**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WARSAME, MAKHANDIA & J.MOHAMMED, JJ.A)**

**CRIMINAL APPEAL NO. 183 OF 2016**

**BETWEEN**

**GEOFFREY THIONGO MUKUNYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal against the decision of the High Court of Kenya at Nairobi (Kimaru and Ngenye JJ.) dated 1st March, 2016*

***in***

***H.C.CR.A. No. 121 of 2013***

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**JUDGMENT OF THE COURT**

The appellant, **Geoffrey Thiongo Mukunyi** was charged with three counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and Stealing contrary to **Section 275** of the **Penal Code**.

It was alleged that the appellant with another not before Court, while armed with a slasher and a knife committed three counts of robbery and one count of stealing on 25th July 2012 at Regen Estate in Kiambu County. In count one, the appellant robbed **Fred Kiprotich Sambu, PW 1**, of a mobile phone, CPU make Compaq, ATM card and ID card. In count 2, the appellant robbed **Peter Kuria Njoroge**, **PW 2**, of a mobile phone make Nokia 1202, ID card, ATM card and insurance card. In count 3, the appellant robbed **Monica Waithira Mwangi** of a mobile phone and laptop make Samsung notebook and in count 4, the appellant stole a sub-woofer, 2 camping lights, one suit case, a bag, an iron box and a meko gas; all belonging to **Levi Maina Wanyoike, PW3.**

After the trial, the learned Magistrate found the appellant guilty of the 1st count of robbery with violence and Count 4 of stealing, but acquitted him of Count 2 and count 3 which were erroneous charges of robbery with violence contrary to **Section 95** as read with **Section 296** of the **Penal Code**. The appellant was subsequently sentenced to death and sentence on Count 4 held in abeyance. Dissatisfied with the judgment, he appealed to the High Court, which upheld the conviction and sentence of the trial court.

The appellant has preferred the appeal now before us against his conviction and sentence vide a supplementary Memorandum of Appeal dated 2nd February 2018, where the appellant faults the learned Judges for upholding his conviction whereas identification was inconclusive; failing to re-evaluate prosecution evidence and failing to find that the offence was not proved to the required standard. He also contends that the Judgment was void since one Judge of the superior court had failed to sign the judgment.

At the hearing, learned counsel for the appellant, submitted that the appellant's conviction for robbery with violence which was upheld on identification was unsafe, given that PW1 and PW2 did not know the appellant prior to the attack. He contended that the robbery occurred at 8.30 p.m. as the victims were in the process of opening the doors to their house and they therefore did not have ample opportunity to identify the assailant.

Counsel asserted that none of the two identifying witnesses made a first report giving the description of their assailants and that the appellant was not subjected to an identification parade. In his view it was improper for the police to act without the first report. Counsel cited ***Terekali & Another vs. Republic [1952] EA 259*** for the proposition that a first report by the complainant is a good test by which the truth and accuracy of a subsequent statement can be gauged. Further citing the case of ***Kamau Njoroge vs. Republic (1982-88) KLR 1134***, it was submitted that dock identification as was in this instance was worthless unless preceded by a properly conducted identification parade.

Lastly, counsel emphasized that at the time of the alleged arrest, the appellant was being released from police custody as a suspect for a different offence.

**Mr. Obiri**, learned counsel for the State, opposed the appeal and submitted that the appellant was properly identified by PW1 and PW2 at the entrance of the house. Again, there was a separate light inside to enable proper identification of the appellant. He therefore submitted that all the ingredients of robbery with violence were proved beyond reasonable doubt.

We have considered the record of appeal, submissions made by counsel and the law. By dint of **Section 361(a) Criminal Procedure Code**, we are permitted to only consider matters of law in a second appeal. (See **Njoroge vs. Republic [1982]**).

The first issue for our determination is whether the appellant was properly identified. The trial magistrate in analyzing whether identification was proper stated as follows:

> ***"The prosecution's evidence which remained largely unchallenged was that there was a security light outside the house where the accused person and his accomplice first accosted PW1 and PW2 and further the electric lights at the house were on at the time the accused and his accomplice robbed them. I am satisfied that there is sufficient evidence that PW1 and PW2 both had the opportunity to see the accused person. I also note this was not a case of dock identification as the witnesses described the robbers to the police and as indicated in their statements portions of which were read out in court, they indicate that the accused person had dreadlocks with a green bead at the front, a fact confirmed by the investigating officer who arrested the accused person"***

The same finding was similarly considered by the High Court. It held:

> ***"PW2, Peter Kuria Njoroge largely corroborated PW1's account. They both described what each of the robbers did: the Appellant was guarding them while the other robber collected items in the house. The Appellant was described as short, having dreadlocks with a green bead at the front. This description was also noted at the time of the arrest. PW1 maintained that he would have remembered the Appellant even without the dreadlocks. PW1 and PW2 indicated that even though they were both lying down, they were able to observe the attackers who did not disguise their faces. Further, the house was well lit. We observe that from the testimonies of the complainants, the robbers took their time inside the house; collecting personal items from them and even getting items from other rooms in the house and eventually packing them in a suitcase. With this account of events, we think that there was sufficient time for observing the attackers. Further, the complainants were able to spot the Appellant based on his unique features when they spotted him after the incident. We are satisfied that the identification in this case was proper***."

There is no doubt that the learned Judges of the superior court were keenly aware that the issue of identification of the appellant at the scene of the robbery was crucial in determining the appeal before them.

It is trite law that where the only evidence against an accused person is evidence of visual identification, a trial court is enjoined to examine such evidence carefully and to satisfy itself that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction. (See ***Wamunga vs. Republic (1989) KLR 424***). It was therefore incumbent upon the High Court to re-evaluate the evidence on identification and circumstances surrounding the scene of the crime. As the trial court did, the High Court found that the circumstances leading to identification by the complainants were favourable. According to PW1 and PW2, there was ample light from the security lights outside the house when the robbers approached them and the electric lights inside the house were on at the time of the robbery. Consequently, they were able to observe their assailants when they approached them outside the house and while they were lying on the floor as the robbers ransacked the house and as they were answering the questions asked by the robbers. The evidence of PW1 and PW2 described the appellant as a short man with dreadlocks, with a green bead on one of the dreadlocks. Their description of the appellant was confirmed by PW4 **PC Alexander Miriti,** who arrested the appellant and confirmed that at the time of arrest the appellant had dreadlocks with a green bead at the front and that he had since shaved the dreadlocks.

It is clear that the allegation of being framed or mistaken identification cannot hold. Both courts believed and accepted the evidence of the three witnesses as credible and rejected the testimony of the appellant that he was framed. In considering the inconsistencies pointed out by the appellant on the issue of the absence of a first report made by the complainants the court held as follows:

> ***"The prosecution did not call any other officer who may have received the complainants when they reported in the first instance. We however, observe that whether or not the report by the complainants was recorded by the police, the evidence by the complainants is that they spotted one of the attackers and informed the police who came and arrested him. This ground alone would not defeat the charges against the Appellant. The police acted upon information by PW1 and PW2 that they had spotted the Appellant. The determinant factor is whether or not the identification of the Appellant was positive as to be sufficiently relied on".***

On the discrepancy of the time of the appellant's arrest which according to him was as he was being released for commission of other offences and not at 9.am as stated by PW4 or upon being spotted at a butchery as stated by PW1 and PW2; the court directed itself as follows:

> ***"We find this discrepancy on the description on the time immaterial. The contention is whether or not the Appellant was in custody at the time PW1 and PW2 indicated they had spotted him. PW4 stated that he is the one who released him. By virtue of the fact that he had initially been arrested on suspicion of committing another offence, does not lessen the fact that PW1 and 2 at the same time went to the Police Station to report about the robbery***."

It is clear that both Courts considered the appellant's testimony and concluded that that the appellant's testimony did not dislodge the prosecution's case. As stated by this Court in ***Joseph Maina Mwangi vs. Republic, Criminal Appeal No. 73 of 1993;***

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."***

Similarly, in ***Njuki & 4 Others vs. Republic [2002] 1KLR 771*** the court went further to *state that:*

> ***"In certain criminal cases, particularly those which involve many witnesses, discrepancies are, in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so them the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However where discrepancies in the evidence do not effect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused".***

The inconsistencies in this instance were not material and do not affect the strength of the evidence against the appellant. His conviction was grounded on the credibility of the witnesses both on identification and on the circumstances in which he was arrested. We therefore find no reason to interfere with the findings of the two courts.

As for the ground of appeal that the judgment was void since one Judge of the superior court had failed to sign the judgment, a perusal of the proceedings reveals that both **Justice Kimaru** and **Justice Ngenye** signed the judgment in compliance with **Section 169** of the **Criminal Procedure Code** and therefore the said ground is a non-starter.

For the above reasons, we find no merit in this appeal and dismiss it accordingly.

***Dated and delivered at Nairobi this 8th day of May, 2020.***

**M. WARSAME**

**……**

**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

**……**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**……**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

***Signed***

***DEPUTY REGISTRAR***