

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: W. KARANJA, M'INOTI & ALI-ARONI, JJ.A.)

CRIMINAL APPEAL NO. 48 OF

2015 BETWEEN

DAVID NJERU NJIRU 1ST APPELLANT

JULIUS KIRIMA MUGAMBI 2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Embu
(Muchemi & Bwonwonga, JJ.) dated 2nd June 2015*

in

HCCR. A NOS. 3, 4, 5, 6, & 7 of 2014 (Consolidated))

JUDGMENT OF THE COURT

1. This is a second appeal from the judgment of the **High Court of Kenya** at **EMBU (Muchemi and Bonwonga, JJ.)** dated 2nd June 2015. By that judgment, the High Court dismissed a consolidated appeal by the **appellants, David Njeru Njiru** and **Julius Kirima Mugambi**, in which they had challenged their conviction and sentence to death by the **Principal Magistrates Court** at **Runyenyes (the trial court)**, for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. In the trial

court the appellants were charged jointly with four others, but the four were acquitted on appeal by the High Court.

2. The particulars of the offence with which the appellants and their co-accused were charged were that on 4th July 2013 at Mugui Village in Embu County, with other not before the court and while armed with pangas and axes, they robbed **Alex Muriithi Njeru** and **Agnes Maitha Kimani** (the complainants) of 3 Hasqvarna chainsaws; 1 iPhone 5 cellphone; 2 Nokia cellphones; 2 keg pumps; 15 bundles of Sportsman cigarettes; a pair of shoes; and Kshs. 500, all valued at **Kshs 304,500**. The particulars also contained the averment that immediately before or after the time of the robbery, they used actual violence on the two complainants.
3. The prosecution's case against the appellants was that on the material day, at about 1.00 am, the complaints were sound asleep in their home when they were woken up by a knock on the door and an order to open. On checking through the window, the 1st compliant found their daughter with some people, who identified themselves as police officers. After stepping out, four people ordered the complainants to sit down. They claimed to be police officers who wished to search their house because they had information that the complainants were

in possession of counterfeit
money.

4. Three of the people entered the house at the time when the lights were on and four others escorted the 1st complainant to open the stores. After realising that he had forgotten the keys to one of the stores, the 1st complainant went back to the house to retrieve them but he encountered one of the attackers emerging from the bedroom with a carton that contained coins. Realising that the people could not be genuine policemen, he kicked the carton and scattered the coins all over, as a result of which the attackers set upon him with crude weapons. They cut him on the face, head, and fractured his hand. One of them exploded an explosive and at that point the 1st complainant switched off the lights. He managed to flee and hid until the gang left. He then went to a neighbour's house to seek assistance and the neighbour took him to hospital. Subsequently he was transferred to Nairobi Hospital where he was admitted for two weeks for further treatment.
5. Upon discharge from the hospital, the 1st complainant noticed that the properties specified in the charged sheet were stolen in the course of the robbery and reported the robbery to the police. About three months after the robbery, on 30th October 2013, he was informed that a suspect had been arrested. He proceeded to Runyenyes Police Station where he identified the

2nd appellant in

an identification parade. He identified the 1st appellant under

similar circumstance on 4th November 2013. He testified that it was the 1st appellant who exploded the explosive, while the 2nd appellant was the one carrying the carton with the coins, and that he was able to identify the two appellants from the lights in the sitting room. He added that the appellants did not attack him immediately and that he had had time to talk to them.

6. The evidence of the 2nd complainant was similar to that of the 1st, only to add that after the lights went off, she fled and was pursued by two of the attackers who cut her. She managed to get to a neighbour's house and subsequently went to the hospital and later reported the incident to the police. She identified the appellants on the same date and in similar circumstances as the 1st complainant. She also testified that she was able to identify the 2nd appellant because he had, in addition, demanded from her Kshs 300,000. As for the 1st appellant, he was the one who removed all her clothes from the drawers and also ate the food that had been left on the table. According to the witness, the incident took about 20 minutes.

7. The evidence of **PW3, Bernard Azango Chueyie** was that on 9th August 2013, he gave the 2nd appellant, who he had known for over two years, Kshs 1,500 and in turn the 2nd appellant gave him a phone which he was to hold as security until refund of the

money.

The 2nd appellant did not refund the money and the witness decided

to us the phone. On 20th October 2103, he received a call from a stranger who requested him to go to KWIFT offices, where two people met him and asked him how he had come by the phone. They took him to Mugoya Police Station, and upon interrogation, he told the police that he obtained the phone from the 2nd appellant, who was later arrested.

8. **PW5, CIP Fanuel Nasio** testified how he conducted the identification parades on 30th October 2013 and 4th November 2013 for the 2nd and 1st appellants, respectively, when both complainants positively identified them. **PW 6, Dr G. N. Njiru** testified to having examined the complaints and filed their P3 Forms. The 1st complainant had suffered fractures of the facial bone and the right hand, and multiple cut wounds. His injuries were assessed as harm. As for the 2nd complainant, she had suffered multiple fractures of the upper arm and the nose and her injuries were similarly classified as harm.
9. **PW8, Daniel Munene** a 16 year old son of the complainants testified that on the material day, he was woken up by people calling his father. They subsequently came to his bedroom and demanded that he takes them to the store, which he did. He identified one of the people as the 1st appellant, who ordered him

to open the store. The witness testified that he was able to see the

1st appellant with the aid of lights from the toilet and that the 1st appellant was standing about one meter from the source of the light.

10. **Corporal Nelson Tanzi, PW9**, was the investigating officer and testified that he went to the complainants' home after getting a report of the robbery and found that they had been taken to the hospital. He observed blood stains in the house and items scattered all over. Subsequently he recorded the complainants' statements and issued them with P3 Forms. The witness also testified how Bernard Chueya was arrested using one of the Nokia phones stolen from the complainants and led the police to the 2nd appellant who was latter charged with the offence. The witness produced in evidence the two Nokia phones and their respective receipts.
11. **PW 10, PC Francis Sirma** testified that with the assistance of Safaricom, the police traced the two stolen Nokia phones. One of the phones, Nokia 302 Serial No. 355210058844008 was used by PW3 (Bernard Chueyie) using line No. 0720 412 482. The phone was traced to Embu Town, and the police arrested PW3, who led them to the 2nd appellant as the person who gave him the phone as security for Kshs 1,500. Upon interrogation, the 2nd appellant

informed the police that the phone belonged to the 1st appellant.

12. The last witness was **PC Sylvester Mwaniki (PW11)**, a Safaricom security officer. He produced phone call records and testified that using a program known as Equipment Identity Registration (EIR), they identified line No. 0720 412 482 as belonging to PW3 which was paired with cellphone serial No. 355210058844008, thus establishing a link between the line and the phone.
13. After they were put on their defence, both appellants elected to give unsworn statements and called no witnesses. The 1st appellant testified that he could not recall where he was or what he was doing on the day of the robbery, but that on 4th November 2013, he was sleeping in his house when he was woken up at about 10 pm by three people who said they were police officers. They searched the house but did not recover anything. They arrested him and took him to Mugoya Police Station where he was beaten and asked about the phone and power saws. He was then moved to Runyenyes Police Station where he was accused of having stolen a phone. He was identified by two people in an identification parade of 9 people and thereafter he was charged with the offence.
14. On his part, the 2nd appellant testified that he also could not recall

where he was or what he was doing on the material date.
However, on 23rd October 2013, as he was returning home
from work at

about 9.00 pm, he met police officers who asked him to sit down and subsequently took him to Runyenyes Police Station where they locked him up. The next day the investigating officer asked him for Kshs. 5,000 so as to release him, but when the 2nd appellant said he had no money, the investigating officer said he was rude and would take him to court. On 30th October, the OCS called him to his office after which he conducted an identification parade and was identified by two persons that he had seen at the office. When he complained that the identification parade was not properly conducted, the OCS slapped him and forced him to sign the forms. Subsequently he was charged with the offence.

15. In a judgment dated 4th March 2014, the trial court considered the circumstances under which the offence was committed and held that the complainants were able to positively identify both appellants. The court also found that the identification parade was held in accordance with the law; that in addition the appellants were linked to the offence by one of the phones that was stolen from the complainants and found in possession of PW3, who testified that he had received it from the 2nd appellant who in turn stated that it belonged to the 1st appellant; that the appellants did not offer any plausible

explanation how they came

by the phone; and that their defences comprised of general denials and were not genuine.

16. After their conviction and sentence to death, the appellants unsuccessfully lodged separate first appeals in the High Court, which were consolidated and from which this appeal arises. In the present appeal, the appellants filed separate supplementary memoranda of appeal both dated 27th August 2025, but raising the same grounds of appeal. Their learned counsel, **Mr. Mbarire**, submitted that the High Court erred by holding that the prosecution had proved its case against the appellants beyond reasonable doubt and by failing to consider relevant evidence, thereby arriving at a plainly wrong decision.
17. Counsel submitted that the High Court failed in its duty as a first appellate court to re-evaluate and analyse the evidence and having failed to do so, it is the duty of this Court to analyse the evidence and determine whether it was sufficient to sustain a conviction. He relied on the decision of this Court in **Mwanyengela v. Republic** [2024] KECA 561 (KLR).
18. It was submitted that the first appellate court further erred by upholding the identification parade whereas the appellants had stated that they had met the complainants at the police station

and in Embu town before the parade. Counsel contended that the

first appellate court failed to re-evaluate the evidence as regards the identification parade and, coupled with the fact that the complainants did not describe the appellants to the police, the possibility of errors in the identification remained.

- 19.** He further argued that the identification parade was not conducted with scrupulous fairness and in accordance with the law because the suspects were not of the same height. He added that the appellants' identification was nothing but dock identification, which was worthless. The decisions in

Mathew

Mwongera & 2 Others v. Republic [2014] eKLR and **Gabriel**

Kamau Njoroge v. Republic [1982-1988] 1 KAR 1134 were cited

in support of the submissions.

20. On the basis of those submissions, counsel urged the Court to allow the appeal, quash the convictions, and set aside the sentences.

21. **Ms. Mengo**, learned counsel who held brief for **Mr. Naulikha** for the respondent, opposed the appeal relying on submissions dated 8th April 2025. Counsel contended that the appeal had no merit and that the first appellate court properly evaluated the evidence and satisfied itself that the appellants were

properly identified. It was submitted that although the offence was committed in the dead of the night, both the trial court and the first appellate court

inquired into the source and intensity of light and found that the complainants were able to identify the appellants from the light in the sitting room and the role that each appellant played during the robbery.

22. Specifically, as regards the identification parade, it was submitted that PW5 testified on how he conducted the identification parade and that the complainants did not see the witnesses before the parade; that there were nine people in each parade; that the appellants were allowed to choose their position in the lineup; that the complainants positively identified the appellants by touching them; and that the appellants duly and voluntarily signed the identification parade forms.
23. The respondent further submitted that in addition to the identification evidence of the complainants, the appellants were linked to the offence by the evidence of PW3 who testified that he received one of the Nokia phones stolen from the complainants from the 2nd appellant to hold until the 2nd appellant refunded a sum of Kshs 1,500 that PW3 had given him. It was contended that it was the 2nd appellant who in turn stated that he had obtained the phone from the 1st appellant.
24. Accordingly, the respondent urged the Court to dismiss the

appeal

in its entirety due to lack of merit.

25. We have carefully considered this second appeal. By dint of **section 361** of the Criminal Procedure Code, a second appeal is restricted to issues of law only. In **Karani v. Republic** [2010) 1 KLR 73 this Court explained its approach in a second appeal as follows:

“This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior court on fact unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law.”

26. In a second appeal, all issues of fact are taken to have been settled by the trial and the first appellate courts. The second appellate court will therefore, not involve itself in disputes about facts, and will not interfere with the findings of facts by the courts below, unless it is demonstrated that the findings are not based on evidence or that on the whole, the decision is plainly

wrong. In

M'Riungu v. Republic [1983] KLR 455, this Court held as follows:

"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 decisions is bad in law..."

27. On the other hand, the duty of a first appellate court is to exhaustively re-evaluate the evidence adduced before the trial court and reach its own conclusions. In **Okeno v. Republic (1972) EA 32**, the duty of the first appellate court was explained as follows:

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ...and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion... It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In

doing so, it

should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

28. While we agree that a proper re-evaluation of evidence is not mere regurgitation of the evidence produced before the trial court, there is no prescribed style of re-valuation of evidence. The critical issue at the end of the day, is whether in totality, the first appellate court reconsidered the evidence and arrived at its own decision, either agreeing or disagreeing with the trial court. In **David Njuguna**

Wairimu v. Republic [2010] eKLR this Court held thus:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. T here are instances where the first appellate court may,

depending on the facts and circumstances of the case,

come to the same conclusions as those of the lower court.

It may rehash those conclusions. We do not think there

is anything objectionable in doing so, provided it is clear

that the court has considered the evidence on the basis

of the law and the evidence to satisfy itself on the correctness of the decision.” (Emphasis added).

29. We also do not think that in considering whether the first trial court adequately evaluated the evidence, it is permissible for a party to selectively pick only one narrow aspect of the evidence

and ignore the totality of the evidence that was considered by the first trial court. In this appeal, the appellants' contention that the first appellate court did not subject the evidence adduce before the trial court to analysis and re-evaluation is not borne out by the record. For starters, one must wonder how the High Court was able to acquit the appellants' four co-accused if it merely regurgitated the findings of the trial court, as suggested by the appellants.

30. The appellants' specific complaint about evaluation of the evidence relating to the identification parade must be seen from the vantage point of the first appellate court's evaluation of the entire evidence of identification of the appellants. The first appellate court thoroughly reconsidered the evidence on record as regards identification of the appellants and was satisfied that their identification was reliable and safe.
31. The best we can do in this regard is to reproduce verbatim, how the High Court went about the issue of the appellants' identification. In paragraphs to 16 to 24 of the judgment, the court considered the identification of the 1st appellant. The court rendered itself thus:

This appellant was convicted on the basis of visual identification evidence of Mr. Alex Muriithi Njeru (PW1)

and

his wife Mrs. Agnes Maitha Kimani (PW 2). According to PW1, he was able to identify David Njeru Njiru (1st appellant) because he had switched on the electricity lights in the table room. He went further to state that he was with him for six to ten minutes. He says that this particular appellant who was variously described as the 3rd or 5th accused at trial as the person who ate his food that was on the table. Furthermore, he says that this appellant is the one who exploded an explosive device in his house. The witness has stated that he also identified this witness by his height and body size. Finally, he says that this appellant was the one who carried coins in a container which the witness kicked and they were all scattered on the floor. The evidence of P W 1 is supported by that of his wife PW 2. According to her, she heard the robbers shouting "Mzee, open the door!" The robbers identified themselves as KWS officers. After entering their house, they ordered both P W 1 and 2 to sit down. Their stated mission was to search the house for fake money and illegal beer. The robbers were armed with pangas, axes and metal bars. PW2 identified David Njeru Njiru during the attack because there was sufficient electricity light in their house. She says that it is this appellant who removed her clothes from the drawer. According to her, the incident took twenty minutes. In cross-examination, PW2 stated the incident actually took six to seven minutes. Under further cross-examination, she stated she never described the appearance of the

robbers to the police. Like her husband PW 1, she identified this appellant at the police identification parade held by Chief Inspector

Fanuel Nasio (PW 3) on 30th October, 2013. The appellant has complained that PW1 and 2 did not give any description of their attackers when they reported the matter to the police. We did not find merit in this ground of appeal because these witnesses were able to identify the appellant. There was sufficient electricity light that enabled the witnesses to identify the appellant. Furthermore, they have described what this appellant did when he was in their house. According to PW 1, it is this witness who exploded an explosive device. The witness went further to state that it is this appellant who ate their food that was at their table. The whole incident took six to seven minutes. It should be remembered that that the robbers amongst whom was this appellant had introduced themselves as police officers who in their house wanted to conduct a search for fake money and illegal beer. PW1 was convinced that they were police officers until the time when one robber took his money that was in the container. The witness was calm when welcoming these robbers because they posed as police officers. They stayed at the scene of the robbery between seven to twenty minutes. In the circumstances, the identification of this appellant was positive. It therefore follows that his ground of appeal that his appearance was not given to the police does not hold any water.”

32. From that analysis, it is evidently clear why the High Court was satisfied that the appellant's identification was safe, having

inquired from the evidence the nature and source of light at
the
material time; the period of time that the complainants and the

appellants were together; their proximity to each other; and the complainants' evidence of the role that each appellant played in the robbery.

33. Similarly, the first appellate court evaluated the evidence of identification of the 2nd appellant and found it to be positive and safe, in the following terms, from paragraphs 49 to 51 of the judgment:

“The conviction of this appellant is based on the visual identification of the appellant by PW 1 and 2 , which evidence of identification has been outlined in the foregoing paragraphs. Furthermore, according to PW1, it was this appellant who carried his coins in a container which he kicked and as a result they were all scattered in the room. The witness said that he saw this appellant very well. The witness went further to state that there was enough electricity light which enabled him to identify this appellant. He identified him by his height and body size. This witness denied seeing the appellant before the holding of the police identification parade on 30th October, 2013. The evidence of this witness is corroborated by that of his wife who similarly identified the appellant at the scene o f robbery. According to her, she talked with this appellant for ten minutes. It is also her evidence that it is this appellant who demanded shillings three hundred thousand. In response to that, the witness told

***him that they did not have money
because they had just bought stock. Like her
husband,***

PW 2 identified this appellant at the police identification parade which was conducted by PW5 C.I.P Fanuel Nasio on 30" October 2013. The identification parade form was put in evidence as prosecution exhibit 7. Furthermore, it is the appellant who was the 4th accused during his trial- who borrowed shillings two thousand from Bernard Chueyie (PW 3). The appellant gave PW3 the stolen mobile phone as security. The appellant then promised but failed to refund the money on 16" August 2013. During his trial, he was variously identified as the 2nd or 4th " accused following the amendment of the charge by the prosecution. When this appellant was taken to the police station, he asked PW3 whether he had been arrested because of then the stolen mobile phone. PW 3 answered in the positive. The appellant, told PW 3 to assist him. The appellant told PW 3 that if he was released on bond, P W 3 should not come to testify against him. In response to this witness declined. According to PW 3, he knew the appellant before this incident."

34. From the foregoing, we are satisfied that there is no merit in the appellants' contention that the first appellate court merely regurgitated the evidence and did not re-evaluate the evidence as regards their identification.

35. Beyond the evidence of visual identification of the appellants by the complainants, it must also be borne in mind that the

appellant's were linked to the robbery by the evidence of PW3
who testified that

he had obtained from the 2nd appellant one of the Nokia phones that was stolen from the complainants. The 2nd appellant had given the witness the phone as security for repayment of money that the witness had lent to him and the police traced the phone to PW3 when he used it. PW3 then led the police to the 2nd appellant, who in turn claimed that he had obtained the phone from the 1st appellant. This evidence of possession of the phone was corroborative of the evidence of the complainants as regards identification of the appellants, and the two courts below found it credible and trustworthy. As a second appellate court, we have no basis in the circumstances of this appeal, for interfering with those findings.

36. In **M’Riungu v. Republic** (supra), the Court held as follows regarding corroboration:

“As was stated in R. v. Baskerville [1916] 2 KB 658, corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime, and we agree that it must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the

evidence that the crime has been committed but also that the prisoner committed it.”

37. We agree with the above exposition of the law, and add that the corroborative evidence in this case satisfied the conditions because it was independent evidence from that of the complaints and circumstantially implicated the appellants as among the persons who committed the offence.

38. Having carefully considered this appeal, we find that the same has no merit and it is hereby dismissed in its entirety. It is so ordered.

Dated and delivered at Nyeri this 19th day of December, 2025.

W. KARANJA

---- **JUDGE OF
APPEAL**

K. M'INOTI

---- **JUDGE OF
APPEAL**

ALI-ARONI.

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

Signed
DEPUTY REGISTRAR

**---- JUDGE OF
APPEAL**