IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 66 OF 2016

BETWEEN

JOSEPH ONYIKWA NYARIKI .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ngugi & Achode, JJ.) dated 27th November, 2013

in

H.C.CR.A No. 138 of 2010.)

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JUDGMENT OF THE COURT

1. Late in the afternoon of 12th October, 2007 Jane Wambui Gichohi (PW1) drove from Nairobi to Ruiru in the company of Alfred Eliud Mathu (PW2). She was taking Alfred who had expressed interest in purchasing a cow, to see some of the cows which were being offered for sale by her friend, one Mukorino. They arrived at Mukorino's homestead at around 4:00 p.m. and Alfred was able to pick out a cow but unfortunately, the deal fell through because both Mukorino and Alfred could not agree on the purchase price.

2. Subsequently, Jane and Alfred left the homestead at around 6:00 p.m. and as they were about to join the Nairobi/Thika Highway they noticed three men, one of whom was armed with a pistol, barricading the feeder road to the highway. Jane stopped the car and the armed assailant came to her door and ordered her to open her window which she did. Meanwhile, the other two assailants went to the front passenger's side where Alfred was seated and opened his door. Alfred and Jane were directed to move to the back seat where they were joined by the two unarmed assailants. The armed assailant took the wheel and drove around Ruiru Town for about 1 ½ hours whilst his partners in crime robbed Jane and Alfred of their valuables which included cash, mobile phones and safaricom scratch cards. After they were done the assailants abandoned Jane and Alfred in the car and fled.

3. Jane reported the incident at Ruiru Police Station three days later on 15th October, 2007. After about 2 weeks the police called on Jane and Alfred to identify whether a suspect who had been arrested in connection with a different carjacking in the same area was involved in the earlier incident. The suspect turned out to be the appellant herein. According to PC Ezekiel Ngode (PW5), on 27th October, 2007 at around 3:30 p.m. while he was manning a roadblock at Ruiru Clayworks along the Nairobi/Thika Highway, a woman informed him and his colleagues that she had been carjacked in the same spot as Jane and Alfred; the assailants had made away with her car and other personal items.

4. PC Ezekiel and some of his colleagues decided to drive the lady to the police station where she could make a formal report. However, after driving for a short distance the lady alerted PC Ezekiel that she had seen one of the assailants; she pointed out a man who was in front of them and in the process of crossing the road. Thus, PC Ezekiel came out of the patrol car and when the appellant saw him he immediately took to his heels. PC Ezekiel was quick to respond and gave chase to the appellant. Eventually, he was able to apprehend the appellant who upon being searched was found with Kshs.3,000 and a Samsung mobile phone which was identified by the lady who was in the patrol car as the one which had been stolen from her.

5. An identification parade consisting of 9 members including the appellant was conducted by IP Gideon Kiraa (PW4). He gave the appellant the opportunity to choose the position he would take in the parade which he did. He then brought in Jane who was seated in an office which was about 500 metres away from the parade. Jane picked the appellant and even went ahead to identify him as the assailant who

was armed with a pistol.

6. After that, IP Gideon excused Jane and brought in Alfred who was seated in a different office which was also 500 metres from the parade. Alfred's approach was different; he asked all the members of the parade to repeat the words, *'Toa ID yako!'* which had been uttered by one of the assailants on the material day. It is in that manner that he was able to identify the appellant's voice as that of one of the assailants who had robbed them.

7. It is on the basis of the foregoing identification that the prosecution believed they had a water tight case against the appellant. Consequently, the appellant jointly with another person were charged with two counts of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***. At the close of the prosecution's case the appellant was placed on his defence while his co-accused was acquitted for lack of evidence.

8. In his sworn evidence, the appellant denied committing any of the offences and maintained he had been framed. He stated that on 27th October, 2007 he woke up early as was his routine and went to tend to his tree nursery. At around 3:00 p.m. police men came and arrested him for undisclosed reasons only to be later charged with the offences in question.

9. The trial court addressed its mind on the evidence on record and was convinced that the identification evidence was not only positive and free from error but also placed the appellant at the scene of the crime as one of the perpetrators. As such, the appellant was convicted on both counts of robbery with violence and sentenced to death. Aggrieved with that decision the appellant preferred an appeal in the High Court (**Ngugi & Achode, JJ**.) which equally concurred with the trial court's findings and vide a judgment dated 27th November, 2013 upheld his conviction and confirmed the sentence meted out to him.

10. Unrelenting, the appellant is before us on a second appeal which revolves around one central issue of identification. Mrs. Rashid, learned counsel for the appellant, challenged the identification evidence on two fronts. Firstly, she opined that the circumstances which obtained at the material time were difficult and could not give rise to a positive identification. Elaborating further, counsel stated that it was rainy and the nature of the light which was allegedly used to aid in the identification of the appellant was not known. As far as she was concerned, there was no basis for the learned Judges to hold that the incident occurred in broad day light. To bolster that line of argument, Mrs. Rashid relied on the case of ***Joel Saiyanga Ole Mwaniki & Another vs. R [2007] eKLR***.

11. Secondly, she went on to argue that the identification parade was not properly conducted. To begin with the appellant retained the same position in the line-up when both Jane and Alfred picked him as one of the assailants. Further, neither Jane nor Alfred gave a description of the assailants prior to the identification parade hence the identification parade was irregular and of no probative value. Mrs. Rashid submitted that a witness may be honest but still mistaken on the issue of identification, a fact that she believed the two lower courts failed to caution themselves of. All in all, the two courts below misdirected themselves on the issue of the identification

12. Opposing the appeal, Mr. Naulikha who appeared for the State, asserted that the identification of the appellant was safe and justified his conviction. He added that the incident occurred during daylight and the complainants had interacted with the robbers for a considerable period of time negating the possibility of a mistaken identity. Mr. Naulikha urged that despite the appellant maintaining the same position in the identification parade when he was picked by the complainants the same did not derogate the fact that he was positively identified as one of the robbers. He urged us to dismiss the appeal which he considered unmeritorious.

13. We have considered the record, submissions by counsel and the law. Our jurisdiction as the second appellate Court was succinctly spelt out in the case of ***Dzombo Mataza vs. R [2014] eKLR*** as follows:

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court - see Okeno v Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***

14. It is common ground that where the only evidence against an accused person is that of identification, such as in this case, a court should be careful to ensure that such evidence is cogent to warrant conviction of the accused person otherwise a miscarriage of justice may arise. The rationale for such caution is due to the fact that in as much as a witness may be truthful he/she can be mistaken when it comes to identification of a perpetrator due to a number of reasons. The aforementioned caution was restated by this Court in ***Hamisi Swaleh Kibuyu vs. R [2015] eKLR*** as herein under:

> ***"We are alive to the fact that even the most honest of witnesses can be mistaken when it comes to identification (see KAMAU versus REPUBLIC (1975) EA 139). In light of this, conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt, and hence possible error. The evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit."***

15. How does a court exercise such caution? In ***Tetu Ole Sepha vs. R [2011] eKLR*** this Court while considering identification evidence aptly observed that the usefulness of such evidence and the weight to be given to it is a factual and credibility matter in each case. It follows therefore that the trial court which has the privilege of observing the demeanour of witnesses as they testify should first determine the credibility or truthfulness of a witness. This will definitely determine the weight to be attached to his/her evidence.

Secondly, the court will consider whether the circumstances that were prevailing at the material time were conducive to ensure positive identification. In summing up the extent of caution to be taken this Court in ***Benson Mugo Mwangi vs. R [2010] eKLR*** expressed:

"Honesty and integrity of the witness are the matters to be considered first before the circumstances under which identification took place are considered."

16. Our perusal of the record indicates that the trial court found Jane and Alfred to be truthful witnesses and we see no reason to interfere with such finding.

See this Court's decision in ***Nelson Julius Karanja Irungu vs. R [2010] eKLR***.

17. Based on the often quoted English case of ***R vs. Turnbull & Others [1973] 3 ALL ER 549***, a test though not conclusive, has been established for determining whether prevailing circumstances would enable a positive identification of a perpetrator. In its own words the Court stated:

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

18. Were the circumstances in this case favourable for the positive identification of the assailants? We have gone through the evidence on record and contrary to the High Court's assertion the carjacking did not take place at 4:30 p.m. Rather Jane and Alfred's evidence which was unshaken is that they ran into the assailants at around 6:00 p.m.; there was still daylight and that they drove around Ruiru Town with the assailants for about 1 ½ hours. We, like the two courts below, find that the daylight coupled with the period of time the complainants were in the company of the assailants negates the possibility of mistaken identity. In addition and converse to Mrs. Rashid's submission, there was no evidence to the effect that it was rainy at the material time or that visibility was in any way impaired.

19. It is without doubt that the veracity of identification of a stranger by a witness is usually tested by the description given by such a witness of the assailant(s) to the police in his/her first report. It is on the footing of such prior description that an identification parade is conducted to test the accuracy of the identification evidence. Here the complainants did not give any description of the robbers prior to the identification parade being conducted. What was the consequence thereof?

20. This Court has had the opportunity to consider such a scenario in the case of ***Nathan Kamau Mugwe vs. R - Criminal Appeal No. 63 of 2008 (UR)*** and made the following observations:

"As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

21. In the case at hand, the appellant was arrested in connection with a different carjacking which occurred at the same place and under similar circumstances as the one involving the complainants. As per PC Ezekiel, it is for those reasons that the police believed that the two carjacking incidents were related hence they called upon the complainants to participate in the identification parade to see whether they could identify the suspect who had been arrested in relation to the second carjacking incident. Accordingly, we find that failure by the complainants to give a description of the assailants before the identification parade did not vitiate the identification parade.

22. We are also clear in our minds that the identification parade was conducted in accordance with the law and the ***Forces Standing Orders*** in respect of Identification Parades. We agree with Mr. Naulikha that notwithstanding the fact that the appellant remained in the same position in the identification parade when the complainants picked him as one of the assailants the quality of the identification evidence was not impaired in any way. We say so because ***Standing Order 6(iv)(e)*** stipulates:

"the accused/suspected person will be allowed to take any position he chooses and will be allowed to change his position after each identifying witness has left , if he so desires."

23. It is not in dispute that prior to organizing the parade IP Gideon explained the reason and import of the said parade to the appellant as well as his rights thereto; the appellant was allowed to choose the position he would take in the parade before the witnesses were called in to participate in the same. It is equally clear from the abovementioned standing order that an accused person can still remain in the same position where there is more than one identifying witness. Here we have not been told that the appellant had requested to change his position

prior to Alfred being called in and/or that the request was denied.

24. Besides, we see no prejudice because after Jane identified the appellant she was excused by IP Gideon before Alfred was called in. What is more, Alfred identified the appellant by his voice and in accordance to ***Standing Order 6(iv)(h)*** which reads:

> ***"if the witness desires to see the accused/suspected person walk, hear him speak, see him with his hat on or of, this should be done, but in this event the whole parade should be asked to do likewise;…"****[Emphasis added]*

Alfred requested all the parade members to repeat the words, *'Toa ID yako'* which were uttered on the material day by one of the assailants. It is through this means that Alfred was able to identify the appellant. We are satisfied that the voice identification was proper because the prosecution was able to prove that firstly, Alfred had engaged in conversation with the assailants during the robbery which took place for over 1 ½ hours hence he had become familiar with the assailants voices. Secondly, that the conditions obtaining at the time were such that there was no possibility of a mistaken identification. Thirdly, that it was the appellant who uttered the words in question. See this Court's decision in ***Safari Yaa Baya vs. R [2017] eKLR***.

25. In the end, we find that the evidence of voice identification corroborated Jane's visual identification of the appellant as one of the robbers. Therefore, we agree with the two lower courts that the visual and voice identification of the appellant was proper and safe to sustain his conviction for the two counts of robbery with violence. Ultimately, the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Nairobi this 8th day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

…….

JUDGE OF APPEAL

M. K. KOOME

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR