IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CRIMINAL APPEAL NO 432 OF 2010

BETWEEN

MOSES NJENGA NDUNGU.....…….....……...…… APPELLANT

AND

REPUBLIC ……RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru

(Maraga, Emukule, JJ.) dated 29th October, 2010

in

H. C. Cr. A. No. 296 of 2010

****

JUDGMENT OF THE COURT

1. On the 22nd November 2008 at about 9.30 pm, ***Peter Gatiba Irungu*** (Peter) (PW1), closed down his sausage business at Tokyo Bar & Restaurant in Nyahururu town. He was walking home when barely 100 meters from his place of business, he was accosted by three men. He noticed that they were armed with *pangas* and a *rungu.* They demanded money and his mobile phone and he quickly raised his hands as one of them, who stood in front of him, frisked his pockets and took his driving licence, mobile phone and wallet containing cash Sh. 1800 and several other documents. It took about two minutes after which the robbers disappeared towards Manguo Estate.

2. As the robbery took place, the watchman at Toyota Bar & Restaurant, ***Geoffrey Lemakara*** (PW3) who had just assisted Peter in closing down the business and escorted him out, heard a scream and rushed out only to find Peter struggling with three men near the Caltex Petrol Station. As he approached, the robbers ran away but Peter had recognized one of them whom they called out as the robbers escaped.

3. The following morning Peter reported the incident to ***Cpl Geoffrey Kailutha*** (PW4) of Nyahururu Police Station where he stated that he had recognized one of the robbers and knew where he worked but did not give out his name. He was given a telephone number to call the police if and when he spotted him.

Two days later, on 25th November 2008, Peter spotted ***Moses Njenga Njuguna (***the appellant) at the bus stage where he worked as a loader. He called the police who came, arrested the appellant and locked him up despite his protestation of innocence. He was charged, tried and convicted by Nyahururu Ag SRM ***(M. T. Kariuki)*** for the offence of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** and was sentenced to death. His appeal to the High Court ***(Maraga J,*** (as he then was), and ***Emukule J.)*** was dismissed, hence the second appeal now before us.

4. The appeal is centered on identification which learned counsel for the appellant, **Mr. D. Mongeri**, raised as a supplementary ground of appeal after abandoning the original grounds. He argued strongly that the circumstances surrounding the robbery were not conducive to positive identification and gave several reasons: it was at night; the robbery took only two minutes; there is only the mention of a light aiding the identification without evidence on its intensity and distance; only one person was identified and no explanation is given as to why it was not possible to identify the other two given the same circumstances; and the complainant was not able to give out the name of the appellant or his features to the police despite saying he had known him for one year. Furthermore, submitted counsel, there were material contradictions, firstly, when PW2 said he heard a scream but PW1 did not testify that he had screamed, and secondly, between PW3 and PW4 about the day of reporting the incident. In his view, this goes to credibility. Mr. Mongeri cited three decisions of this Court: ***Bowen Too & Another vs. Republic Cr. App. No. 146 of 2011 (UR)*** to emphasize the dangers of visual identification and the need for careful examination; ***Martin Mukaria v. Republic Cr. App. No. 462 of 2010*** on the utility of the first report made to the police without particulars of visual identification; and ***Douglas Komu Mwangi V. Republic Nyeri Criminal Appeal No. 653 of 2010 (UR)*** on the need to test carefully even the evidence of recognition of one robber against the non-identification of others under the same conditions. He called for the acquittal of the appellant.

5. In response to the appeal, learned Senior Public Prosecution Counsel, **Mr. J. K. Mutai** supported the concurrent findings that the two civilian witnesses were able to recognize the appellant at the scene of the crime; the appellant was known to the appellant before; the lighting and other conditions favouring positive identification were accepted by the two courts below. He submitted that nothing turned on the short duration of the robbery, the non-identification of the other two robbers or the date when the robbery was reported to the police. There was thus no issue of law to warrant interference with the concurrent findings of fact.

6. Both counsel appreciate the jurisdiction of this Court that it may only consider issues of law at this stage - **Section 361(1) Criminal Procedure Code.** The Court is also obligated to defer to the concurrent findings of fact made by the two courts below, save for some narrow exceptions. These principles have been restated times without number, sometimes in different terminology, but to the same effect, thus:

> ***"A second appeal lies only upon questions of law. In such a case this Court is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the findings of fact. This being a question of law".*** See the old case of ***Rex v. Hassan Bin Said [1942] EACA.***

In the case of ***Christopher Nyoike Kangethe v Republic*** ***[2010] eKLR*** (**Criminal Appeal No 306 of 2005)** the Court also stated:

> ***"an invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law."***

7. As stated earlier the appeal stands or falls on the findings made on the identification, or more appropriately, the recognition of the appellant at the scene of the crime. Both courts appreciated that

such evidence may bring about a miscarriage of justice and warned themselves accordingly on the need for caution. Upon administering that caution on itself, the trial Court assessed the evidence as follows:

> ***"From the circumstances of the present case the accused is not a stranger to both the complainant and PWII.***
>
> ***The accused himself says that they had a grudge against each other over a woman. While the accused's allegation has not been established, what is clear is that they knew each other or at least had seen each other before the incident the subject matter of this case. As such each was familiar to the other. The same thing can be said of PWII and the accused.***
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> ***Therefore this is a case of recognition rather than identification. There is evidence which the accused did not challenge that after he and his accomplices robbed the complainant, the complainant and PWII did not chase him but rather called him to stop as they both of them knew him. The court also noted that when the complainant made his report to the police he informed the duty officer that he knew one of the robbers who had stolen from him. He is also the one who pointed out the accused to PW III, PC Kennedy Otieno and his colleagues who were on patrol around the bus stage area when he saw the accused."***

8. The trial court also examined the lighting at Caltex Petrol Station and found it was from electricity mains and was enough to support recognition of the appellant without difficulty.

9. For its part, the High Court re- assessed the evidence on identification as follows:

> ***"The evidence of PW I in cross-examination by the appellant is eloquent about identification of the appellant-***
>
> ***"I knew you very well. I used to see you at the Nairobi stage idling around in the course of my work. You had a white shirt and a dark grey jacket. I was attacked 100 metres away from my place of business. The robbers attacked me from behind. There was light from the Caltex Petrol Station. They came infront of me and stopped me. I was surprised to see you threatening to cut me with a panga. I was robbed for approximately 2 minutes. I saw you infront of me and you immediately frisked my pockets.***
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> ***When you were arrested you begged me to forgive you so that you can return my things....."***
>
> ***PW II in cross-examination by the appellant testified-***
>
> ***"I know your face but I have never known your names. We called you because we both know you.....There was light from Caltex Petrol Station. You ran away when I approached you."***
>
> ***In his evidence in chief, PW I testified that he then informed the police that he knew one of the robbers who had attacked him, he was given a contact number, and as soon as he saw him at the stage he informed the police, who had the appellant arrested and charged. PW II testified that PW I pointed out the appellant to him and his colleagues PCs Boto and Omondi when they arrested the appellant.***
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> ***PW IV, the Investigating Officer corroborated the evidence of PW II who informed him that he saved PW I from the appellant and his accomplices. PW IV acted on information from PW I, to have the appellant arrested and once pointed out by PW I, PW III had the appellant arrested.***
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> ***From all that evidence it is clear to us that the positive identification of the appellant was clear. He was a person known to both PW I and PW II. He confronted PW I face to face after sneaking from behind him. The lighting from the Caltex Petrol Station provided clear opportunity for both PW I and PW II to see the appellant. The contention that the conditions for his identification were not favourable is simply not tenable."***

10. We have carefully gone through the record and we are satisfied that there was a proper basis for the concurrent findings made by the two courts below. The applicable principles which must guide the courts in matters of identification are not in dispute and were well articulated by the appellant's counsel, Mr. Mongeri. It is therefore beyond question, and this Court has repeatedly emphasized, that:-

> ***"… a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases a conviction on it. In particular, if the conditions under which such identification is purported to have been made were not favourable and if the identification is by a single witness; although recognition raises less problems than identification of strangers, nonetheless even in cases of recognition; there is need to exercise caution before conviction is entered. It is this establishment that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In the case of Kiarie v. Republic [1984] KLR 739, this Court made it clear that before a conviction can be entered against a suspect on account of visual identification, such evidence must be water tight as it is possible for even a honest witness to make a mistake.*** . See the case of ***John Njeru Kithaka and Ibrahim Ndwiga Murugu v. Republic. Nyeri CA 436 of 2007 (UR)***.

11. In this case, the evidence of Peter that he was able to recognize the appellant and that he knew him before, was believed by the trial court which heard and saw him testify before it and affirmed by the appellate court upon re-evaluation of the said evidence. It was a question of credibility which this Court has no reason to fault. The two courts also believed the evidence of the watchman, PW2, that when he arrived at the scene he was able to see and recognize the appellant as the robber who held a panga and took part in the robbery. They were both consistent about the enabling lighting at the scene. In those circumstances we are unable to say that the factual findings were made on no evidence at all or on a misdirection in principle. In the end therefore we find no merit in the appeal and order that it be and is hereby dismissed.

Orders accordingly.

Dated and delivered at Nakuru this 17th day of November, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR