REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 125 & 124 OF 2013

BONIFACE KAMAU MUTHONI.....1ST APPELLANT

MOSES MAINA GITAHI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of Hon.J.Wambilyanga at the Senior Resident Magistrate's Court, Nyeri delivered on 4th October, 2013 in Criminal Case No. 1041 of 2012)

JUDGMENT

FACTS

1. The appellants, **Boniface Kamau Muthoni and Moses Maina Gitahi,** were both charged on Count 1 with the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code** and on Count II with the offence of Assault Causing Actual Bodily Harm contrary to **Section 251** of the **Penal Code.**

2. The particulars of the charge on **Count I** are that on the 5th day of December, 2012 at Ngooru Village in Nyeri County **John Mwangi Githaiga (PW1)** was walking home in the company of **PW2** and another when they were attacked by the appellants and others not before the court; the appellants were armed with dangerous weapons namely iron rods; they jointly robbed **PW1** of his cash Kshs.300/- and immediately before or after the time of such robbery used actual violence and wounded **PW1**.

3. The appellants were charged with the offence of assault however on the 23/04/2013 this charge was substituted under the provisions of section 214 of the Criminal Procedure Code with another count of robbery with violence; the particulars of the charge on Count II are that on the same date and at the same village and within the same County the appellants with others not before this court, whilst armed with dangerous weapons namely iron rods robbed **James Kariuki Biringi** of cash in the sum of Kshs.2000/-, a loaf of bread and 1kg of maize flour; and immediately before or after the time of such robbery used actual violence and wounded **PW2**.

4. The *appellants were tried and convicted on the two Counts and sentenced on both counts to the mandatory death sentence.*

5. Being aggrieved by the convictions and sentences the appellants now appeal to this court against both their convictions and sentences; they filed their respective Amended Memorandum of Appeal and Supplementary Petition of Appeal and the Grounds of Appeal are as summarized hereunder:-

6. **1ST APPELLANTS GROUNDS OF APPEAL**

(i) The mode of identification- on whether it was identification or recognition or voice recognition;

(ii) The trial court relied on contradictory evidence of the prosecution witnesses on the mode of attack; identification and mode of arrest;

(iii) That crucial exhibits were not produced in court;

(iv) The trial court failed to consider the appellants defence of alibi which was not shaken by the prosecution;

7. 2ND APPELLANTS GROUNDS OF APPEAL

(i) The trial magistrate failed to specify the Section under which the 2nd appellant was convicted;

(ii) The trial court erred in sentencing the 2nd appellant to death for the offence of assault charged on Count II;

(iii) The trial court relied on evidence of identification without warning itself on the conditions and circumstances of identification;

(iv) Crucial witnesses like Purity the bar maid and Mama Boni were not called as prosecution witnesses;

(v) The trial court relied on contradictory evidence of the prosecution witnesses on the mode of attack; on the mode of identification; and on the mode of arrest;

(vi) That crucial exhibits were not produced in court;

(vii) The trial court disregarded the appellants defence of alibi which was not shaken by the prosecution;

8. At the hearing of the Appeal the 1st appellant despite having been informed of his right to free legal representation by the State chose to act in person, the 2nd appellant was represented by learned counsel Mr.Njage and Mrs. Gicheha was the Prosecuting Counsel for the State; the 1st appellant relied on his written submissions whereas both counsels made oral submissions; hereunder is a summary of the respective presentations;

1st APPELLANTS SUBMISSIONS

9. The 1st appellant's case was;

(i) That the conditions for identification by **PW1** and **PW2** were not favorable for positive identification; **PW1** claimed to have seen the 1st appellant in Ngoro bar and also heard him as he conversed therein; but **PW1** never mentioned the source of light inside the bar nor at the place where they were attacked; that after the attack **PW1** failed to mention the 1st appellants name or give his description to the police; the authority cited on the importance of a first report is that of **Tekerari s/o Kilongozi and Others vs Republic Cr.App.No. 182 of 1953.**

(ii) That the above evidence was not corroborated by **PW2** who was with **PW1** in the bar and during the attack; when testifying **PW2** never mentioned having seen the 1st appellant nor having heard his voice inside the bar where they had been prior to the attack; therefore the evidence of **PW1** and **PW2** was inconsistent and contradictory and was not credible; **PW2** had also told the court that by the use of his torchlight he was able to shine it on the robbers; but he did not give evidence on the quality of the light nor its intensity nor on his positioning during the attack; he relied on the case of **Paul Etole and Reuben Ombima vs Republic Cr.App. NO.24 of 2000;**

(iii) Still on the issue of identification the appellant contends that no evidence was adduced as to how to the said assistant chief got the appellants names that led to his arrest.

(iv) That the trial court failed to consider that the conditions and circumstances for identification were not favorable for positive identification; reference was made to the renowned case of **R vs Turnbull and Others (1956) All ER 549;**

(v) That crucial witnesses were never called by the prosecution; particularly the bar maid and Mama Boni;

(vi) His constitutional rights under Article 50(1)(2)(j) of the Constitution 2010 were breached as the trial was conducted unfairly; that no statement no charge sheet and/or any other document the prosecution intended to rely on was availed to the appellant to enable prepare his defence; and this occasioned a great miscarriage of justice;

(vii) Further the provisions of section 214 of the Criminal Procedure Code were contravened; that when the charges were amended/substituted the court record does not reflect that the trial court explained to the appellant that he had a right to recall and re-examine the prosecution witnesses;

(viii) That no evidence was led by the prosecution on the qualification of **PW3** therefore the trial court erred in admitting the medical evidence of an unqualified person; therefore making the medical documents inadmissible in law;

(ix) The trial court disregarded the alibi defence and the evidence of **DW2** whose evidence was not challenged by the prosecution;

(x) The appellant beseeched this court to consider and re-evaluate all the recorded evidence and reach a different conclusion from that of the trial court; and prayed that his appeal be allowed to succeed in totality.

RESPONDENTS RESPONSE TO 1ST APPELLANTS SUBMISSIONS

10. In response Counsel for the State submitted;

(i) **On identification**; That though the lighting in the bar was not mentioned it was obvious that **PW1** and **PW2** were not drinking in darkness in the bar; that **PW1** and **PW2** were attacked by three men as they headed home on the road that passed near the 1st appellants home; that the 1st appellant was a person known to both **PW1** and **PW2** since the 1st appellant's childhood; that **PW1** was able to identify him by his physique; that the attack took place behind the 1st appellants home; when they were being attacked **PW1** let off a scream and the 1st appellants mother came out and ordered the 1st appellant to stop attacking the old men; and that she used the name **"Boni"** when she called out;

(ii) The attack was by people known to him and this information was used in assisting in the arrest of the 1st appellant and his accomplices.

(iii) **PW2** told the court that before the attack he had talked to the attackers who were three in number and enquired from them as to where they were headed as they were going in an opposite direction from the 1st appellants home; that the group was about 50 metres away and he had a torch which he shone at them; he was able to see and identify the 1st appellant and the other two; the 1st appellant was a person very well known to him having grown up in the same village with him;

(iv) Therefore **PW1** and **PW2** properly identified the 1st appellant by way of recognition;

(v) **Crucial witnesses:** the appellants contention was that crucial witnesses were not called therefore the prosecution failed to prove its case; the prosecution called five witnesses and proved that the 1st appellant was one of the attackers and that **PW1** and **PW2** were the victims; counsel submitted that the trial court must have reasons to summon other witnesses to clarify matters or issues; Section 143 of the Evidence Act also provides that no number of witnesses need be called to prove matters or facts;

(vi) That the mother was the 1st appellants witness and could therefore not have testified for the prosecution; the Assistant Chief was not at the scene of crime; the other witnesses who were with the complainants couldn't be reached and their attendance was dispensed with; ; that the prosecution had proved its case beyond reasonable doubt;

(vii) **Inconsistencies and contradictions;** the appellant did not elaborate on these issues;

(viii) **Shifting of burden of proof;** the appellant contends that the trial court shifted the burden of proof from the prosecution to the appellant contrary to the law; that the trial court analyzed the evidence before it to reach its decision;

(ix) **Breach of Constitutional rights;** the contention that he was not provided with the witness statements is not true; that the appellant had indicated that he was unable to proceed with cross-examining **PW2** as he did not have his statement; the trial court made an order that he be provided with the witness's statement; thereafter the appellant told the court that he was ready to proceed;

(x) The ruling that the appellant had a case to answer was made on the 30/07/2013 and the appellant was put on his defence on the 20/08/2013; therefore the appellant was given adequate time to prepare his defence; that he never raised any complaint nor did he request for additional time to prepare his defence.

(xi) **Qualifications of PW3;** the appellants contention is that Section 48 of the Evidence Act had not been complied with and therefore it was not safe; but this contention does not create any doubt on the evidence tendered by the prosecution;

(xii) The evidence of **PW2** in that he was in ICU and attended Consolata Hospital and that the injuries arose from the attack of these were not contested; from the proceedings it is apparent that the trial court gave no indication of **PW3's** qualifications; but the issue of qualifications does not negate the facts of robbery and assault.

(xiii) **Rejection of appellants defence;** the appellant contends that the trial court misled itself in rejecting his defence; but counsel submitted that the defence was contradictory; in his defence the appellant stated that the essence of the family gathering held on the material date was to discuss subdivision of land; whereas the evidence of his witness **DW2** his mother stated that the agenda of the meeting was to help her raise money for a hospital bill; the appellant testified that he had slept with his uncle and his brother Ephantus Kimani; when **DW2** was asked on the whereabouts of the appellant she stated that he had slept with child of her cousin; and that her son Ephantus had attended the meeting but did not spend the night there on that date;

(xiv) The question was whether the appellant and **DW2** were at the same meeting; the trial court noted that the appellant came out as a dishonest person as his evidence had too many contradictions; the conclusion is that no meeting was held at the homestead and it was an attempt to remove the appellant from the scene of crime;

(xv) The defence did not overturn the evidence of the prosecution witnesses;

(xvi) The conclusion to be drawn was that the 1st appellant was one of the attackers; he was positively identified by recognition by **PW1** and **PW2**;

(xvii) Counsel urged this court to dismiss the 1st appellant's appeal and to up hold the conviction and sentence.

2ND APPELLANTS SUBMISSIONS

11. Counsel for the 2nd appellant stated that they were 11 grounds of appeal which would be narrowed down to 3 grounds and made the following submissions;

(i) **Identification and Recognition**

(ii) **Rejection of the 2nd appellant defence**

(iii) **Legality of sentence**

RESPONDENTS RESPONSE TO THE 2ND APPELLANTS SUBMISSIONS

ISSUES FOR DETERMINATION

12. After taking into consideration the forgoing submissions made by the appellant and those of the Counsel for the State, the framed issues for determination are as set out hereunder;

(i) Whether the appellants were positively identified;

(ii) Whether the evidence proffered by the prosecution was sufficient to support a conviction of robbery and assault;

(iii) Whether the trial court rejected the appellants defences of alibi; and

(iv) Whether the sentences imposed were legal;

ANALYSIS

13. This being the first appellate court it is incumbent upon it to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Reference is made to the case of **Njoroge vs Republic [1989] KLR 313.**

Whether the appellants were positively identified;

14. In this instance the only evidence against the appellants was that of identification by way of recognition; to which both appellants have submitted was unsatisfactory and unsafe; both appellants in their submissions contended that the record did not show any inquiries made as to the nature of the intensity of light and its source; and that the trial court did not analyze and examine such evidence on identification with care and satisfy itself that the circumstances and conditions for identification were favorable and free from possibility of error before it could safely make it a basis of a conviction;

15. Reverting to the judgment, on this issue, it is noted that the trial magistrate considered the identification evidence and found it be that of recognition; the trial court in its finding states at page **J5** as follows;

"I have considered the above I find that first it is clear that the two complainants and the two accused persons had seen each other earlier than the date of the offence and/or the time of the offence, therefore there was the knowledge of each other, the two complainants also testified that the mother of the accused shouted at him and asked him to leave the old men alone, that also means that they knew each other.

When the complainants stated that they saw and were able to recognize the accused persons as people who they had left in the pub then it is true and the court believes them. On this issue of recognition I rely on the case of Anjononi and others vs Republic (1980) KLR where the Court of Appeal held;

> ***'Recognition of assailants is more satisfactory more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other'***
>
> **In a particular case, I am satisfied that the complainants knew the accused persons very well therefore it was easy for them to recognize them as the people who had attacked and robbed them."**

16. From the above extract it is noted that the trial magistrate made a finding of positive identification by way of recognition but did **not analyze the nature and source of the light in detail;**

17. Nevertheless, this court on its own evaluation of the evidence on record finds that **PW2**, did mention the source and sufficiency of the lighting at the point of the attack; **PW2** testified that on the night of the robbery there was sufficient light from his torchlight which he shone at the group and he was able to see and identify the 1st appellant and that he was a person well known to him; that he knew the attacker/ appellant by name and testified to having grown up with him in the same village; he further narrated that the group was about 50 metres away and how he held a conversation with the appellants on where they were headed to;

18. In the light of the above this court has also re-analysed the evidence of **PW1** on the first report he made to the police which is

corroborated by **PW5**; it is noted there is evidence on record that a report was made on 6/12/2012 by **PW1** to the police and when he reported the matter he clearly mentioned the name of the 1st appellant as the one who attacked them; he also told the police that the 1st appellant was previously known him and that he could identify him; the court record reads as follows;

> **"I told the police I knew Boni the 1st accused who I could identify."**

19. This first report assisted in the arrest of the 1st appellant; this evidence was corroborated by **PW5** who stated that a report was made by **PW1** on 6/12/12 at the police station to a PC. Mwoki; he stated that he later visited both the victims and interrogated **PW1** and recorded his statement; that he also visited the scene of crime and he confirmed that it was on a road that was behind the compound of the home of the 1st appellant;

20. From the evidence adduced this court is satisfied that **PW1** and **PW2** did in fact recognize the 1st appellant as their assailant; and that the reception of the evidence of recognition is safe and free from possibility of error and can be relied upon to form the basis of a conviction against the 1st appellant, only; this court is guided by the renowned case of **R vs Turnbull (supra)** where it was held that ;

> **"…. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to know someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

21. This court has re-examined the evidence of **PW1** and **PW2** carefully and is satisfied that the circumstances of identification was free from any possibility of error and it can therefore safely be a basis of a conviction of the 1st appellant.

22. The is ground of appeal is found lacking in merit with respect to the 1st appellant and it is hereby disallowed;

23. Whereas this court having considered all the evidence adduced by **PW1** and **PW2** in relation to the identification of the 2nd appellant it is satisfied that they did not recognize him as one of their attackers as no mention is made of his name nor is there any description given of anything that helped them recognize the 2nd appellant on the material night.

24. This court finds reason to interfere with the trial courts finding on identification of the 2nd appellant and finds that from the evidence adduced the 2nd appellant was not positively identified;

25. The 2nd appellants ground of appeal on identification is found to have merit and it is hereby allowed;

Whether the evidence proffered by the prosecution was sufficient to support a conviction of robbery and assault;

26. Section 296(2) of the Penal Code sets out clearly the essential ingredients of the offence of robbery with violence and reads as follows;

a) The offender is armed with any dangerous and offensive weapon or instrument; or

b) The offender is in the company with one or more other person or persons; or

c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person;

27. The trial court in its judgment specifically elaborated in detail these three key ingredient(s) of the offence of robbery with violence and found that all three had been proved by the prosecution to the desired threshold; it gave the following narrative of the evidence and then made a finding; it stated as follows;

> **"On the 1st ingredient, the two complainants that is PW1 and PW2 testified that the assailants whom the positively recognised before this court were armed with sticks and metal rods which they used to attack them. I find that the said sticks and metal rods which were used were dangerous weapons. On the 2nd ingredient, the two complainants stated that the assailants were more than one this ingredient qualifies. On the 3rd ingredient which is on violence I find that the same has been proved by the fact that the two complainants were injured during the robbery, they went to the hospital and even a P3 form in respect of the 2nd complainant was produced before court which clearly indicated he had serious head injuries, I am satisfied that this ingredient also qualifies.**
>
> **…… I find that the prosecution had proved this case to the required standard;……..…..."**

28. From the aforegoing and the evidence on the court record this court is satisfied that the prosecution tendered evidence to prove the crucial ingredients of the offence; that the 1st appellant was in the company of other robbers who helped the 1st appellant to rob the complainants of their humble belongings; there was also proof of actual violence inflicted upon the complainants before and during the robbery; that the complainants evidence on the injuries they sustained was corroborated by the evidence of **PW3 Dr Francis Maina**.

29. The 1st appellant raised the issue that no evidence was led by the prosecution on the qualification of **PW3** and that the trial court erred in

admitting the medical evidence of an unqualified person; therefore making the medical documents inadmissible in law;

30. The non-compliance with Section 48 of the Evidence Act firstly it is noted was never raised by the 1st appellant at the trial during his cross-examination of this witness; nor did the 1st appellant contest the evidence of **PW2** in that he was in ICU and attended Consolata Hospital and that the injuries arose from the attack;

31. This court is satisfied that even though the prosecution gave no indication of **PW3's** qualifications; this omission does not create any doubt on the evidence tendered by **PW2** on the assault and the injuries arising from the robbery; further this court concurs with the States submission that the issue of qualifications does not negate the evidence tendered by the prosecution on the attack and the robbery.

32. The appellants contend that crucial witnesses that is Purity the bar maid, Mama Boni and the area chief were not called therefore the prosecution failed to prove its case; this court notes that that Section 143 of the Evidence Act provides that no number of witnesses need be called to prove matters or facts; the prosecution it is noted called five witnesses to testify and had reason to believe that these were sufficient to prove that the 1st appellant was one of the attackers and that **PW1** and **PW2** were the victims of robbery with violence;

33. Further it is noted that the Mama Boni is the mother of the 1st appellant and was also his witness and could therefore not have testified for the prosecution; as for the Assistant Chief he was not at the scene of crime and his evidence would not have been of any probative value; the other witnesses who were with the complainants couldn't be reached and their attendance was dispensed with;

34. This court is satisfied that even without having summoned these witnesses such failure was not in any way fatal to the prosecutions' case; this ground of appeal is found lacking in merit and is disallowed.

35. It was also the contention of the 1st appellant that the provisions of section 214 of the Criminal Procedure Code were contravened; that when the charges were amended/substituted that the court record does not reflect that the trial court explained to the appellant that he had a right to recall and re-examine the prosecution witnesses;

36. Upon perusal of the court record it is noted that the charges were substituted at a very early stage of the proceedings; that this was before the commencement of hearing of the prosecution witnesses; therefore all that was required was for the appellants to be informed which was done and both appellants stated that they had no objections to the substitution; the record indicates that the substituted charge was read out to them in Kikuyu which was a language they understood and thereafter a fresh plea was taken; this ground of appeal is disallowed as it is found lacking in merit.

37. The prosecution is found to have proved all the two key ingredients of the main charge to the desired threshold; this ground of appeal has no merit and is disallowed.

Whether the trial court gave good reasons for rejecting the appellants defence;

38. The 1st appellant put forward a defence of alibi which he submits the trial court completely rejected without giving good reasons;

39. The trial court is found to have considered the appellants defence and given good reasons for rejecting it; this ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the sentences imposed were legal;

40. Counsel for the 2nd appellant contends that the trial court imposed the mandatory death sentence on a charge of assault;

41. But the court record indicates that the appellants were initially charged with the offence of assault however on the 23/04/2013 this charge was substituted under the provisions of section 214 of the Criminal Procedure Code with another count of robbery with violence contrary to Section 296(2) of the Penal Code;

42. The sentence provided by Section 296(2) when found guilty of the offence of robbery with violence is the mandatory death sentence; the error made by the trial court was the failure to hold the death sentence on Count II in abeyance; this court is satisfied with the legality of the sentence imposed on the 1st appellant as it is the only sentence prescribed by statute; the error on Count II is curable and stands corrected.

FINDINGS

43. In the light of the forgoing this court makes the following finding and determination;

(i) This court finds that the 1st defendant was positively identified; and the conviction is found to be safe;

(ii) This court finds that the 2nd appellant was not positively identified; and the conviction of the 2nd appellant is found to be unsafe;

(iii) The prosecution proved the offence of robbery with violence against the 1st appellant on both counts to the desired threshold;

(iv) The trial court is found to have properly rejected the 1st appellants defence of alibi and gave good reasons for rejecting it.

(v) The sentences imposed on the 1st appellant on both counts are found to be legal and it is the only sentence prescribed by statute; the error on Count II is curable and stands corrected to read that it shall be held in abeyance.

DETERMINATION

44. The 1st appellants appeal is found lacking in merit and it is hereby dismissed; the convictions on both Counts are hereby upheld;

45. The sentences on both Counts are hereby upheld but a correction is made on Count II with the rider that it be held in abeyance;

46. The 2nd appellants appeal on both counts is found to meritorious and is hereby allowed; the convictions are hereby quashed and sentences set aside; the 2nd appellant be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 8thth day of June, 2017.

HON.A.MSHILA

JUDGE