IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, SICHALE & KANTAI, JJA)

CRIMINAL APPEAL NO. 90 & 101 OF 2015

STEPHEN GICHUKI GICHIGO.....1ST APPELLANT

ELIJAH WAITHAKA MUNDIA .....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal form a conviction, judgment, decree , order of the High Court of Kenya at Nyeri, (Justice H.I. Ongundi and J. Ngaah) dated 15th February, 2015) In HCCRA NO. 44 OF 2013)

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JUDGMENT OF THE COURT

Five men were arraigned before the Senior Principal Magistrate's court, Mukurweini, on various charges.Count 1 related to a charge of robbery with violence contrary to ***section 296(2)*** of the penal code,particulars being that on 19th June 2010 at Gitundu Village in Nyeri, jointly with others not before court while armed with offensive weapons, they robbed Godfrey Ndungu Wangondu of cash and other items and that immediately before or immediately after such robbery, they threatened to use personal violence to the said person. Count 2 was also a charge of robbery with violence contrary to the said section of the Penal Code, particulars being that on the same day at the same place while similarly armed in company of others not before the court they robbed Jane Wangeci Ndungu of cash Kshs. 104,000/= and a mobile phone and that immediately before or immediately after such robbery they used personal violence against her. In count 3 which also related torobbery with violence contrary to the said provision of law, it was said that on the same date at the same place while similarly armed in company of others not before the court, they robbed John Ndungu Kahihu of cash Ksh. 1800/= and a mobile phone and that immediately before or immediately after such robbery, they threatened to use personal violence against the said person.

Elijah Waithaka Mundia, the 2nd appellant herein was charged in count 4 with the offence of handling stolen goods contrary to ***section 322(1) (2)*** of the Penal Code, particulars being that on the 18th day of February, 2011 at Kiptangwani trading centre in Nakuru County otherwise than in the course of stealing, he dishonestly received or retained one Woofer music system and one laptop knowing or having reason to believe them to be stolen goods.

A trial was conducted by a Senior Principal Magistrate and in a Judgment delivered on 27th March, 2013, two of the accused in the case were acquitted while 3 including the two appellants here were convicted. The three filed an appeal at the High Court of Kenya at Nyeri and in a judgment delivered on 15th of December, 2015, the appeal by one of the appellants there was allowed while the appeals by the appellants here ***Stephen Gichuki Gichigo*** and ***Elijah Waithaka Mundia*** were dismissed. The 1st appellant, Stephen Gichuki Gichigo was the 2nd accused before the trial court while Elijah Waithaka Mundia was the 5th accused. The appellants were disatisfied with the findings of the High Court and hence this appeal.

Being a second appeal our mandate under ***Section 361Criminal Procedure Code*** is to consider issues of law but not revisit matters of fact that have been tried before the trial court and evaluated on the first appeal to the High Court. Our examination of the facts of the case is confined to our satisfying ourselves whether the two courts have carried out their mandate as required by law. The mandate of the Court on a second appeal has been considered in various cases by this Court such as ***Stephen M'Irungi& Another v Republic*** ***[1982-88] 1 KAR 360,*** where the following passage appears:

> **"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."**

We proceed to examine the case as a whole to carry out our said mandate as required of us in law.

A total of 15 prosecution witnesses were called in support of the prosecution case.

Godfrey Ndungu (PW 1) (Ndungu) testified in respect of count 1 while ***John Ndungu Kahihu (PW 2) (Kahihu)*** testified in respect of count 3. Jane Wangeci Ndungu the complainant in respect of count 2 was not called as a witness.

A summary of the prosecution case in respect of the two appellants is that on 19th June, 2010, Ndungu was resting at home in the evening when his wife Wangeci served him tea. There were lights in the house and he was watching television. As his wife walked out she was confronted by two men who entered the house.They were armed with pangas.One of the men went directly to Ndungu while the other walked around the dining table and broke a flourescent bulb that was on. Ndungu was forcefully escorted into his bedroom where he was forced to sit on the floor; his wife was soon brought to the bedroom while his son Kahihu was also brought moments later. Three attackers remained with them in the bedroom while three others ransacked the whole house. Ndungu was forced to surrender his wallet which contained money and his mobile phone was also taken. The thieves broke all drawers in the bedroom and the rest of the house and took money and other items. According to him, the attackers remained with them for about 1 ½ hours. When the thieves were through one of them without any provocation hit Wangeci on the head with an iron bar causing her serious injuries. The thieves left ferrying the items they had stolen.

It was the evidence of Kahihu that he arrived home in the evening at about 8p.m and was surprised to find a person who was inside his father (Ndungu's) car which was parked outside. The person emerged from the car armed with a metal rod and Kahihu was forced into the house and to the bedroom where he joined his mother and father, (Ndungu and Wangeci). According to him, he recognised the first appellant amongst others.

Ndungu and Kahihu took Wangeci to Othaya District Hospital and thereafter they went to Othaya Police Station where they made a report. According to them, they gave a description of the attackers to the police. Ndungu identified several items in Court that were produced as exhibits as some of the items that were stolen from him on the fateful night. Ndungu and Kahihu were later called by police and participated in identification parades where they were able to pick out the first appellant.

In cross examination by the 1st appellant, Ndungu testified that when the attackers entered the house, lights were on and that the attackers also had torches. Ndungu also testified in further cross examination that he informed police that he could identify the attackers and he had givena description of the attackers.

The evidence of ***PW 4 Corporal David Macharia*** of Kiptangwenyi Administration Police Post was to the effect that on instructions of the District Criminal Investigations Officer,(DCIO), Othaya, he arrested the 2nd appellant on 18th February, 2011 when he went to his house which was next to the Adminsitration Police Post. He conducted a search and recovered many items in the 2nd appellant'shouse some of which were produced as evidence in the case and were identified by Ndungu as items that were stolen from him during the robbery of 19th June, 2010.

David Kamau Ngugi (PW 5) (Ngugi) testified that in October, 2010, he was a student at PanAfrican Secondary School when he was telephoned by ***Elijah Kamau (PW6)*** that a person called Waithaka was offering a laptop for sale.He sent Waithaka money through Mpesa and collected the laptop which he later sold to a person called Diana Nyambura. He was later informed by police that the laptop was a stolen one. He identified the laptop in Court which he testified had been sold to him by the 2nd appellant.

Elijah Kamau Kahiru (PW 6) confirmed that he had dealt with Ngugi in the transaction involving buying the stolen laptop. He confirmed that he paid money to the 2nd appellant.

Stanley Njoroge Mungai (PW 7) (Mungai) testified that he bought a sub woofer from the 2nd appellant. He identified the sub woofer in Court which he confirmed had been sold to him by the 2nd appellant a person he knew as a businessman in their area.

Number 23108 CIP Stephen Muthoka was at the material time the Deputy Officer Commanding Station, Mukurweni Police Station.On 25th August 2010 upon request by the investigtions officer, he conducted an identification parade at Othaya Police Station in respect of the 1st appellant. He testified that Ndungu,Wangeci (who was not called as a witness) and Kahihu all identified the 1st appellant at the parade by touching him.

Number 231201 CIP Stephen Mutua, was the DCIO Nyeri South, His testimony largely related to another case that was pending in other courts against some accused persons including the appellants. He is the one who gave instructions to Kiptangwenyi Administration Police Post to arrest the 2nd appellant.

James Waithaka Nyaguthi, (PW 12) (Waithaka) was a taxi driver in Othaya, He testified that he knew the 1st appellant and that on 14th June, 2010, the 1st appellant had asked him to assist him in withdrawing money at an Mpesa Shop. He assisted the 1stappellant to withdraw a sum of Kshs. 500/= using his phone number 0728 082240. He was later called by police and questioned about that transaction and he informed police that he had assisted the 1stappellant to withdraw the money.He obtained a statement from Safaricom that confirmed the transaction. That statement was produced in Court as part of the evidence. He also identified the 1st appellant at an identification parade.

The last witness called by the prosecution was ***No. 65173 Senior Sergent Francis Wambua*** who had taken over investigations from the previous investigations officer who had since died. He produced various exhibits in court as part of the evidence. He further testified that a mobile phone and Sim Card had been recovered from the house of the 1st appellant and that other items had been recovered in Elementaita at the house of 2nd appellant.

We have omitted to speak to the evidence of other witnesses who testified in the case as it related to the other accused persons who were acquitted at the trial or on 1st appeal as we have shown in this judgment.

That was the evidence produced by the prosecution upon which the appellants were put on their defence.

The 1st Appellant in sworn testimony stated that he was a horticultural farmer and denied committing the offences with which he was charged. He explained that on 14th August 2010 he was at home when he was arrested. He was beaten badly by the police until he could not walk and until he lost consciousness. Further, that identification parades were conducted when he was still sick and unable to stand thus compromising the integrity of the parades.

The 2nd appellant also gave sworn testimony where he stated that on the 17th February, 2011 he took his sick wife to the hospital and he was arrested the next day when his house was thoroughly searched and many items which he claimed to be his carried away. He was charged before various courts. According to him, the items collected from his house were not produced as exhibits in the case.

The trial magistrate considered the evidence produced by the prosecution and the defence offered by the appellants and convicted them as we have already stated.

In homemade grounds of appeal the 1st appellant states amongst other things that the High Court was wrong to uphold his conviction on the basis of visual identification when there was no description given on first report. Further, that the High Court was wrong to rely on evidence of the identification parades which the 1st appellant says was conducted contrary to Police Force Standing Orders. He also complains that evidence was not properly evaluated by the High Court.

The homemade grounds of appeal by the 2nd appellant are similar to those of the 1st appellant. When the appeal came up for hearing before us on 17th October, 2018, Mr. Robert Kimunya, learnd counsel appeared for both appellants while Mr. Peter Mailanyi Senior Assistant Deputy Public Prosecutor appeared for the respondents. Mr. Kimunya had filed a Supplementary Ground of Appeal that contained one ground to the effect that the High Court erred in law and in fact in finding that the circumstances at the scene of robbery were conducive for a positive identification of the appellants. He relied on both the homemade grounds and the supplementary grounds.In submissions, Mr. Kimunya faulted the High Court for finding that Ndungu was able to identify the attackers when it was recorded in evidence that the first thing that the robbers did was to break a flourescent bulb in the table room. Counsel wondered how the Judges of the High Court found another source of light when there was no evidence to that effect on record. According to counsel, the robbers took Ndungu, Wangeci and Kahihu to the bedroom and it was not clear who amongst the robbers did what. Counsel also pointed out that there was contradiction in Ndungu's evidence on whether there were six or eight robbers. Further, that Kahihu had been shown to have been drunk as he had passed by a bar where he had stayed for 20 minutes before the incident and according to counsel, Kahihu's judgment must have been impared. According to counsel, there was no evidence on which light was in the bedroom or the intensity of the same. And as it was at night, such evidence of identification must be tested with the greatest care using guidelines set out in the English case of ***R. Vs Turnbull [1976] 3All ER 549***andthat such evidence must be absolutely watertight to justify a conviction.

Mr. Kimunya also attacked the findings by the High Court that the identification parade in respect of the 1st appellant had been properly conducted. According to counsel, Ndungu had testified that he knew some of the accuseds including the 1st appellant before and counsel wondered why it was found necessary to conduct a parade. Further, that the 1st appellant had an injury and the Force Standing Orders were not complied with during the parade as the injury was not concealed.

In respect of the 2nd appellant Mr. Kimunya submitted that the 2nd appellants photographs were shown to witnesses before an identification parade was conducted. Counsel attacked findings of the two courts below as there appeared to be some confusion on which evidence was being used for the case before the court and cases before other courts. Counsel also faulted evidence on transfer of money through the Safaricom system as the recipient of money was not called as a witness. Counsel further submitted that the docrine of recent possession was not applicable as the laptop was not recovered in the 2nd appellant's possession.

In opposing the appeal Mr. Mailanyi submitted that although the florescent light was broken, there was other light in the house. According to counsel, robbers remained with the victim for 1 ½ hours and that was a long time to enable Ndungu and Kahihu to identify the attackers. According to counsel, both Ndungu and Kahihu gave a description of the robbers to the police. On conduct of the parades, it was Mr. Mailanyis' submission that members of the parade were asked to sit down in order to conceal the injury that the first appellant carried on his leg. On why it had taken so long to arrest the appellants Mr. Mailanyi submitted that there was another robbery case involving Ndungu's home which had been attacked in June and again in August.

On the docrine of recent possession, counsel submitted that it had been proved that the 2nd appellant had a laptop which he had passed from one person to another.

We have considered the record of appeal, the submissions made and the law.What we identify as a principal legal issue in this appeal is whether the appellants were properly identified as the people who attacked the home of Ndungu on 19th June, 2010. According to the evidence given by Ndungu on 19th June, 2010, two people entered the table room of his house where he was watching television and one of them immediately hit the flourescent light bulb breaking it. He was herded into the bedroom where he was soon joined by his wife Wangeci and his son Kahihu who testified as PW 2. In examination in chief, he stated that he did not know any of the attackers before, but in cross examination, he stated that he had indicated (probably to the police) that he knew the 4thaccused from childhood and had recognised him during the robbery.He also indicated that he had known the second accused before. He said ***''I did not tell police, that I knew them before''*** He further stated that he even knew parents of the 4th accused. He stated that he had given a description of the attackers to the police.

CIP Stephen Mutua who testified as PW 10 testified that Ndungu's home was attacked twice, first on 19th June, 2010 and again on 9th August, 2010. The second robbery incident was a subject of a different criminal case which was pending in court.

We observe that neither Ndungu nor his son Kahihu made any mention of this second attack when they gave evidence before the trial Court. According to this witness (Stephen Mutua), the complainants, that is Ndungu and Kahihu informed him and his colleagues that three of the assailants in the attack of 19th June, 2010 were also part of the gang that attacked their home in the second incident of 9th of August, 2010. Neither Ndungu nor Kahihu gave this evidence at all.

Senior Sergent Francis Wambua who testified as ***PW 15*** took over investigations from a previous officer who had passed away.In evidence before the trial court, he stated that neither Ndungu nor Kahihu had given any description of the attackers when they made the first report. So the trial court was faced with a situation where Ndungu testified that he knew some of the attackers but he had not given any description of them to the police on first report. It was his testimony that he even knew parents of one of the accused. He did not give this information to the police when he reported the incident. It is not even clear to us from the record when the first report was made.This is because there appears to be some confusion in the record because of the two incidents of robbery that took place, the first on 19th June, 2010 and the second on 9th August, 2010. It is not clear to us whether the complainants in respect of the robbery that took place on 19th June, 2010 had pursued any matter with the police or whether pursuing the issues only happened after the second attack.

It is the duty of a complainant on making a complaint to police after a criminal incident to give a description of the attackers while making first report. See the case of ***Tekerali s/o Korongozi& 4 Others [1952] 19 EACA 259.***

In the oft cited case of ***Wamunga vs Republic [1989] KLR 424***, this court while addressing the question of identification held that:

> **''It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that thecircumstances of identification were favourable and free from possibility of error before it can safely make it a basis of a conviction''.**

In the case before the trial court, robbers entered Ndungu's home and immediately broke a flourescent bulb light which was on. The High Court in the judgment delivered on 15th December, 2015 on the issue of identification had this to say:

> **''....as we have noted, considering the condition of lighting at the time of robbery, and the time the complainants's assailants spent with them, the circumstances of identification of the appellants were favourable and free from the possibility of any error. We are satisfied that the prosecution met the threshold of the standard of proof of the offences against the1st appellant.''**

We have perused the record and there is no evidence given to the trial court on what other light remained inthe table room after the flourescent bulb was broken. Thereis no evidence that was given by any witness on what light was in the bedroom where the victims were hearded into or the intensity of the same. We are of the respectful opinion that the High Court was wrong to find that there was sufficient lighting to enable the victims to identify the attackers without possibility of error, when no evidence was led on the nature of light present on the intensity of the same.

This court in the case of ***Maitanyi vs Republic [1989] KLR 198*** stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its posistion relative to the suspect. In the case before the trial court no such evidence was led by the prosecution to satisfy the requirements identified in ***Maitanyi****(supra)* case. In addition, Ndungu knew some of the assailants before the incident but when he made a report to the police he did not say so. In that event, it was wrong for the trial court and for the High Court not to find fault in the evidence where Ndungu had concealed information within his possession. In the event, we need not go into an examination of the evidence of the identifiction parade in respect of the 1st appellant as our first finding settles the legal issue of identification. Another relevant observation in respect of the 1st appellant is that he was convicted partly because of evidence on a money transaction that had taken place during the robbery of 19th June, 2010.

Waithaka Nyaguthi who testified as ***PW 12*** related an incident that took place on 14th June, 2010 when he was approached by the 1st appellant who requested him to assist him to withdraw money at an M-Pesa shop. It was later found that the money had been transfered from a mobile phone during the robbery subject of the trial. As we have observed, that robbery took place on the night of 19th June, 2010 and the money transaction that took place on 14th June, 2010 could not be relevant to the matter before the trial court. The transaction took place 5 days before the robbery.

Looking at the whole record, we are not satisfied that the appellants were properly identified as the people who robbed Ndungu and others in the robbery incident of 19th June, 2010. We find that they should not have been convicted at all. It is for those reasons that we allow the appeals, quash the convictions and set aside the sentences. The appellants shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri, this 13th day of February, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR