Mwangi & another v Republic (Criminal Appeal 132 of 2018)
[2022] KECA 656 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 656 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 132 OF 2018

K M'INOTI, S OLE KANTAI & KI LAIBUTA, JJA

JULY 8, 2022

BETWEEN

HARRISON KARIUKI MWANGI & ANOTHER ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi (G. W. Ngenye, J.) dated 17th August 2016 in HCCR.A No. 5, 7, & 9 of 2014)

JUDGMENT

1. This is a second appeal from the judgment of the Chief Magistrate's Court at Kibera (Onyina, SPM) delivered on December 2, 2013 in Criminal Case No. 5087B of 2009.

2. The brief background is that the appellants (Harrison Kariuki Mwangi and Kennedy Otieno Juma) were charged jointly with 3 others in the Chief Magistrate's Court at Kibera in Criminal Case No. 5087B of 2009 with 7 counts of robbery with violence contrary to section 296(2) of the Penal Code. In summary, the particulars were that on 31st March 2006 at [Particulars Withheld] Lodge area in Ongata Rongai in the Kajiado District of the then Rift Valley Province, jointly with others, while armed with dangerous weapons, namely pistols, pangas and knives, robbed VAL, CCS, JCA, SPPA, LAD, and PJD, of an assortment of personal effects, including cameras, watches, mobile phones, laptops and other electronic equipment, and motor vehicle accessories, all valued at KShs. 1,300,000, and at or immediately before or immediately after the time of the robbery used actual violence to the above-named complainants.

3. In addition to the 7 counts aforesaid, the appellants were charged with two counts of rape contrary to section 140 of the Penal Code. On the 1st count, the particulars were that Harrison Kariuki Mwangi and Kennedy Otieno Juma, on March 31, 2006, and at the place aforesaid jointly with others not before court had carnal knowledge of Charlotte Campbell Stephen without her consent. On the 2nd

count, Harrison Kariuki Mwangi (the 1st appellant) and one Joshua Omosa, on the day and at the place aforesaid, jointly with others not before court had carnal knowledge of MCwithout her consent.

4. The appellants denied the 7 counts of robbery with violence and the 2 counts of rape whereupon the matter proceeded to trial. The prosecution called 7 witnesses. Even though this is a second appeal (against both conviction and sentence) in respect of which our decision is confined to points of law, we nonetheless take the liberty to summarise the relevant facts relating to the points of law on which the appeal is preferred.

5. Beginning with the prosecution's case, CCS (PW1) told the trial court that, on the material day, she left her residence in the [Particulars Withheld] Lodge area of Ongata Rongai at about 8.30 am; that on return at about 10.30 am., she was accosted and seized by three men who took her around the house menacingly demanding a sum of KShs. 300,000 and a firearm, which she said she did not have; that they led her downstairs, at gunpoint, where they found the 1st appellant and one Joshua Omosa Nyangau; that the 3 men gagged her and held her at gunpoint; that they led her to a bedroom upstairs where the appellants took turns raping her; that, thereafter, she was led to a neighbouring house where she found four other people who had also been seized and tied up by the assailants; that they were kept under watch by the 1st appellant while Omosa was ferrying various personal effects, including electronic equipment out of the house; that, shortly thereafter, Omosa brought in MC (PW2) into the house where the appellants were joined by four other strangers, including Omosa; that she could clearly see the faces of five of them as their faces were not covered; that they were sat around the dining table where the men served themselves food and whisky; that after 2-2 ½ hours, the men led them captive down the hallway into a room where they were tied up and gagged with Omosa keeping watch; that the assailants seized and brought 6 more people into the room where the appellants and Omosa tied them up; that they left the room and brought another man captive into the room; that at about 5.30 pm., the assailants hurriedly got into a car and sped off, taking with them the various personal effects and electronic goods; that PW1 and the other victims managed to force open the door and escape; that they were taken to hospital by No. 4xxxx IP Geoffrey Kinyua (PW7) where they received treatment; and that they reported the incident at Ongata Rongai Police Station.

6. According to PW1, the 6 people brought in and held captive together with her included one JA, one SP, one E and one FWN (PW2B), all of whom lived in her neighbourhood; that it was after the appellant brought another man into the room and ordered him to sit on the floor that they left for Dr. W's and JK's premises in the neighbourhood; that when PW1 and the others managed to break free, she noticed that the assailants had driven off in a car belonging to JA; that at about 6.00 pm, PW1 left for a nearby school to seek help from her friends, namely RI and JB; that the three picked PW2 at Dr. W's residence and left for Nairobi Women's Hospital where she was treated; that the police had already arrived at the residence by the time they left for the hospital; that she returned to the premises the next day when she found police on site; and that she had been robbed of one digital camera, one laptop make Toshiba, one mobile phone make Nokia, one Hi-fi system make Sony, one gold silver watch, one black band watch, one and Range Rover jack and assorted personal artifacts, all valued at about KShs. 1,300,000.

7. PW1 also told the court that, on May 17, 2006, she was summoned to Kilimani police station where she identified the 1st appellant and one Joshua Omosa in separate identification parades comprised of 9 people; and that she also positively identified the 2nd appellant on May 18, 2006 from an identification parade consisting of 9 people at Muthangari police station.

8. MC (PW2) told the court that she was employed as a house maid at a Mrs. L's residence; that on the material day, she was sweeping the verandah when a car approached the residence and 3 people including the 1st appellant and Joshua Omosa alighted; that the1st appellant was armed with a pistol;

further, that they seized her and led her to the kitchen where she found Mrs. L, her driver (Ngiriama) and Joseph, her cook; that the men tied her hands and legs; Mrs. L, her driver and cook had also been tied up; that, after the assailants tied her up, one of them led her to the veranda where he sexually assaulted and raped her; that the 1st appellant also took her to a room and raped her, and then took her back to the kitchen whereupon Omosa took her to a different room and raped her; that, after about 10 minutes, he (Omosa) took her back to the kitchen and tied her up; that, sometime later, a short message came through Mrs. L's phone from PW1, who was requesting for PW2 to go and clean her house; that the assailants demanded to know who she was and where the keys to her cottage were; that the 1st appellant, the 2nd appellant and Omosa left for PW1's house and brought her to Mrs. Leakey's house at about 11.00 am.

9. Confirming the sequence of events that took place at Mrs. L's house as narrated by PW1, PW2 told the court that she went to Ongata Rongai police station in the company of JMT (PW3) and E on 29th May 2006; that, at the station, she identified the 1st and 2nd appellants at the identification parade comprising of 10 people; that the two were among the assailants she had encountered between 9.00 am and 5.00 pm; and that, on the material day (May 29, 2006), she attended three identification parades comprised of different people with different identifying features.

10. FWN (PW2B) told the court that he was employed as a driver by JA, who also lived in the [Particulars Withheld] Lodge area; that he saw two of the assailants in the premises on the material day; that one of them drew pistols and forced Mr. A and himself into the house where they tied them and left them under guard by one of them while the other left, returning shortly thereafter with five other people; that they led them to Mrs. L's house where they found Mrs. L, PW1, PW2, PW3, N and others were tied up and locked up in a room; they managed to break free and raise alarm after the assailants drove off; that he did not know the armed assailants prior thereto; and that he identified the 1st and 2nd appellants in an identification parade on May 29, 2006 at Ongata Rongai police station.

11. PW3, who was employed as a cook by Mrs. L, confirmed PW2's evidence that the appellants were in the premises on the material day, and that he did not know them prior to the incident; that he could identify the assailants as the robbery took place between 9.15 am. and 5.00 pm; that the assailants were in close view and did not conceal their faces; that he attended an identification parade at Ongata Rongai police station on a date that he could not recall; that he was in the company of PW2 and E; further, that the identification parade was conducted in a well lit room, and that he was able to identify the 1st and 2nd appellants, and Joshua Omosa.

12. PW5 (No. 2xxxxx IP Wilson Yego) told the court that he was the investigating officer, and was acting on instructions from IP Geoffrey Kinyua (PW7); that during the investigations, the 1st and 2nd appellants were in custody; that he conducted the identification parades following due procedure, and that the appellants consented to the identification parade; that the two appellants expressed satisfaction by signing the Identification Parade Forms; that, prior thereto, the appellants stated that they did not wish to have any friends or legal representatives present at the identification parade; and, further, that he (PW5) explained the pre-parade procedures to the witnesses before the identification parade was conducted.

13. MKK (PW6,) a night watchman at the adjoining [Particulars Withheld] Lodge, and who worked at the Lodge's workshop during the day, told the court that the robbery took place on 31st March 2006. He stated that they were rounded up, tied up and guarded by one of the assailants while others went searching around the house; that he attended the identification parade conducted at Ongata Rongai police station, but could not identify any of the assailants.

14. No. 4xxxx Ag. IP Geoffrey Kinyua (PW7) stated that he was the officer in charge of investigations relating to the robbery and sexual assault with which the appellants were charged; that he recovered a stained bedcover suggestive of sexual assault and rape, two pieces of clothing used by the assailants to wipe themselves after the rape, and a used condom; that he instructed PW5 to conduct the investigations; that he completed an exhibit memo form and sent the exhibits to the Government Chemist for analysis; that, upon investigations and tip-offs, they arrested the appellants on the night of May 5, 2006; that the police at Kilimani police station subsequently recovered PW1's Toshiba laptop; that the other assailants were arrested on diverse dates at different locations; and that PW1's description of the appellants' were very specific.

15. Notwithstanding the recovery of the exhibits aforesaid, the record of appeal before us does not contain any testimony or medical reports on the rape and sexual assault with which the appellants were also charged. According to PW7, the exhibits and the requisite P3 Forms produced in court had disappeared together with the trial court file, the case having been heard afresh on several occasions, but not concluded following the disappearance of the court records; and that this was the seventh time the case was being heard afresh. Be that as it may, he sought to produce the exhibits as secured in the police file in the absence of the missing medical reports and testimonies of the makers thereof.

16. Put on his defence, the 1st appellant (Harrison Kariuki Mwangi – DW1) gave a sworn statement and denied the charges. Pleading an alibi, he told the court that on March 31, 2006 he played football until 6.30 pm. or thereabouts and, thereafter, went home; that he took his evening meal and slept at about 9.00 pm; that he was arrested on 15th May 2006, held in custody at Ongata Rongai police station for 40 days after which he was arraigned in court on June 22, 2006; that he did not know the reasons for his arrest until the day he was charged; that his DNA samples were taken; but that he did not commit any of the offences charged; that none of the complainants identified him; that he was charged on a defective charge sheet, which indicated the date of the crime as January 11, 2006 with regard to count 9 and 31st March 2006 with regard to count 2; and that the charges against him were framed.

17. In her sworn statement, Nancy Njeri (DW2), the 1st appellant's mother, called as his witness, told the court that, on March 31, 2006, her son (the 1st appellant) was at home; that they took supper together and got up in the morning; that they took breakfast, after which she left for their farm; that she did not know whether the 1st appellant had raped a lady; that she had stayed with him the whole of that day; and that at no time had he left home.

18. In his defence, the 2nd appellant (Kennedy Otieno Juma – DW3), gave a sworn statement denying the charges. Pleading an alibi, he told the court that he was arrested on March 14, 2006 and taken to Ngong police station; that, on the following day, he was taken to Ngong forest where he was tortured by police officers, who coerced him to admit the offences charged; that he was held in custody for 41 days before being arraigned in court and charged; that the officers infringed his constitutional rights by holding him in custody for 45 days before charging him; that on March 31, 2006 he was not in Nairobi; that he had gone for a funeral at Nyakadi; that he was not positively identified as one of the perpetrators of the offences, but was framed; that the charge sheet was defective; that he was not the one who had the recovered laptop.

19. Mary Anyango Okul (DW4), who was called by the 2nd appellant as his witness, stated that she was the 2nd appellant's mother; that on March 24, 2006 she and the 2nd appellant travelled for her father-in-law's burial, which was scheduled for April 1, 2006; that, on 31st March 2006, the 2nd appellant went to prepare the burial venue in the company of other people; that he (the 2nd appellant) was busy all day; and that he did not leave home on that day.

20. After hearing the prosecution and the defence, the Hon. Ag. Senior Principal Magistrate (L. O. Onyina) delivered his judgment on December 2, 2013. He convicted the appellants of robbery with violence and sentenced them to death.

21. Aggrieved by the conviction and sentence, the appellants appealed to the High Court of Kenya at Nairobi. In its judgment delivered on 17th August 2016 in HCCr Appeal Case Nos. 5, 7 and 9 of 2014 (consolidated), the High Court (G. W. Ngenye-Macharia, J.) dismissed the appellant's appeal and upheld the conviction and sentence meted by the trial court.

22. Being further aggrieved, the appellants appealed to this Court on 11 grounds set out in their Supplementary Memorandum of Appeal dated and filed on January 23, 2020. According to the appellants:

> " 1. The Superior Court erred in law by failing to appreciate that the constitutional rights of the appellants were violated, rendering the entire proceedings invalid within the meaning of Article 2(4) of *the Constitution*.
>
> 2. The Superior Court erred by failing to re-evaluate the entire evidence and draw its own conclusions.
>
> 3. The Superior Court misapprehended the facts and applied wrong legal principles, to the prejudice of the appellants.
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> 4. The Superior Court failed to appreciate that the evidence of identification did not meet the required legal standards.
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> 5. The Superior Court erred by confirming the convictions on counts already acquitted by the trial court.
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> 6. The Superior Court erred by failing to analyse the defence critically.
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> 7. The charges were never proved beyond reasonable doubt.
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> 8. The Superior Court erred by shifting the burden of proof to the prejudice of the appellants.
>
> 9. The circumstances and mode of arrest were never analysed.
>
> 10. The Superior Court misdirected itself by delivering an emotional judgment not underpinned by the law.
>
> 11. The offence of robbery with violence contrary to section 296(2) was never proved."

On the grounds aforesaid, the appellants urge this Court to quash the judgment of the Hon. G. W. Ngenye-Macharia, J dated 17th August 2016.

23. In support of their appeal, the appellants' counsel (M/s. Ondieki & Ondieki Advocates) filed their written submissions and case digest dated January 24, 2020, which learned counsel Mr. Ondieki highlighted orally, requesting the Court to allow the appeal. In response, learned State Counsel (Ms. Ngalyuka M. for the Director of Public Prosecutions), also filed written submissions dated March 17, 2022 together with a list of supporting authorities, which she highlighted orally, urging the Court to dismiss this appeal. We shall consider those submissions shortly.

24. This Court's mandate on a second appeal is conferred by Section 361(1) (a) of the *Criminal Procedure Code*, which provides:

> " 361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
> (a) on a matter of fact, and severity of sentence is a matter of fact."

25. What constitutes "matters of law" to which this Court's jurisdiction is confined on a second appeal was clarified by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR where the learned Judges characterised the three elements of the phrase "matters of law" thus:

> "(a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> (b) the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and
>
> (c) the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

26. The jurisdiction of this Court on a second appeal, as is the case here, has also been the subject of judicial pronouncements in various cases, such as *Stephen M'Irungi & another v Republic* [1982-88] 1 KAR p.360 where it was held:

> " 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."

27. In addition to the foregoing, we also agree with what this Court (differently constituted) had to say in *Samuel Warui Karimi v Republic* [2016] eKLR:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong v R, [1984] KLR 611."

28. Mindful of the principles highlighted above, we are alive to the fact that it is incumbent upon us to determine whether, as regards matters of fact, the two- fold test mentioned above has been met, namely whether the concurrent findings of fact in the two courts were not based on evidence, or were based on a misapprehension of evidence; and whether the trial court and the High Court acted on wrong principles. Our careful examination of the record as put to us reveals that the two courts below properly met the twofold test aforesaid. In the circumstances, we are obligated to confine ourselves to consideration of the points of law raised in the appeal.

29. Turning to the 1st ground, which raises the issue as to the constitutionality of their trial, conviction and sentence, the appellants' case is that the Superior Court erred in law by failing to appreciate that the constitutional rights of the appellants were violated thereby rendering the entire proceedings invalid within the meaning of Article 2(4) of *the Constitution*. Closely related to the first is the secondary issue as to whether, as pleaded, the constitutional guarantees enshrined in the cited Article of *the Constitution* of Kenya, 2010 are applicable in retrospect to the appellants' case.

30. We take to mind that Article 2 of the 2010 Constitution, which generally declares the supremacy of *the Constitution* over all other laws, applies albeit in retrospect to the appellants' case when they were first charged and tried in 2006 when all the prosecution witnesses testified and the prosecution case closed. It is also noteworthy that, after close of the prosecution case, the court file disappeared before delivery of the requisite ruling as to whether the appellants had a case to answer so as to admit evidence in their defence in conclusion of their trial. Consequently, the trial had to commence afresh, an eventuality that recurred until their final trial in 2011.

31. The foregoing proposition finds acceptance on account of the fact that the supremacy of *the Constitution* is immutable and transcends the past, the present and the future. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court had this to say:

> " At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients."

32. Be that as it may, we are inclined to give the appellants the benefit of doubt and presume that their intention in raising this issue was to make reference to and rely on Article 2(4) of *the Constitution* in so far as their continued remand in custody before commencement and conclusion of their trial in 2011 was tantamount to what that sub-article refers to as "an act or omission in contravention of this Constitution."

33. The 1st appellant told the trial court that he was arrested on May 15, 2006 and held in police custody until June 22, 2006 when he was brought before the court. According to the 2nd appellant, he was arrested on March 14, 2006. It is noteworthy, though, that this was way before the offences charged had been committed. On the other hand, PW7 told the court that the 2nd appellant was arrested on 5th May 2006 whereupon he was held in custody for a period of about 41 days pending investigations that culminated in the charges, conviction and sentence to which this appeal relates. According to the appellants, their constitutional rights were breached on account of the fact that they were not charged within 24 hours of arrest as required by Article 49 (2)(e) of *the Constitution*.

34. It is noteworthy that the trial Magistrate appears not to have given much attention to this issue, which the appellants raised as one of the grounds in their first appeal. In his judgment, the learned Judge had this to say on the matter:

> " It was first submitted that the appellants were not accorded a speedy trial pursuant to Article 50(2) (e) of *the Constitution*, which provides that –
>
> 'Every person has the right to a fair trial, which includes the right –

(e) to have the trial begin and conclude without unreasonable delay, Under this head, the appellants submitted that after the matter was pulled out under section 87(a) of the Criminal Procedure Code, they were kept in jail for a year before being charged afresh. This court has perused the record before it and it is clear that the appellants were already sentenced in another matter. They were not held in prison awaiting fresh arraignment in court as alluded, but were serving sentence in another matter. Therefore, this ground of appeal fails."

35. In his submissions, learned counsel for the appellants states that the appellants were arrested on April 22, 2006; that they were taken to court on 3rd March 2011 after 5 years; and that this violates the principles and values of fair trial under Article 25(c), 50(1) and (2) and 49(1) (h) of *the Constitution*. However, learned counsel makes no mention of the multiplicity of fresh trials occasioned by repeated disappearance of court files, or the fact that the appellants were at all material times serving a custodial sentence in a different case. In the absence of the record referred to by the learned Judge in that regard, we find nothing to justify departure from her findings and holding in her judgment delivered on August 17, 2016. Neither do we find anything to fault the findings of the 1st appellate court that the appellants were, at the time, serving a custodial sentence in an unrelated case.

36. In any event, and even if the breaches complaint of occurred as alleged, the appellants were, and still are, at liberty to pursue appropriate remedies in the right forum independent of this appeal, which cannot stand on that ground.

Moreover, even if that ground were to hold, it cannot be a basis for acquittal. Pronouncing itself on a similar complaint, this Court in the case of *Fappyton Mutuku Ngui v Republic* [2014] eKLR held that –

> "The correct position in law was set out in Julius Kamau Mbugua v Republic (2010) eKLR where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights."

37. On the 2nd ground, the appellants contend that the Superior Court erred by failing to re-evaluate the entire evidence and draw its own conclusions. In support of this ground, learned counsel for the appellants submits that the learned State counsel had, in her submissions to the first appellate court, conceded the appeal on the ground that the evidence of identification was flawed and recommended that the appellants be acquitted on this account.

38. Far from the appellants' contention, the record of appeal before us speaks for itself and discloses extensive examination and re-evaluation by the learned Judge of the evidence as presented before the trial court. It is on the basis of that re-evaluation that the Judge reached the conclusion with which we agree to the effect that –

> "The conducive identification conditions at the locus in quo acted as corroboration of the subsequent dock identification and identifications during the identification parades. I hold in the circumstances, that the learned Magistrate properly evaluated the evidence of identification in convicting the appellants."

39. In addition to the foregoing, our perusal of the record reveals that the 1st appellate court took a correct approach in the discharge of its mandate, and was consistent with the duty of a fresh and exhaustive re-analysis and re- evaluation of the entire evidence tendered in the trial court so as to

reach its independent conclusions as contemplated in *Okeno v Republic* [1972] EA 32. We also take cognisance of the fact that there is no set formula or criterion for carrying out that mandate, provided that the record demonstrates deference to this statutory requirement. We have no reason to doubt that the 1st appellate court performed this task admirably, and the appellants' submissions to the contrary has no basis. Neither did the State counsel's submission that, in her view, the procedure adopted in the identification of the appellants at several parades was flawed reverse the legal effect of the subsequent dock identification of the appellants.

40. Having considered the record of appeal together with the respective submissions of the learned counsel for the appellants and of the learned State counsel, we find nothing to fault the learned Judge's examination and re- evaluation of the evidence of the appellants' identification, which she carefully analysed having due regard to the manner and the uninterrupted period during which the witnesses interacted with the appellants. To quote the learned Judge:

> " The complainants and witnesses were in the company of the Appellants for periods ranging from 9am to 5pm. This was in clear daylight and that incontrovertible fact was never questioned. In the case of PW1 she was in their company from 11.00am to 5.00pm and could clearly identify them as being her assailants and rapists. PW2 was with them from around 1.30pm till 5pm and had ample opportunity to identify them when he acted as a translator for them with his employer and on the journey back to Mrs. L's house. PW2 was in the company of the Appellants from 9am to 5pm and had ample time to see them both at the dining table and when he was walked out to go get the watchman. PW6 was also in the company of the Appellants from 9am to 5pm and specifically remembers them feeding them ugali and cabbage, giving them soda when they were thirsty and also escorting him to the bathroom when need arose."

41. The foregoing observations substantially answer the appellants' contention in their 4th ground that the Superior Court failed to appreciate that the evidence of identification did not meet the required legal standards; that, contrary to the law, all the identification parades were comprised of the same group of persons; that the witnesses were mistaken; that dock identification was "evidentially worthless". With profound respect to the learned counsel for the appellants, we do not agree.

42. The comprehensive appraisal by the 1st appellate Court of the factual evidence that led to the appellants' conviction clearly demonstrates that the learned Judge was alive to the fact that her determination of the issue of identification of the appellants at the scene of the robbery was key in the success or otherwise of the appeal before her. This is borne out by her foregoing observations on the record relating to the manner and the uninterrupted long period during which the complainants interacted with the appellants throughout the day. In our considered view, that in itself fortified the evidence of positive dock identification on the basis of which the appellants were convicted.

43. Commenting on the value of dock identification, this Court in *Muiruri & 2 others v Republic* [2002] 1 KLR 274 stated:

> " It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of the crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.

> But the holding in Gabriel Njoroge Case [1982 – 88] 1KAR 1134 appears to be too broadly touched. We do not think it can be said that all dock identification is worthless if that were to be the case then decisions like Abdalla Bin Wendo v Republic [1953] 20 EACA 166, Roria v Republic [1967] EA 583 and Charles Maitanyi v Republic [1986] 2 KAR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence.
>
> In those cases, courts have emphasised the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to find a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and prior thereto the court duly warns itself of the possible danger of mistaken identification."

44. Closely tied to the 2nd ground of appeal is the 9th ground on which the appellants contend that the Superior Court erred in failing to analyse the circumstances and mode of their arrest. We hasten to observe that the appellants' arrest and arraignment in court is a matter of fact beyond controversy, unless issues are raised as to the legality of the manner of such arrest. However, no issue has been raised by the appellants on any related matter of law for our determination. Suffice it to observe that PW7 told the trial court how he, together with other police officers, undertook investigations, tracked down and arrested the appellants in Nairobi's central business district on May 5, 2006. To our mind, an "analysis" by the Superior Court of the events leading to the appellants' arrest merely for the sake of analysis, and without more, would not have served any useful purpose or otherwise influence the outcome of the impugned judgment. Moreover, a complaint relating to breach (if any) of any constitutional or statutory right relating to the manner of arrest would of itself found a claim in tort for compensation. Likewise, this ground of appeal also fails.

45. Turning to the 3rd ground, the appellants contend that the Superior Court misapprehended the facts and applied wrong legal principles to their

prejudice. They fault the learned Judge's holding that failure to call the officer in the name of CPL. Mwangi, who arrested Joshua Omosa Nyangau (the 3rd appellant in the first appeal), was not fatal to the prosecution's case; that the court dropping 8 counts because some of the complainants could not testify was not fatal to the case; and in making conclusions that had no evidential support.

46. In addition to the foregoing, we do not agree that failure to call the officer who arrested Omosa, a person who is not a party to this appeal, was fatal to the case against the appellants. Neither do we agree that the learned Judge was at fault in sustaining conviction on other charges after some of the counts were dropped for the reason that some of the complainants were unable to attend court and testify. In view of the foregoing, the only issue falling to be determined in this regard is whether the counts on which the appellants were convicted were proved to the required standard.

47. This Court is alive to the fact that there is no legal requirement in law on the number of witnesses required to prove any particular fact. That is the essence of Section 143 of the *Evidence Act*, which provides that "no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." In *Keter vs. Republic* [2007] 1 EA p.135, the court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

48. Having carefully considered the record before us, we form the view that the counts on which the appellants were convicted were proved beyond reasonable doubt, and that the learned Judge was correct in upholding the conviction on those counts. Accordingly, the appellants' contention on their fifth ground of appeal to the effect that the Superior Court confirmed their conviction on counts already acquitted by the trial court is without basis.

49. As to the Judge's informal observations on the disappearance of court records, the police Occurrence Book and identification parade forms, which prompted fresh trial, we do not agree with the appellants that those observations amounted to misapprehension of facts, application of wrong principles, or conclusive findings without evidence. Neither were the learned Judge's observations idle or baseless expression of opinion. Our examination of the trial proceedings and record of appeal disclose loss of court and police records, including exhibits and witness statements, which prompted fresh proceedings, the last of which culminated in the appellants' conviction.

50. With regard to the alleged shift of the burden of proof on account of the observations aforesaid, suffice it to observe that the record of the trial court does not disclose such shift. If anything, the prosecution led evidence in proof of the ingredients of the offence of robbery with violence. The statement in the written submissions of learned counsel for the appellants to the effect that "the superior court shifted the burden of proof to the appellants by implying that they had a hand in the disappearance of the court record" is, to say the least, a gross misperception of proceedings at a trial or on appeal. The remarks made by the learned Judge were of no effect to the preceding trial. They constituted an obiter dictum, which had no bearing on the appellants' trial and conviction.

51. In addition to the foregoing, the questions raised by the learned Judge as to why the appellants would make a request for the police Occurrence Book entries seven years after commencement of the criminal proceedings were inconsequential to the outcome of their 1st appeal. Moreover, after posing this question in her judgment, the learned Judge proceeded to observe that the appellants were by no means prejudiced by the disappearance of the police Occurrence Book in view of the fact that they had the benefit of copies of the original witness statements. Accordingly, we fail to see how those questions and observations made on appeal amount to shifting the burden of proof to the appellants and, therefore, this ground cannot stand.

52. Turning to the sixth ground on which the appellants contend that the Superior Court failed to critically analyse their respective alibi defences in which their mothers testified in support, we take to mind that the appellants' conviction by the trial court, and the subsequent confirmation by the Superior Court, hinged almost entirely on the evidence of positive identification by PW1, PW2, PW2B and PW3, whose respective testimonies are highlighted above. The four were among eight or so victims of the offences with which the appellants were charged and convicted. The eight had spent long hours under restraint by the appellants and others not before the court. They had been assaulted, tied up, guarded to avoid escape, two of them having been sexually assaulted and raped. In view of that overwhelming evidence, the appellant's alibis could not stand. Having carefully considered the record of appeal, we find nothing to fault the two courts below on their concurrent findings of fact leading to the impugned convictions and, likewise, this ground fails.

53. The only issue that arises from the 7th and 11th grounds of appeal, which are closely related, is whether the prosecution proved its case against the appellants beyond reasonable doubt. The appellants were convicted of the 2nd count of robbery with violence contrary to section 296(2) of the *Penal Code* (Cap. 63). This issue turns upon our findings as to whether the evidence led by the prosecution established the ingredients of the offence of robbery with violence, and whether the charge against the appellants on that count was proved beyond reasonable doubt.

54. The ingredients for the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* were set out in the case of *Johanna Ndung'u vs. Republic* [2020] eKLR as follows:

    (a) if the offender is armed with any dangerous or offensive weapon or instrument; (b)if he is in the company of one or more other person or persons; or

    (c) if at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence on any person.

55. As was held in *Oluoch v Republic* [1985] KLR p.549, the Court observed that proof of any one of the ingredients of robbery with violence is sufficient to sustain a conviction. However, the evidential facts tendered for proof of the ingredients of the offence must be cogent and consistent save for such minor flaws as are curable under section 382 of the *Criminal Procedure Code*.

56. The evidence on record clearly shows that the appellants were armed with dangerous or offensive weapons, to wit, a pistol, pangas and clubs; that the two were in the company of several other assailants; and that they used violence on the complainants, who they tied up and threatened to harm with the weapons, which they wielded throughout the ordeal. In the end, they robbed PW1 and other complainants of various electronic and personal effects. Their identity had been established to the satisfaction of the two courts below. Accordingly, we hold that all the ingredients for the offence of robbery with violence were met, and that the prosecution proved its case against the appellants beyond reasonable doubt. In effect, the 7th and 11th grounds of appeal fail.

57. Finally, the appellants contend in their 10th ground that the Superior Court misdirected itself by "... delivering an emotional judgment not underpinned by the law". However, that is as far as the appellants' submissions go. Apart from their learned counsel's blanketing opinion, the appellants lay no basis on which the Superior Court may be faulted for what the appellants view as "emotional". With due respect to learned counsel, suffice it to observe that the law does not prescribe the tone or manner of speech with which a court of law is required to pronounce itself; provided always that the court addresses itself to the facts and the law on the basis of which it reaches its decision. In our considered view, we find nothing to fault the learned Judge's decision on this account. Likewise, this ground fails.

58. Having considered the record of appeal before us, the judgments of the two courts below, the grounds on which the appeal before us is made, the written and oral submissions of learned counsel for the appellants and of the learned State Counsel, we find nothing in the proceedings before the two courts below to suggest that the concurrent findings of fact in the two courts were based on either no evidence or on misapprehension of evidence. Neither do we find anything to lead to the conclusion that the trial court and the High Court actedon wrong principles in making the findings on evidence leading to the appellants' conviction and sentence, and the subsequent decision to dismiss their first appeal. Having found nothing on record to warrant our interference with the lower courts' concurrent findings of fact and holding on matters of law, we find that the appellants' appeal herein on both conviction and sentence fails and, accordingly, the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR