REPUBLIC OF KENYA

IN THE HIGH COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL 101 OF 2004

SIMON MWANGI KAMANDE ……....…… APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ) dated 14th October, 2003

in

H.C. Cr. Appeal No. 762 of 2001)

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JUDGMENT OF THE COURT

Simon Mwangi Kamande, the appellant in this appeal, together with one Titus Kasyoki Mbole, were jointly charged in the subordinate court at Nairobi with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge were that on the 20th day of January, 2000 at Runda Estate within Nairobi area, jointly with others not before court, being armed with dangerous weapons namely iron bars and knives, robbed Bredan Fernades of cash Ksh.8,000/=, assorted golden ornaments, digital camera, Binoculars, two mobile phones, video machine, and an auditing machine all valued at Ksh.785,000/=, and at or immediately before or immediately after the time of such robbery used actual violence on the said Bredan Fernades. The appellant alone faced an alternative charge of handling stolen goods contrary to **section 322(2)** of the Penal Code in that on the 20th day of January 2000 at Runda Estate otherwise than in the course of stealing, he dishonestly "handled" two ignition keys from motor vehicle registration number KAL 227X knowing or having reasons to believe them to be stolen goods. He also faced two other counts of assault causing actual bodily harm contrary to **section 251** of the Penal Code. His then co-accused was further charged with the offence of failing to prevent the commission of a felony contrary to **section 392** of the Penal Code. They both pleaded not guilty to the charges brought against each of them. After the hearing, the appellant was convicted of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code (count 1) and of both offences of assault contrary to **section 251** of the Penal Code (counts 3 and 4). He was sentenced to death in respect of the robbery charge but was discharged under **section 35(1)** of the Penal Code in respect of both counts of assault. His co-accused who was at the relevant time a watchman to the complainant, was acquitted of both charges of robbery with violence and failing to prevent the commission of a felony.

The appellant was not satisfied with the conviction and sentence. He appealed to the superior court against conviction, and of course sentence, in respect of the first count of robbery with violence contrary to **section 296(2)**. The superior court (Mbaluto and Onyancha, JJ) dismissed the appeal stating:

"**On our own evaluation of the matter, we are satisfied the prosecution evidence conclusively proved beyond reasonable doubt that the appellant was one of the robbers who raided the house of the complainant on the material night and robbed him of several items. The conviction was therefore, proper and justified. In these circumstances, the appeal against conviction and sentence has no merit and is dismissed."**

The appellant is still not satisfied, hence this second appeal before us. Four grounds of appeal were filed by the appellant in person and Mr. Kanyangi, the learned counsel for the appellant, who argued this appeal before us adopted the same grounds of appeal which were:-

"**1. That, the learned appellate judges erred in law in upholding that the circumstances that prevailed in the scene of crime (sic) allowed positive identification by PW 4 a single identifying witness thus failing to make note the time for observation hardly existed (sic).**

2. That, the learned appellate judges erred in law in upholding that the exhibited ignition keys were found in my possession without efficient evidence to establish the same (sic).

3. That, the learned appellate judges erred in law in upholding that my mode of arrest or apprehension implicated me with the crime in question without a conclusive direct link to establish the same.

4. That, the learned appellate judges misdirected themselves even when they upheld that the prosecution case had been proved to the required degree and rejected my defence."

The brief facts giving rise to this appeal are that the complainant in the first count of robbery with violence, Bredan Fernades (PW 1) (to whom we shall refer as "Bredan" in this judgment) was, in the month of January 2000 living with his wife, Gaye Fernades (PW 8) (hereinafter referred to as Gaye), mother Mabet Fernades (PW 2) (hereinafter referred to as Mabet) and his sister, Pertilla Fernades (PW 3) (hereinafter referred to as Pertilla) in his house No. 156 at Runda Estate. On 20th January, 2000 at about 9.15 p.m., he (Bredan) drove his motor vehicle KAL 227X into his compound. His watchman (who was the second accused in the subordinate court) opened the gate and then Mabet opened the door for him, his wife and child. His wife and child left the car and entered the house. He remained behind as his car took sometimes to switch off. He then entered the house through the kitchen, but as he entered the corridor towards his bedroom, he heard his mother screaming. As he turned to see what was happening, a huge man emerged from the kitchen and punched him on the face. Electricity lights were on in the house and outside. That man then dragged him to a sofa set in the sitting room and demanded money. Six other men were in the kitchen and they joined the huge man as Bredan was being dragged into the sitting room. Two of those people were armed with sticks and one was carrying a fire extinguisher. The attackers beat him with the fire extinguisher, sticks and they took his car keys from his pockets and went through his pockets taking his wallet which had his ID card, driving license and business card. They dragged Bredan to the bedroom threatening to kill him. To avoid being killed, Bredan gave them two jars containing collection of coins. The attackers increased in numbers and ransacked the house thoroughly taking gold ornaments, gold chains and rings that were given to them by Gaye who was also assaulted. The attackers also took Gaye's handbag and money that was in the same handbag. Mabet was not spared either. She was thrown down by the attackers and her hands were tied with a string. In the commotion that ensured, Gaye pressed the security alarm button and Affernixon Muil Katu (PW 4) (to whom we shall hereinafter refer as Katu), who was together with other three colleagues on duty with Security (K) Ltd. as an escort in the alarm motor vehicle got a message from his control company's control room through their radio. Acting on the message, they proceeded to Bredan's house No. 156 at Runda Estate. They found the gate locked and none opened for them. They then jumped over the gate into the compound. As they moved to the entrance to the house, they saw a man dash from the area where a motor vehicle was parked. He saw that man through the security lights in the compound which was sufficient light. He called that man and

that man said he was a watchman. That man (whom Katu later identified as the appellant) went with him towards the house and then dashed into the house before Katu and came back with two men. The appellant was hiding some things in his hands. One of the people accompanying the appellant from the house, who was described by Katu as a hefty man, pushed Katu away from the doorway and as the three men ran away, Bredan emerged from the house shouting "thieves, thief". Katu then knew at that moment that the appellant who had said he was a watchman was not a watchman but a thief. Katu and his colleagues from the security gave chase but one of the thugs made as if he was removing a gun from his pocket and the security men, fearing for their lives, gave up the chase and went outside the compound to see if any of the attackers could be traced. They saw one of the attackers (the appellant) run from the flowers outside the gate. They gave chase. Members of the public who had responded to the screams from the victims blocked the appellant's way ahead. The appellant then ran into the maize plantation where he was arrested. Meanwhile, police had been alerted by the security company. They went to the scene, searched the appellant and found him with ignition keys for Bredan's vehicle, KAL 227X, which keys were found in his pockets. The appellant was re-arrested by the police, taken to police station and charged with the offence as stated hereinabove. In his defence, the appellant said he was a barber in Industrial Area of Nairobi and he lived there. On the day he was arrested, he had gone to see his brother at Githogoro village which is beyond Runda Estate. After certain discussions with his brother, he left at 9.30 p.m. When walking towards matatu stage, he met police officers, security guards and members of the public. They stopped him, interrogated him and alleged that he was one of the robbers who had attacked the area. He was interrogated at length and then the police officers planted the car keys on him and after he had been forced to sign some documents, he was charged with the offences that were before the subordinate court.

The main issue in this appeal and which was taken up by the learned counsel for the defence is that of identification. In his first ground of appeal and in his counsel's address to us, the appellant contends that the concurrent findings of the subordinate court and the superior court did not put into consideration that the appellant was only identified by Katu and that amounted to identification by a single witness which required extra caution before a conviction can be entered. We do agree that the trial court has a duty to examine evidence of identification or recognition carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction (see the case of **Cleophas Otieno Wamunga vs. Republic – Criminal Appeal No. 20 of 1989**). That duty is enhanced when the identifying witness is a single witness identifying a suspect under difficult conditions. (See the case of **Abdalla Bin Wendo and another v. R (1953) 20 EACA 166).** The predecessor to this Court made the legal position very clear in the case of **Roria vs R. (1967) EA 583** where the Court stated at page 584 as follows:

"**A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardner, L.C said recently in the House of Lords in the course of a debate on section 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:-**

"**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 as many as ten – it is in a question of identity."**

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all circumstances, it is safe to act on such identification."

It is with the above principle in mind that we do consider this appeal. We were told by the learned counsel for the appellant, as we have stated, that Katu was the only witness who identified the appellant. We do, with respect, agree with the submission but only to the extent that he was the only identifying witness as far as visual identification is concerned. Thus, in considering his evidence, other evidence, circumstantial or otherwise, that helps to identify whoever was one of the thieves must also be considered. That consideration must be in addition to considering whether the circumstances that

prevailed that night were favourable for positive identification. Katu and his colleagues were summoned to go to Bredan's house where robbery was in progress. When they reached the house, the security lights outside the house were on and he says they could see properly by the use of the same lights. He saw a man come from the direction of the vehicle. He talked to that man who told him he (that man) was a watchman. He walked with that man towards the house upto the door and that man entered the house only to come back with two other people one of whom was huge and strong. Katu was then pushed aside from the door and that man he had seen outside and talked with ran away together with the others. Even pausing at that point, one would not fault Katu when he said that he identified the man who was later arrested a few minutes thereafter and who was the appellant. There was enough light in the compound and inside the house to help in realizing positive identification. Katu had enough time to identify the appellant. Further, later that same night, the appellant was arrested by the security watchmen and members of the public less than 200 metres from the house of Bredan and on being searched by police, car keys from Bredan's car, KAL 227X, were found in his pockets. It could not have been by coincidence that the same person that Katu had seen coming from the motor vehicle's direction was the person having the car keys that had been removed from Bredan's pockets during the robbery by thugs and which keys were to the same motor vehicle. It was, in our view, by design. The appellant says the police planted the car keys on to him. The subordinate court and the superior court considered that defence and after full consideration rejected it and gave reasons for their decision. We see no merit in that defence although as this is a second appeal, we need not reconsider the concurrent findings of facts.

We have carefully considered the superior court's decision. In our mind, the superior court applied the correct principles as enunciated in the case of **Okeno v. R. (1972) EA 32** at page 36 in which this Court stated that an appellant on first appeal is entitled to expect the first appellate court to subject the evidence given in the trial court to a fresh and exhaustive analysis and come to its own conclusion and make its own inference. The learned Judges of the superior court carefully examined the evidence that was adduced in the subordinate court and after the same exhaustive examination, dismissed the appeal. We cannot fault their conclusion.

The only conclusion that any court could have reached when visual identification of the appellant by Katu is considered together with the evidence that the car keys were found with the appellant after Katu had seen the same appellant coming from the direction of the vehicle of which keys were found with the appellant and the appellant's arrest in an area not far from the victim's house, he (the appellant) having emerged from the flower garden at the gate of the victim's house, is that the appellant was one of the robbers.

The upshot of all the above is that this appeal must fail. It is dismissed. Judgment accordingly.

Dated and delivered at Nairobi this 17th day of March, 2006.

R.S.C OMOLO

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR