IN THE COURT OF APPEAL AT NYERI

(CORAM: J. MOHAMMED, LESIIT & ALI ARONI, JJ.A.)

CRIMINAL APPEAL NO. 15 OF 2016

BETWEEN

DOMINIC NGARI MWAI..................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from Judgment of the High Court of Kenya at Kerugoya (Limo, J.) dated 3rd May, 2016

in

HC. CRA No. 58 of 2014.)

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JUDGMENT OF THE COURT

1. The appellant herein was charged with three counts of the offence of robbery with violence contrary to **section 296(2**) of the **Penal Code** before the Principal Magistrate's Court at Wang'uru. The particulars of the three counts were similar; that on the 31st day of August 2013 at Ndorome village within Kirinyaga County jointly with others not before the court, while armed with dangerous weapons namely metal bars, robbed:

   "In Count 1; Patrick Murithi Ngai cash Kshs.5,000/- and at, immediately before or immediately after the time of such robbery threatened to use actual violence to the said Patrick Murithi Ngai;

   In Count 2; robbed Diana Rose Muthoni a mobile phone make Nokia, a hand bag, identity card, a Co-operative

Bank

plate and cash Kshs.1,000/- all valued at Kshs.10,000/- and at, immediately before or immediately after the time of such robbery threatened to use actual violence to the said Diana Rose Muthoni Muriithi; and,

In Count 3; robbed Elias Murimi Murithi cash Kshs.1,000/- and at, immediately before or immediately after the time of such robbery used actual violence to the said Elias Murimi Murithi."

2. The appellant pleaded not guilty to the charges and the matter proceeded to full trial whereupon the appellant was found guilty in Count one and acquitted in Counts two and three. Upon conviction, he was sentenced to death.

3. Being dissatisfied with the whole decision of the trial court, the appellant filed an appeal which was heard by the High Court of Kenya at Kerugoya (**Limo, J**.). In a judgment dated 3rd May, 2016 the appeal was dismissed and the sentence upheld. The appellant has now filed this appeal before this Court. The appeal is opposed by the State.

4. Brief facts of the matter is that the prosecution called seven (7) witnesses. **PW1**, **Patrick Mureithi Ngai**, recalled that on 31st August, 2013, around 9 p.m. together, with his wife, **Diana Rose Muthoni Mureithi**, **PW2** and their granddaughter drove home from Ngurubani in his motor vehicle registration number KBB 334M Toyota Hilax. At his home, the security lights were on, and he drove inside the compound and parked his vehicle safely. Their son, **Elias Mureithi**, **PW5**, was waiting outside the house for

them.

PW2 and the granddaughter alighted from the passenger's side. However, as PW1 alighted, he heard a voice order him not to alight from the vehicle. He turned and saw two men armed, one with a panga and the other with an iron bar. One of them moved next to him and ordered him to hand over all the money he had or he dies. He handed him Kshs.5,000/-. PW1 asked PW5 if he had any money on him. PW1 also said that all the while PW2 and PW5 were being watched by the robbers. PW5 was ordered to lie down before one of the robbers took Ksh.1,000/- that he was holding.

5. The robbers headed for the gate saying that they would return as the cash they had taken from them was not enough. They boarded a motor cycle that was waiting outside with another person. When the robbers left, PW1 reversed his car and pursued them. He caught up with them but the motor bike skidded, throwing the pillion rider and his two passengers to the mud. PW1 said that the three escaped into the rice farm which was under water.

6. PW1 said that a huge crowd gathered at the place the motor bike fell and that they set it on fire, after Administration police removed the registration plate of the bike. He then proceeded to Nguka Police Post which was about 200 meters from his home, and reported the incident. He stated that it was while reporting that he was informed that PW5 was injured during the incident and that he had been rushed to hospital at Kwa Wekesa. He went to the hospital to see his son. The son was admitted

there. He then proceeded to Wanguru Police Station to pursue his report.

7. While at Wanguru Police Station, three men came to report that they had been robbed of their motor cycle registration number KMCY 038Z. He noted that one of them had mud and his trouser was wet and he recognized him as one of his attackers. He said he identified him (the appellant) by the jacket he was wearing, which was blackish in color. PW1 notified **PC Charles Mutinda**, **PW4** who then arrested the appellant and the two other persons he was with and placed them in the cells. According to PW1, the arrested persons gave the registration of their motor cycle which they alleged was robbed off them as KMCY 038Z which the PW1 stated matched the one used by the robbers in the attack on him and his family, and further the same one the police removed from the abandoned motor cycle which was set on fire by the members of the public. PW1 identified the black/blue muddy jacket, white muddy shirt and black pair of shoes Prosecution Exhibit 2, 3 and 4 respectively, as the clothes that the appellant was wearing during the incident. PW4 obtained them from the appellant at the time of his arrest.

8. PW2 confirmed that she was with PW1 when the robbers struck after they entered their compound. She testified that the robber on her side demanded for money from her and that she gave him her purse which she was holding which had Kshs.1,000/- and coins, ID card, Co-operative Bank card, phone and receipts. She stated that she saw the two robbers throw a metal bar at their gate man, **Oscar Wangira Wanyonyi**, **PW3**, who dodged it and that

the bar hit PW5 on his ribs, causing him to lose consciousness. He was taken

to hospital and admitted. PW2 testified that she saw one of their attackers at the station and identified him when he and two others came to the station to report about their stolen motor cycle. She identified him as the appellant.

9. The evidence of PW3 was that he was a tractor conductor and that on the material evening he arrived to the home slightly ahead of his boss PW1, who was with PW2 and their granddaughter. He was atop a tractor which was parked in the compound followed closely by PW1 in his vehicle. He said that as he went to lock the gate, he was confronted by two men. The one in front threw an iron bar at him which he dodged then went out of the compound by the side gate. He was confronted by a third man outside who ordered him to lie down, which he did. He then heard PW5 shout. On looking up, there was no one near so he stood up and called an Administrative Officer he knew and reported the attack. He then went to where PW5 was lying unconscious. He said he was among those who took him to hospital. He said that he did not identify the attackers.

10. PW4 was the police officer on duty at the report office at Wanguru Police Station. He said he received PW1 at the station at 12:30 a.m., who reported a robbery at his home. That as he reported, the appellant entered the station in the company of his father and another man. The three reported the robbery of a motor bike from them. PW4 testified that the moment PW1 saw the appellant, he identified him as one of the robbers. PW4 arrested him

and recovered the

clothes and shoes he was wearing and charged him with this offence.

11. PW6, **Dr. Wekesa**, the proprietor of Mwea Medical Clinic produced the P3 form filled in relation to PW5. He said that he examined PW5 and found bruises and tenderness on the right side of the chest between the 7th and 9th ribs. The weapon used to inflict the injuries was a blunt object. He assessed the degree of injury as harm.

12. PW7, **Corporal Christopher Oroko** was the investigating officer. After his investigation he established that PW1, PW2 and PW5 were robbed of their belongings and that the appellant was involved in the robbery. He released the two other persons who had been arrested alongside the appellant and charged the appellant with the three counts of robbery with violence as herein above.

13. The appellant gave a sworn testimony and called one witness. He stated that he was a boda boda rider at Mwea region. He testified that on the material day he had hired a motor cycle registration KMCR 262H from one Josphat. At around 8.00 p.m. he was hired by two men to take them to a place known as "S" corner to water their rice field. However, when they arrived there, the two men alighted the motor cycle and started to beat him and they robbed him of Kshs.450/=. He stated that while fighting back he fell inside the water before he could escape leaving behind his motor cycle. He recalled that he called his friends including the chairman of boda boda one Kutus and informed them of the

incident, however, he did not say much because his phone had no charge.

14. He stated that around 9.00 p.m. he trekked back to a place where he found people watering their shamba. He explained to them what had happened and they offered to help him. He stated that he called his father, **DW2 James Mwai Muruiki**, through the phone of one of them, at around
10.00 p.m. He testified that one man volunteered to take him to Ngurubani town where he met up with DW2. That by then it was around 11.30 p.m. Together with his father, DW2, they hired a taxi to take them to Wang'uru Police Station where they reported the incident. He said that while at the police station he was accused of being involved in a robbery and that his motor cycle was also involved and together with DW2 and the taxi driver they were arrested. Later on, he was arraigned in court alone and charged with the offence as aforementioned.

15. DW2 gave evidence that the appellant called him and explained to him his ordeal. He stated that they met and together they hired a boda boda rider who took them to Wang'uru Police Station to report. While there, the appellant was told that his motor cycle which had been stolen was involved in a robbery and that the three of them were locked up. Later he and the rider were released but the appellant was arraigned in court.

16. In the judgment dated 15th October, 2014 the trial magistrate, Hon. Kiama (PM), found that the ingredients of

the offence of robbery with violence contrary to section

296(2) of the Penal Code were proved against the appellant with regard to count I and convicted him of the same. With regard to count II and III the trial magistrate found that it was clear from the evidence that PW2 and PW5 were attacked and robbed by a second man in the company of the appellant and therefore the appellant was acquitted on the subsequent two counts. Upon considering the appellant's mitigation, the trial magistrate sentenced the appellant to suffer death citing lack of discretion to impose any other sentence than that prescribed by the law which is death.

17. Aggrieved and dissatisfied with the said judgment the appellant preferred a first appeal to the High Court *to wit*, **Criminal Appeal No. 58 of 2014**. In the judgment dated 3rd May, 2016 Limo, J. found that the prosecution's case was proved to the required standard. In conclusion therefore he found no merit in the appeal and dismissed it and consequently upheld both the conviction and sentence by the trial court.

18. Aggrieved and dissatisfied with the said judgment the appellant preferred a second appeal to this Court and lodged his notice of appeal on 10th May, 2016. In his grounds of appeal, the appellants faults the learned Judge on six grounds. Considering these grounds they can be summarized into three grounds; that the learned Judge of the first appellate court erred in law: for upholding the appellant's conviction on the basis of identification made under conditions that did not favour positive identification,

and without any identification parade being conducted; for

misapprehending the facts, applying wrong legal principles and drawing erroneous conclusions to the prejudice of the appellant; and, by failing to appreciate the appellant's defence which was strong enough against the prosecution evidence.

19. At the hearing of this appeal, conducted virtually on 11th December, 2024, learned counsel **Mr. Muchangi** was present for the appellant whereas Learned Prosecution Counsel **Mr. Naulikha** was present for the State. The appellant was present virtually from Naivasha Maximum Prison. The two counsel had filed their written submissions, which they briefly highlighted.

20. We have considered the evidence adduced in the case, the rival submissions of counsel and the cases relied upon. Being a second appeal our mandate is circumscribed by **Section 361 (1) (a)** of the **Criminal Procedure Code** to deal with matters of law only if we find that there are any raised in the appeal. We must resist the temptation to deal with facts which were tried by the trial court and retried on first appeal.

21. That mandate was recognized as follows in ***Stephen M'Irungi & Another vs. Republic*** **[1982-88] 1 KAR 360**:

> ***"Where a right of appeal is confined to questions of law only, 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 finding of fact and law, and, it should not interfere with the decisions 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 the decision is bad in law."

22. Although on a second appeal, this Court is only entitled to deal with matters of law, factual evaluation becomes necessary where it is alleged that the first appellate court failed to undertake its obligation of subjecting the evidence before the trial court to a fresh scrutiny. This Court therefore held in ***Jonas Akuno O'kubasu vs. Republic*** **[2000] eKLR** that:

> ***"It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness, but there may be other circumstances, quite apart from manner or demeanour which may show whether a statement is credible or not which may warrant the court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen. On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."***

23. As we have already stated, three grounds of appeal were raised and we propose to deal with two of them together,

which are the issues around identification and the faulting of the first appellate court of misapprehending the facts, applying wrong legal principles and drawing erroneous conclusions.

24. Mr. Muchangi for the appellant urges that the conviction of the appellant was unsafe due to lack of positive identification and procedural irregularities. He emphasized that no identification parade was conducted, yet the appellant was arrested at the police station while attempting to report an offence committed against him. He highlighted inconsistencies in witness testimonies especially regarding the color of the assailant's jacket. He submitted that PW1 stated that he identified the appellant by his jacket which he said was blackish in colour, while PW3 stated that the robber who approached him had a navy blue jacket. He urged that the trial court ought to have interrogated whether in such circumstances it was possible for the victims to make out the physical features of the assailants. He urged that as gleaned from the above inferences of facts, the witnesses differed on not only the type of weapons that were used on them in this particular incident but also on the description of the attackers and the clothes they wore.

25. Counsel placed reliance on the case of ***Maitanyi vs. Republic*** **[1986] KECA 39 (KLR)** where this Court emphasized that identification evidence, particularly by a single witness, must be cautiously evaluated with careful inquiry into lighting, observation conditions, and the

potential for honest mistakes. He also relied on the case of

Joseph Murimi Gitusho & Another vs. Republic **[2020] eKLR** where the Court emphasized failures in police investigations, including the omission of identification parades as grounds for finding a conviction unsafe.

26. With regards to the issue of inconsistencies in the time of report (Judge, this is not very clear), description of clothing, the number and identity of attackers, and the motor cycle registration numbers, the appellant cites the case of ***David Ojeabou vs. Federal Republic of Nigeria*** **[2014] LPELR- 22555 (CA)1** where the Court held that contradictions on material facts, not minor discrepancies, undermine the credibility of witnesses. Further, in ***Julius Waweru Muchira & Another vs. Republic*** **[2016] KEHC 905 (KLR)**, the High Court found that mismatched evidence such as differing vehicle registration numbers and failed identification parades rendered the conviction unsustainable.

27. In response, Mr. Naulikha submits that this being a second appeal this Court should consider points of law only as provided under section 361 of the Criminal Procedure Code and as held in the case of ***Reuben Karari c/o Karanja vs. Republic*** **[1956] 17 EACA 146**. In addition, (Judge, not very clear) be mindful of the caution not to 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 and relied on the case of ***M'Riungu vs. Republic*** **[1983] KLR 455**.

28. Mr. Naulikha defended the conviction asserting that the evidence placed the appellant at the scene of the robbery and that he was positively identified shortly thereafter at the police station by PW1. The respondent emphasized that the evidence of PW1, PW2, PW4 and PW5 was consistent on the issue of identification of the appellant and further argues that the security lights were on during the attack and it was only after the attack that the security lights were damaged as the attackers were fleeing. The respondent thus argues that failure to conduct an identification parade by itself was not fatal to the identification of the appellant as being part of the attackers on the material date. He urged that any inconsistencies in the witnesses' testimonies were minor and did not prejudice the appellant's case. Counsel placed reliance on the case of ***Twehangane Alfred vs. Uganda*** **[2003] UGCA 6** which held that it is not every contradiction that warrants rejection of evidence and maintains that the contradictions cited by the appellant were not grave and did not point to deliberate untruthfulness that affected the substance of the charge against the appellant.

29. The issue is whether the two courts below correctly examined and analyzed the evidence of identification by the prosecution witnesses. The learned trial Magistrate observed that PW1's evidence on identification was that: *'he recognized the suspect from the jacket he was wearing which was blackish in colour*." Similar evidence was given by PW2 and PW5. We shall get back to this at a later

stage.

30. The first appellate court summarized the evidence on identification by PW1 and PW2 thus:

> **"Prosecution witness 1 said he recognised the suspect from the jacket he was wearing which was blackish in colour.**
>
> **Prosecution witness 1 said the motor cycle that the accused had gone to report that it had been stolen, was the one the suspects abandoned at the scene and fled into the rice fields.**
>
> **Prosecution witness 2 said the compound had security lights and she was able to see the accused and his accomplice as they entered the gate. Prosecution witness 2 said the suspect who was on her side of the car wore a navy blue long sleeved coat while the suspect (accused) on the side of prosecution witness 1 wore a dark blue or black coat."**

31. As for PW3, the learned Judge noted that his evidence was that he could not identify any of the attackers. PW5 on the other hand said that he was able to see the appellant as the man who went to his father's side (PW1).

32. In the locus classicus case on identification, ***R vs. Turnbull & Others*** **(1976) 3 All ER 549**, **Lord Widgery C.J**. had this to say:

> **"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. … Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by**

JUDICIARY REPUBLIC OF KENYA

each witness came to be made.

<u>How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way</u>,..**”** [Emphasis supplied?]

33. The High Court in ***<u>Sylvester Wanjau Kariuki vs. Republic</u>*** **[2016] eKLR**, cited the decision of the Supreme Court of India in ***<u>K. Anbazhagan vs. State of Karnataka & Others</u>*** **Criminal Appeal No. 637 of 2015** where it was held that:

> ***“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely… The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”***

34. It is trite that the duty of a first appellate court is to re-hear the case, re-evaluate and re-examine the evidence.

See

Jonas Akuno O’kubasu vs. Republic **[2000] eKLR**. We

must point out, with due respect that the judgment of the High Court fell short of the legal expectations. Apart from simply stating that it had a duty to re-evaluate the evidence, there is nothing in the judgment to show that the said court actually re-evaluated the evidence. Re-evaluation of evidence is not the same as rehashing the evidence, which is what the learned Judge did. In our view re-evaluation of the evidence requires a re-examination of the evidence and analysis of the same in order to arrive at a decision whether, in arriving at its decision, the trial court properly addressed itself to the evidence that was adduced before it. This approach was restated in the decision of the Supreme Court of India in ***Ganpat vs. State of Haryana*** **[2010] 12 SCC**

59. **4.** where the Court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

> **"a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.**
>
> **b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.**
>
> **c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed…"**

35. Apart from rehashing the evidence on identification as given by the eye-witnesses, PW1, PW2, PW3 and PW5,

there was no analysis. That is to say, there was no examination or evaluation of the conditions of lighting, the nature, strength

of the light and the distance at which each witness saw the assailants. There was no telling what the quality of the light was, the distance at which the light was from the witness and the assailant, and for how long the witness had the assailant under observation. None of the witnesses gave description of the assailant s except for the coat or jacket the appellant was said to have been wearing. With due respect to both the courts below, a description of the jacket, given at the time the appellant was being arrested at the police station, without more, was not sufficient or safe to found a conviction. Further, the evidence of PW5 was dock identification, which is worthless unless supported by an identification parade.

36. Moreover, we note there was a material inconsistency in the prosecution evidence. PW1 and PW2 were present at the Wanguru Police Station when the appellant entered the station to make a report, shortly after the two prosecution witnesses had arrived. PW1 made no mention of having gone to the station with any other person, leave alone PW2. Further, PW4 did not mention seeing PW2 at the station. It is only PW2 who mentioned that he went to Wanguru Police Station. More strangely was the ability of PW5 to identify the appellant at the hearing, even though PW2 and PW3 said he lost consciousness early at the onset of the robbery. We find that there are more questions than answers in the evidence of identification.

37. The third and final issue raised is the failure by the two courts below to consider the appellant's defence. Mr.

Muchangi for the appellant submitted that the police investigation was shoddy and argued that the appellant's defense, including that of his alibi, was unjustly dismissed with the trial court and High Court improperly shifting the burden of proof onto the appellant contrary to the established legal standards. In conclusion, counsel maintained that the prosecution had not proved its case beyond reasonable doubt and urged this Court to quash the appellant's conviction and sentence.

38. Mr. Naulikha did not agree with the appellant's position and he submitted that the trial court and the High Court properly considered and dismissed the appellant's alibi as un-convincing and urged that the burden was not unfairly shifted to the appellant. In conclusion, counsel maintained that the conviction and sentence were based on sound evidence and urged this Court to dismiss the appeal in its entirety.

39. What we note regarding the appellant's side of his story was the manner in which he was treated at the report office of Wanguru Police Station. He arrived with his father, DW2, wet and complaining of being robbed. The moment PW1 and PW2 saw his wet clothes, they immediately reported that he was one of the men who had robbed them. The only thing they described as the basis of identification was the colour of the jacket or coat he was wearing.

40. PW4, the report officer on duty, in his evidence stated that he noted that the appellant looked anxious after he was

identified by PW1 and PW2, and so put him and the two

men with him in the cells. PW4 did not even wait to listen to the appellant's side of the story. That is why it was PW1 who stated that the registration number given by the appellant as having been stolen from him was KMCY 038Z, which he claimed was the same used to rob him. While in fact the number the appellant gave was noted by the courts below as KMCR 262H.

41. Unfortunately, both courts did not take that into consideration, neither did they pay attention to what DW2 testified to, that he was never part of the robbery, that his son, the appellant called out to him for help after the motor bike he had hired to use that day was stolen from him. Further, the two courts below failed to ponder a very important point: why would the appellant make a report of robbery as a victim if, in fact, he was the villain? What would he gain by making such a report? It beats reason. It makes more sense that he was a victim of an attack and that was the reason he made the report to the police. That is why PW4 and the investigating officer should have investigated whether there was such a motor bike as registration no. KMCR 262H given by the appellant, even if for the purpose of elimination only. Not to mention that the learned Judge shifted the burden against the appellant, stating that he should have called one Josphat to confirm his testimony that he had given him his motor bike to use on the material day.

42. As we have observed in this judgment, the manner in which the two courts below handled the evidence of

identification

left many gaps in the prosecution case, for that reason the evidence was not thoroughly tested as required. Further, there was no other evidence to support the correctness of identification, or to give credence to the prosecution case. In the circumstances, we find that the conviction entered against the appellant is unsafe and cannot be allowed to stand.

43. The result of the appeal is that the same is allowed, the conviction quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 24th day of October, 2025.

J. MOHAMMED

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR