Criminal Pleading, Evidence and Practice, 40th Edition.* Finally on the guiding principles, we may cite this Court's decision in **M'Riungu v. Republic** **[1983] KLR 455**, thus:

"**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 findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings – The Times of March 30, 1983)."**

There is no doubt that the identification of the appellant was made in stressful circumstances in this case as the complainants were under attack from two robbers armed with knives. But this was not the evidence of a single identifying witness, nor was it the only circumstantial or direct evidence. If such was the case, the standard of testing the evidence would have been very high, or as stated in the **Maitanyi case** (supra) "*with the greatest care"*. Both complainants came from the same village and were familiar with the appellant. They swore that the torch light fell on the appellant and they instantly recognized him and one of them called out his name. They wasted no time in forwarding the name of the appellant to the

police who, the following day, found the appellant an arrested him. The evidence of the arresting officer was not challenged through cross-examination or at all, that the appellant was wearing the belt which the complainant, Samuel, had reported was among the items stolen from him. The credibility of those witnesses could best be assessed by the trial court before which they testified and they were believed on their evidence. We find no compelling reason ourselves to interfere with that assessment. Nor do we find the version of events narrated by the appellant inviting enough to raise reasonable doubts on the prosecution case. There was no onus on the appellant to prove anything in his defence, but he said nothing about the day of the robbery nor offered any explanation for possession of the stolen belt found on his person as he was bound to do under ***section 111*** of the Evidence Act.

In all the circumstances, we say with the learned Principal State Counsel Mr. Kaigai, that there was overwhelming evidence against the appellant. We find no merit in the appeal and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 20th day of November, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR