**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, NAMBUYE & MUSINGA, JJA**

**CRIMINAL APPEAL NO. 184 OF 2016**

**RAPHAEL MOURICE MURIU NGOYA.....1ST APPELLANT**

**SIMON WACHIRA MAINA.....2ND APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi & Ochieng, JJ) Dated 28th October, 2013***

***in***

**HC.CR.A. 455 of 2008*)***

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**JUDGEMENT OF THE COURT**

This is a second appeal arising from the judgment of the High Court, **A. Mbogholi Msagha & Fred A. Ochieng, JJ.** dated 24th October, 2013.

The background to the appeal is that, the appellants were arraigned before the Chief Magistrate's court at Kibera charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence were that, on 7th July, 2007 at **Uthiru Gichagi** in Nairobi, the appellants jointly with two others not before court, while armed with dangerous weapons namely a pistol and *a panga*, robbed **Rachael Ruguru** of cash Kshs. 6,000/-, assorted clothes, a blanket, a torch and two wrist watches, all valued at Kshs. 19,500.00 and at or immediately before and after the robbery used actual violence to the said **Rachel Ruguru.** The appellants denied the offence prompting a trial in which the prosecution tendered evidence through six (6) witnesses in support of the charge, while the appellants who gave unsworn testimonies were the sole witnesses in their respective defences.

The brief facts of the case are that, on the material date **Rachel Ruguru** (PW1) was asleep in her single room at **Uthiru Gichagi**. At around 1.00 a.m she heard two gunshots outside but within the compound. Three minutes later, the door to her single room was smashed open using an object PW1 believed was a stone. The room was lit with light from a lantern on the table. Two people whom PW1 knew very well and recognized by appearance and names, as **Mourice Muriu Ngoya,** the 1st appellant and **Simon Wachira** alias **Maina,** the 2nd appellant, entered her room. PW1 knew the 1st appellant for close to five (5) years and the 2nd appellant for close to two (2) years. She knew the 1st appellant as a watchman in the neighbourhood and had escorted her severally to her room as such, while she knew the second appellant as a gardener in a neighbouring home. The two were accompanied by a dog which PW1 knew before as belonging to the 1st appellant as she had seen it severally both in his home and on the occasions when he escorted her to her room with it. The first appellant was armed with a gun while the 2nd appellant had *a panga*. The two demanded Kshs. 20,000 from her but she gave them Kshs. 6,000/- which she had on her. Failing to get more money from her, the 1st appellant picked a sack and stuffed therein assorted clothing and other household items as the 2nd appellant assaulted PW1. The two left locking, her in her room from outside. On sensing that the assailants had left, PW1 screamed for help but nobody responded to her distress call that night. It transpired the next day that her neighbours had also been locked in their respective rooms from the outside.

It was not until the next day when a neighbour called **Njenga** broke the door to her room and led her out. She reported the incident both to PW2, her employer and to the police. The police advised her to seek medical treatment for the serious injuries sustained during the robbery. She attended **St. Marys' Hospital** at Uthiru, from where she was referred to **Kenyatta National Hospital**, where she was admitted for two (2) weeks from 8th July, 2007 to 19th July, 2007. She thereafter gave her statement to the police and led police officers to arrest the

appellants.

Put on their defences, the 1st appellant alleged that PW1 who had been his lover since 2006 was the one who led police to arrest him over a grudge and caused him to be charged jointly with the 2nd appellant whom he did not know before and for an offence he knew nothing about. The second appellant on the other hand, alleged that he was arrested for cutting grass in a neighbouring compound allegedly without the consent of the owner, but was later charged jointly with the 1st appellant whom he did not also know before and for an offence he knew nothing about.

At the conclusion of the trial, the trial magistrate assessed and analyzed the record and concluded:

> ***"From the evidence on record, I am satisfied that the accused persons jointly with others not before court are the ones who attacked the complainant and injured her badly as well as robbing her. She suffered grievous harm as per the doctor's evidence. Other witnesses' evidence confirms that she was indeed attacked. PW2 and PW3 confirmed this. She was admitted in hospital for about 2 weeks. She had serious injuries. She is the one who led the police to arrest the accused persons. The accused persons were well known to her. In fact, accused 1 also claims that she was his lover and they used to do business. They were neighbours at their place of work and accused 1 used to escort the complainant before this incident.***
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> **.....**
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> ***"I believe that the evidence adduced by the complainant about the two accused persons is correct. I believe that they robbed her and they also cut her on the head causing serious injuries on her. I find both of them guilty of the offence they are charged with and convict them accordingly under section 215 criminal procedure code."***

The appellants were aggrieved and appealed to the High Court against their convictions and sentences raising various grounds. The first appellate court re-evaluated and re-analyzed the record and upon reminding themselves of their role as a first appellate court, and on identification of the appellants at the scene of the robbery concluded:

> ***"In her evidence in chief, the complainant stated that, she knew very well the two people who entered her house. She knew them by names and appearance and in fact gave their names. The lamp in her house was on. When the two people entered her house, a dog followed them inside. She knew the dog because on the occasions the first appellant escorted her to her house, he had the same dog. Even the dog knew her. The fact that the first appellant used to escort her was not a one off incident. She had known him in the year 2005 and used to pay him when he escorted her. She saw the two appellants carrying a gun and a panga respectively. The fact that there was a demand for money means that, there was communication between her and the appellants. She gave out Kshs. 6,000/-which they took. In fact the appellants may have known that, she had some money with her because, the first appellant had heard her employer say he would pay P.W.1 some money for the business. It is her evidence that she was attacked because she had recognized her attackers. She was subjected to a lengthy cross-examination, especially by P.W.1. Our assessment of her evidence is that, she remained firm and consistent.***
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> **.....**
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> ***It is instructive that P.W.1. mentioned the names of the appellants to P.W.2, her employer, when she reported the attack on her the previous night. These two people were known to P.W.2. It is enough in our view that, she said that the two people were known to her and mentioned their names to her employer while the incident was very fresh in her mind. The fact that she did not give their names to the police was not prejudicial to the appellants."***

With regard to the appellants' complaints that PW1 had not mentioned their names to either PW2 her employer or to the police when she reported the incident, the Judges made the following conclusions:

> ***"The complainant P.W.1 remained consistent in her evidence about the people who stormed into her house, robbed her and seriously injured her. These were not strangers to her and this is also reinforced by the evidence of P.W.2 who also knew them very well. It is not necessary for one to be arrested in possession of the stolen items to confirm his culpability. Our assessment of the evidence on the issue of identification is that, the two appellants were properly and positively identified by P.W.1.***
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> ***The other issues of the gun shots and the noise made by the stone when the complainant's house was being broken into, are secondary and even if that evidence is discounted, the fact remains that it is the appellants who stormed into the house of the complainant and robbed her. We have also not seen anything on record relating to the amendment of the charge."***

Turning to the appellants' defences, the Judges found that although these had been appraised by the trial magistrate, no evidential probative value was attached to them. After re-evaluating the same on their own, the Judges found no miscarriage of justice was occasioned to the appellants by reason of the trial court's failure to make findings on the weight to be attached to the appellants' defences; and that upon re-evaluation of the appellants' defences on their own, the Judges were satisfied that those defences did not dislodge PW1's cogent evidence which had positively placed the appellants at the scene of the robbery.

The Judges also rejected the 1st appellant's assertions of alleged existence of a grudge between PW1 and him as an afterthought as it was never put to PW1 in cross-examination.

On alleged existence of contradictions in the prosecution's case, the Judges after due reevaluation of the record also found that any alleged

contradictions in the prosecution evidence complained of by the appellants were inconsequential to the prosecution case which they held was well proven to the required threshold of proof beyond reasonable doubt, which they affirmed.

On the totality of the above assessment and reasoning, the Judges dismissed the appellants' appeal, and affirmed their convictions and sentences handed down against them by the trial court.

Undeterred, the appellants are now before this Court on a second appeal raising two grounds, which learned counsel, Mr**. Ojienda,** abandoned in favour of one condensed ground dealing mainly with the issue of identification.

The appeal was canvassed by way of oral submissions. Learned counsel **Mr. Seth Ojienda** appeared for both appellants, while **Mr. Hassan Abdi,** learned Assistant Director of Public Prosecutions appeared for the State.

Supporting the appeal, **Mr. Ojienda** faulted the Judges first, for the failure to appreciate that an identification parade was necessary to clear doubts in the prosecution case, considering that the circumstances under which the offence was allegedly committed were not conducive to positive identification of the appellants as the perpetrators of the offence, considering that the offence occurred at 1.00am, while identification of the alleged perpetrators was through moon light and light from a lantern. The Judges were also faulted for: the failure to appreciate that production of the dog allegedly belonging to the 1st appellant and which featured prominently in the proceedings was fatal to the prosecution's case. The failure to reconcile contradictions in the prosecution's case touching on the dates of the commission of the offence, whether the door was smashed open, whether gun shots were heard by any other person in the same compound besides PW1 and those relating to the misdescription of the injuries sustained during the robbery as described by PW1 and PW5, all of which in counsel's view, were major contradictions which rendered the prosecution evidence incredible; the failure to fault the trial court's misconception that PW1 knew the appellants before as robbers and which misconception counsel believed was the basis for the appellants' convictions; and the failure to appreciate that PW1 never disclosed the names of the appellants either to **Njenga** who broke the door to her room and let her out, PW2 her employer or to the police when she first reported the incident.

On sentence, counsel urged that should we affirm the appellants' convictions, then we should be guided by the jurisprudence in the **Francis Karioko Muruatetu and another versus Republic [2017] eKLR** and resentence the appellants to a sentence of imprisonment to the period served.

Opposing the appeal, **Mr. Hassan** submitted that, there was nothing to demonstrate that the Judges misdirected themselves on the nature of the evidence then laid before them and therefore occasioned a miscarriage of justice to the appellants; that the appellants were known to PW1 for long and holding of an identification parade was therefore unnecessary. That finding of conviction by the trial court and affirming of the appellants' convictions by the 1st appellate court was not based on any perception, or misapprehension of the facts as the Judges properly re-valuated and reassessed the evidence before them and arrived at the correct conclusion that issue of alleged grudge between PW1 and the 1st appellant did not arise in cross examination of PW1 and was therefore an afterthought; and secondly, that evidence on identification of the appellants at the scene of the robbery acted upon by the two courts below as basis both for finding and affirming the appellants convictions was water tight.

On re-sentensing, counsel urged us to remit the matter to the High Court in line with applicable resentensing guidelines should we be persuaded to affirm the appellants' convictions.

In reply to the respondents' submissions, **Mr. Ojienda** reiterated the earlier stand that we should allow the appeal but should we reaffirm the appellants' convictions then we should set aside the death penalty handed down against the appellants by the trial court and affirmed by the first appellate court and then resentence the appellants to the period they have been incarcerated since their arrest.

This is a second appeal. This Court is restricted to addressing itself to matters of law only. It will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. See the case *of* **Karingo versus Republic [1982] KLR 213** *at page* 219 wherein this Court stated thus:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did (Reuben Karoti S/O Karanja versus Republic [1956 17EACA 146)."***

We have considered the record in light of the above mandate and the rival submissions set out above. The issues that fall for our determination are three namely:

1. ***Whether the appellants' identification was proper;***

2. ***Whether the alleged contradictions in the prosecution's case were fundamental and operate to vitiate the prosecution case.***

3. ***Whether the Judges properly discharged their mandate as a first appellate court.***

On the issue of identification, in the case of **Mwaura v Republic [1987] KLR 645**, the Court set out guidelines for receiving and acting on evidence of identification as basis for finding or affirming a conviction as follows:-

***"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such***

***matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".***

In **Anjononi and Others vs Republic, (1976-1980) KLR 1566,** the Court added that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it is depended upon some personal knowledge of the assailant in some form or other.

In **Republic - v- Turnbull, (1976) 3 All ER 549;** the following guidelines were set out; the length of time the witness had the accused under observation; the distance between them during the time of observation; the nature of lighting at the scene of the observation; whether there were any impediments in the cause of that observation; whether the witness had ever seen the accused before that date and if the answer is in the affirmative then how often. If the witness had seen the accused only occasionally then the witness should give specific reasons as to why he/she remembered the accused and also to give the length of time that had elapsed between the time the witness last saw the accused before the encounter at the scene of the crime. Lastly, for the court also to determine whether there was any material contradictions between the descriptions given of the accused by the witness to persons arriving at the scene soon after the robbery, the police and that given to the court.

In **Nzaro -v- Republic, [1991] KAR 212** and **Kiarie - v-Republic, [1984] KLR 739**, the principle reiterated therein is that evidence of identification of an accused must be watertight before it can be acted upon to either find or affirm a conviction. In the case of **Maitanyi -v-Republic [1986] KLR 198,** the Court 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 position relative to the suspect.

Applying the above threshold to the rival positions in this appeal, it is our finding that the undisputed evidence on identification of the appellants in connection with the offence faced is that PW1 was sleeping in her single room with a lantern light on. She knew the appellants prior to the incident and recognized them the moment they entered the room as they had not disguised their appearances either with hoods or masks. Also accompanying them was a dog which PW 1 recognized as the dog that was always with the 1st appellant whenever he escorted her to the single room she lived in. She had also seen it in the 1st appellant's home which PW1 knew very well, a position the first appellant did not controvert. The two courts below considered the length of time the appellants spent in PW1's single room and entertained no doubts in their minds that the circumstances prevailing in that room were condusive for positive identification of the appellants by appearance as they had not disguised their faces as already alluded to above and also through voice as they conversed with PW1 when they were demanding for money. PW1 therefore recognized the appellants both by voice and appearance. These were concurrent findings of facts by the two courts below. We have revisited the record on our own and find no evidence of any misapprehension of those facts to warrant our interference. We therefore find PW 1 properly identified and placed appellants at the scene of the robbery. We affirm those findings.

Turning to alleged existence of unreconciled contradictions, in the prosecution case highlighted above, the Court in **Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993,** held, *inter alia*, that:-

> **"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 viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"**

**Section 382** Criminal Procedure Code provides thus:-

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice"**

See also the case of; - **Kiarie v Republic,** [1984] KLR at 739, for the holding, *inter alia* that:

> ***"The Court of Appeal on a second appeal may upset a finding of fact by the trial or the first appellate court where there is misdirection but such misdirection must be of such a nature and the circumstances of the case must be such that if it were a trial by Jury, the Jury would not have returned their verdict had there been no misdirection. It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken".***

We have applied the above threshold to the rival positions herein on the alleged existence of contradictions in the prosecution case. We find that the Judges not only revisited the record with regard to the complaint in relation thereto, but also reconciled those alleged contradictions and found them inconsequential to the proven prosecution case based on PW1's positive recognition of the appellants, placing them at the scene of the robbery, a position we affirm. Secondly, that these were not so fundamental as to sufficiently prejudice either the prosecution case or the appellants' defences. Thirdly, the appellants' defences were found wanting as they failed to dislodge PW1's cogent testimony of recognition.

Turning to the role of a first appellate court, it is not disputed that the duty of a first appellate court is as was enunciated in **Okeno v. Republic** ***[1972] EA 32 in*** which the predecessor of the Court expressed itself as follows regarding that duty:

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

As we stated earlier, the High Court revisited the issue of alleged existence of a grudge between PW1 & the 1st appellant and made observations thereof as follows:

> ***The issue of any grudge between PW 1 and the complainant finds no place in this incident and in any case, the first appellant did not raise this issue when he cross examined the complainant at length. The record shows that PW 1 was recalled by the 1st appellant but again, the issue of any grudge was not explored. Even if it had been raised at that stage, we would hold that it was an afterthought in view of the evidence on record. PW 5, the police officer examined the complainant 3 weeks from the date of the alleged offence. He was not cross examined on the said dates but going by his evidence, it tallies with the dates that the complainant was injured and admitted to hospital. That evidence was not prejudicial to any of the two appellants.***
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> ***The learned trial magistrate alluded to the defences of the two appellants but did not make any analysis thereto. She should have done that. The omission however is not prejudicial to the appellants because their respective defences could not dislodge the prosecution evidence, and especially that of PW 1. The appellants were with others who were never apprehended. They were armed with dangerous weapons namely a gun and a panga. They seriously injured the complainant. All of these ingredients were proved by the prosecution. Any of them was sufficient to prove the offence under Section 296 (2) of the Penal Code.***

In light of the above reasoning, we find no error in the manner the Judges reappraised and reappreciated the record and considered it in light of the complaints the appellants had raised in their grounds of appeal.

On the totality of the above assessment and reasoning, we find no justification to interfere with the findings reached by the two courts below.

On resentencing, we stand guided by the new jurisprudential guidelines set out in the Supreme Court case of ***Francis Karioko Muruatetu & Another Vs Republic, Petition No. 15/2015*** [2017] eKLR in which the apex court held at paragraph 69 as follows:

> ***"Consequently, we find that section 203 of the Penal Code is inconsistent with the Constitution and invalid to the extend that it provides for the mandatory deaths sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty".***

Similarly, this Court in ***William Okungu Kittiny Vs Republic,*** **Criminal Appeal No. 56 of 2013** had this to say:

> ***" From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in Paragraph 69 applies Mutatis Mutandis to Section 296(2) and 297 (2) of the Penal Code. Thus the Sentence of death Under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment."***

See also **Wycliffe** ***Wangusi Mafura Vs Republic (2018) eKLR***, where the Court stated as follows;-

> ***"We also said in William Okungu Kittiny's case (Supra) that the decision of the Supreme Court in Muruatetu's case has immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence rehearing in any matter pending before those courts. Accordingly since this appeal had not been finalised, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed."***

In light of the above jurisprudential trend emanating from this Court itself, there are two approaches open to this Court in the disposal of the appeal upon affirming the appellants' convictions. One is for us to first of all set aside the death sentence handed down against the appellants by the trial Court and affirmed by the 1st appellate court and resentence where circumstances warrant us to do so. Alternatively, we may remit the appellants to the High Court for resentencing. The circumstances to be borne in mind when deciding either way are the value of the property robbed; the gravity of the injuries PW1 sustained in the course of the robbery and whether the appellants had a chance to mitigate at the trial. In this appeal the value of the property was Kshs. 19,500.00; although PW1 suffered grave injuries, she recovered with no major defects and lastly, that although the appellants mitigated at the trial, the trial courts' hands were tied in so far as the sentence to be handed down against them upon their convictions was concerned, as the death penalty was the only lawful sentence the trial court was capable of handing down against the appellants, which position has now changed in light of the above jurisprudential trend.

The upshot of the above assessment and reasoning is that we dismiss the appellants' appeals against their convictions by the trial court but set aside the death sentence and substitute it with a sentence of imprisonment for a period of 20 years from the 29/5/2008 when the sentence was handed down against the appellants by the trial court.

Orders accordingly

**Dated and Delivered at Nairobi this 28th day of June ,2019**

**E.M. GITHINJI**

**.....**

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

**……**

**JUDGE OF APPEAL**

**D.K. MUSINGA**

**……**

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR.**