IN THE COURT OF APPEAL

AT NYERI

(CORAM: GITHINJI, WAKI & NAMBUYE, JJ.A)

CRIMINAL APPEAL NO. 110 OF 2012

BETWEEN

DANIEL NDAMBIRI CHOMBA …….....…..…… 1ST APPELLANT

ELIAS MURIMI MUSA ALIAS KANANDA ..….....…… 2ND APPELLANT

AND

REPUBLIC ……..…….……. RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Embu

(Apondi & Ong'udi, JJ.) dated 29th March, 2012

in

H. C. Cr. A. No. 198 & 199 of 2008)

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JUDGMENT OF THE COURT

1. The 1st and 2nd appellants shall, in this judgment, be referred to as **Ndambiri** and **Murimi** respectively for ease of reference. They were jointly charged, tried and convicted by Kerugoya Ag. Principal Magistrate **(S. N. Mbungi)** on two counts which the prosecution had framed as follows:

"ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF PENAL CODE.

PARTICULARS

1. ELIAS MURIMI MUSA ALIAS KANANDA

2. DANIEL NDAMBERI CHOMBA: On the 16th December, 2007 at Komboini village in Kirinyaga District within Central Province, jointly with others not before Court being armed with dangerous weapons namely rungus, robbed JOHN KINYUA NYAGA of one bicycle make AVON F/NO BH24263 valued at Kshs.3,470/= and at or immediately before or immediately after the time of such robbery wounded the said JOHN KINYUA NYAGA.

COUNT II

ATTEMPTED ROBBERY CONTRARY TO SECTION 297 (1) OF THE PENAL CODE.

PARTICULARS

1. ***ELIAS MURIMI MUSA ALIAS KANANDA***

2. ***DANIEL NDAMBERI CHOMBA***

On the 16th day of December, 2007 at Komboini village in Kirinyaga District within Central Province, jointly with others not before court, while armed with dangerous weapons namely rungus attempted to rob GERALD NJUKI MUTHIKE of his property."

2. The conviction was based on the evidence of six prosecution witnesses and the evidence of the two appellants. Upon conviction, the appellants were sentenced to death. The conviction and sentence were confirmed by the High Court **(Apondi and Ong'undi, JJ.)** on first appeal, hence the second and final appeal now before us. As always, we are only duty bound to consider issues of law by dint of ***Section 361(1)*** of the ***Criminal Procedure Code*** (CPC). The findings made by the two courts on issues of fact will generally be respected and upheld unless they are based on no evidence at all or are based on a perverted appreciation of the facts. See ***J.A.O v. Republic [2011] eKLR.***

3. Both Ndambiri and Murimi were represented before us by learned counsel Mr. **S. K. Njuguna** but they had filed separate memorandums of appeal raising 6 and 8 grounds respectively. That was deliberate. For the fundamental argument made by counsel was that the two alleged incidents were unconnected in time, place and circumstances and therefore the appellants should not have faced a joint trial. The other issues of law raised relate to identification of the appellants, re- evaluation of the evidence and misapplication of the doctrine of recent possession.

4. The facts as we gather them from the recorded evidence are as follows:

At about 8 pm on 16th December, 2007, the complainant in the 1st count, ***John Kinyua Nyaga*** (PW1) (Nyaga), was riding a borrowed bicycle along some "route" in Komboini village of Kirinyaga. It is not clear whether it was a road or a pathway. But at some point he saw the complainant in the 2nd count, ***Gerald Njuki Muthike*** (PW2) (Gerald) who was running towards him and who, without stopping, warned him "*not to follow the route he was following."* Nyaga did not ask any questions but continued riding along the route he was following which went towards a river. At some point near the river, Nyaga found 4 boys who gave him way to pass but then, as he did so, he was hit with a *rungu* by one of them whom he recognized as Murimi. He knew him as a pawpaw hawker near his shop in Kagio and he could see him through the moonlight. He asked Murimi whether he wanted to kill him and he grabbed his leg. They wrestled to the ground and Murimi bit his finger. Someone else hit him on the head with a *rungu* but he managed to run away and hid in a maize plantation nearby. The robbers took his bicycle and went away saying he had recognized them and would take action against them.

5. At about 9pm he found his way to the house of his cousin**,** ***Hanson Muguuru*** (PW3) who gave him first aid and a place to sleep. The following morning, the two, in company with others, went to the scene and found and collected a yellow plastic shoe of the left leg. Two days later on 18th December, 2007, Nyaga reported the incident to ***PC Ezekiel Syengo*** (PC Syengo) of Sagana Police station. He reported that he had recognized Murimi and was given a P3 form for completion. He was also asked by PC Syengo to report further if he saw Murimi for arrest. The P3 form was completed by ***Justus Kibet*** (PW5) a clinical officer at Baricho health centre on 21st December, 2007 and the injuries were confirmed.

6. Meanwhile, the 2nd complainant, Gerald had his own story. At about 8.30pm on 16th December, 2007, he was walking from Kianyaga area when he met two men on the road. One of them jumped on him and hit him. There was no reference to any weapons. He recognized him as Ndambiri whom he knew before

as his neighbour. There was moonlight. Ndambiri also recognized him and apologized for hitting him. He asked Gerald not to talk about it as Gerald went home, in the process meeting and warning Nyaga about the route he was following. He also met Ndambiri again the following day and Ndambiri repeated the apology. Later, he met Nyaga and they exchanged their experiences. Gerald did not report the matter to the police until 21st December, 2007- 5 days later- when he accompanied Nyaga.

7. Murimi was arrested on 3rd January, 2008 when he was pointed out by Nyaga to the arresting officer ***Sgt Daniel Musembi Makau*** (PW6) (Sgt Makau). They found Murimi in his house which they searched and found a yellow shoe of the right foot matching the one recovered from the scene of the robbery. Ndambiri was also arrested the same evening but nothing was recovered from him.

8. In his unsworn defence, Murimi talked about the day of his arrest when he met some people on his way home from a bar and they claimed to be police officers. They arrested him and put him in the cells only to charge him with an offence he did not commit. Ndambiri on the other hand gave sworn testimony and was cross examined. He also talked about the day of his arrest when police officers came to his home and searched it. They took him together with his own bicycle which they found in the house and locked him up at Sagana Police Station. They interrogated him about a robbery involving Gerald but he told them Gerald, whom he knew, had a grudge against him because he had reported him to the local Administration Police after damaging his mobile phone and Gerald was ordered to pay him Sh.4500 for it. He denied meeting, assaulting and apologizing to Gerald as alleged. He asserted that he did not know Murimi, his co-accused, whom he met for the first time in the cells.

9. As stated earlier, the prosecution case was that the offences of robbery and attempted robbery against the two complainants respectively, were committed at the same place, by the same gang and almost at the same time. That is why the charges were joint. The two courts below also proceeded and made findings on that basis. Was there a possibility that the two offences were different in time, space and circumstances? Learned counsel Mr. Njuguna urges us to so find in his ground of appeal stating:

> ***"That the learned Judges of the High Court erred in law in failing to appreciate that there were two separate attacks at different times and possibly different areas and further that PW1 and PW2 could have been attacked by two different groups of people".***

10. We have carefully examined the decision of the trial court as well as the High Court but they did not direct their minds to this stark possibility. There was certainly a strong suspicion that the same gang attacked both complainants at different times but that remains only a suspicion and not proof beyond reasonable doubt. For starters, there was no certainty that both complainants were travelling on the same route. One complainant was on a road while the other was on a 'route' leading to a river. One met two men on the road and recognized one of them, while the other found 4 boys near the river, one of whom he knew. The two men at the road had no weapons to talk about while the boys near the river had *rungus*. One complainant was assaulted at 8pm while the other was robbed at 8.30 pm. One found no reason to report his assailant, whom he met again the following day, until 5 days later after comparing notes with the other complainant. All those circumstances raise reasonable doubts about the joint nature of commission of these offences and those doubts, as always, should enure to the benefit of the appellants. Indeed, at the end of his oral submissions in opposition to the appeal, learned ***Senior Assistant Director of Public Prosecutions (SADPP) Mr. Kaigai***, conceded that the offence, if any, committed against Gerald by Ndambiri was simple assault and not attempted robbery. We shall come to that later in this judgment.

11. The other main issue of law relates to identification. Mr. Njuguna submitted that there was only one witness on identification of the respective appellants but the trial court did not warn itself, as legally required, before relying on such evidence. Murimi was not identified by anyone at the attempted robbery near the road and Ndambiri was not identified at the robbery near the river, submitted counsel. In both cases, he submitted, the source of light was the moon but there was no evidence, as caution demands, of the brightness of the moon. He cited the cases of ***Karanja & Another v. Republic [2004] 2 KLR 140*** and ***Maitanyi v. Republic [1986] KLR 198*** in support of those submissions.

12. In response, Mr. Kaigai submitted that the evidence on identification was not merely visual but was strengthened by recognition of the appellants. Murimi was known to Nyaga and they wrestled at close proximity in a moonlit evening. Nyaga also recognized his voice. Furthermore, there was independent evidence of recovery of a matching shoe to the one abandoned at the scene of the robbery which connected Murimi to the offence. With all those safeguards therefore, asserted the SADPP, there was no possibility of mistaken identity of Murimi. The same applies to Ndambiri who was a neighbour to Gerald and who apologized twice for the assault on Gerald. Recognition was stronger than mere visual identification, and therefore safer, he concluded.

13. On the issue of the matching shoe, Mr. Njuguna submitted that it was of no probative value since the evidence on it was hearsay. There was no evidence on the ownership of the two shoes and their relevance to the alleged robbery. As they were not part of the property claimed to have been stolen, counsel submitted, the doctrine of recent possession as applied by the High Court was erroneous. On voice recognition, counsel submitted that there was no evidence of the actual words uttered by Murimi for Nyaga to assert that he recognized his voice. It was irrelevant. All these flaws, according to Mr. Njuguna, were supportive of the appellants' claim that the High Court did not re-evaluate the evidence and reach its own conclusions in the matter as by law required.

14. We have fully examined the record and we are satisfied that the claim by the appellants that the High Court did not know or carry out its duty of re-evaluation does not pass muster. The High Court was aware of the principles enunciated in the often cited case of ***Okeno v. Republic*** ***[1972] EA 32*** and referred to it for guidance. It further re-analyzed the recorded evidence at some length. Whether it thereafter made the right conclusions of fact and law is, of course, another matter. That ground of appeal is rejected.

15. As for the findings on identification, the High Court expressed itself as follows:

> ***"Having carefully considered the evidence which was adduced in the lower court, there is no doubt that both PW1, and PW2 were able to recognize the two appellants since they are known to them. Prior to the incident, it is apparent that both witnesses had known the two appellants for a considerable period of time. Apart from the above, it is absolutely clear that PW1 was able to identify the 2nd appellant through the moonlight and that he had an opportunity to struggle with him during the incident. It was the testimony of PW1 that the 2nd appellant used to sell pawpaw near his shop at Kagio Market and that he knew him very well. While PW1 was hiding in the maize plantation, he also heard the 2nd appellant threatening that he was going to take action after having been recognized. There is also no doubt that PW2 had also recognized the 1st appellant who his close neighbour. Though this court did not have the benefit of hearing and seeing the witnesses, we do not find any reason to interfere with the findings of the learned trial magistrate. Infact our view is that the learned trial magistrate analyzed the evidence correctly and reached a proper conclusion. We do concur with him that both appellants were positively identified during the commission of the offence. In addition to the evidence of recognition, it is also apparent that a yellow plastic shoe which had earlier been stolen was also recovered in the house of the 2nd appellant under the bed. That was done shortly after the incident had taken place. In our view, the evidence of recognition was strengthened by the doctrine of recent possession in this particular case."***

16. Earlier in this judgment, we expressed the view that there was a possibility that the two incidents referred to in the charge sheet were different. We shall proceed on that basis to examine the issue of identification. The law is clear, and has been restated by this court times without number, that the evidence on identification must be examined with the greatest care before a court of law can convict on it. We may cite for emphasis the case of ***Wamunga v. Republic*** ***[1989] KLR 424*** where this Court stated thus:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of***

more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

17. Some measures for minimizing this danger have been suggested in various authorities and we take it from the case of ***R. v. Turnbull [1977] QB 224***:-

> ***"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgement when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution."***

18. In the case of the appellant Murimi, there was only one identifying witness and the source of light aiding his identification was moonlight. If that was the only evidence on identification, we would have had no difficulty faulting the two courts below. For it is evident that they did not appreciate sufficiently or at all, firstly, that the identification evidence came from one witness and there is always the need for the court to warn itself in that regard. See the cases of ***Abdullah bin Wendo v. R (1953) 20 EACA 166*** and ***Roria v. Republic EA 583***. Secondly, there was no further inquiry beyond the mere mention by the witness of the presence of moonlight. This Court has emphasized before that an inquiry into the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity, is necessary. See the ***Karanja case (supra)*** at page 148.

19. The evidence on identification, however, went beyond visual. It included recognition of Murimi by a person who swore that he knew him before - Nyaga. The trial court assessed Nyaga's credibility as "*an honest man who had nothing to gain from falsely testifying against anybody.*" Even with such assessment, the mere fact of recognition is not foolproof and is merely "*..more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other,"* in the words of ***Anjononi & Others vs. Republic (1976-80) 1 KLR 1566***. The caution of Lord Widgery CJ in the case of ***Republic vs. Turnbull [1976] 2 ALL ER 549*** at page 552 is apt that:-

> ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".***

20. The evidence was buttressed by the fact that Nyaga wrestled with Murimi after grabbing his leg and therefore they were at close proximity with each other when Murimi bit his finger. There was also further circumstantial evidence of the finding of an abandoned shoe at the scene of the crime which matched another shoe of the opposite foot found in possession of Murimi in his house. The High Court, as correctly pointed out by Mr. Njuguna, erroneously assessed this evidence as though it was evidence of recent possession of stolen goods. The doctrine of recent possession applies where there is:

> "***… positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant."***
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> See ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic Cr App. No. 272 of 2005*****(UR).**

21. There was no such evidence in this case. The logic of the circumstantial evidence on record was that the appellant was found in possession of a shoe that matched another shoe found at the scene of crime. Only the appellant could explain how he came to be in possession of the other shoe and it is our view, in

those circumstances, that the evidential burden shifted to him under ***Section 111(1)*** of the ***Evidence Act***. In the case of ***Douglas Thiong'o Kibocha vs. Republic [2009] eKLR*** the court made the following observations on the applicability or otherwise of ***Section 111(1)***:

> "***When parliament enacted Section 111(1) above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge otherwise the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111(1) above places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in nature of an admission of a material fact."***

22. The appellant did not discharge that burden, which leads to the inevitable conclusion that he was at the scene of the crime. Indeed, after his conviction and before sentence, he pleaded that *"This is my first crime to commit."* We find no merit in the ground challenging identification of Murimi in the 1st count and we reject it. There was no evidence that he was involved in the 2nd count and we allow his appeal on that count.

23. As for Ndambiri, there was no evidence that he was involved in the robbery near the river. His appeal on the 1st count must therefore be allowed. On count 2, the sole evidence is that of Gerald which the two courts below did not warn themselves about and proceed to engage in careful analysis. Nothing more was said about the moonlight which was the sole source of light. We have examined these two pieces of evidence elsewhere against the applicable principles of law and found them wanting. Indeed, the events subsequent to the assault on Gerald create considerable doubts that the offence of attempted robbery was committed as alleged. Gerald did not mention or report the incident to anyone despite meeting Ndambiri, who was his neighbour, the following day. The idea of reporting to the police appears to have been planted on him by Nyaga when they compared notes later in the day. Even then, Gerald took another 5 days before reporting to the police. He never went for any treatment until 19th December, 2007 and the P3 issued to him was dated 26th December, 2007 which was 10 days after the event. And why did it take up to 3rd January, 2008 to point out and arrest Ndambiri? Neither Gerald nor the arresting officer Sgt Makau explains it. Sgt Makau simply testified that they went to the house of Ndambiri, arrested him and took him to the police station. It seems to us in all the circumstances, that Ndambiri was arrested and charged as an afterthought on the assumption that he was part of the gang that robbed Nyaga. Once again Ndambiri must benefit from the doubts and succeed in his appeal on the 2nd count too.

24. The upshot of the foregoing is that:

a) The appeal of the first appellant, **Daniel Ndambiri Chomba**, is allowed on both counts. His conviction is quashed and the sentence imposed on him is set aside. He shall be set at liberty forthwith unless he is otherwise lawfully held.

b) The appeal of the second appellant, **Elias Murimi Musa alias Kananda**, on the 2nd count is allowed, the conviction quashed and the sentence set aside. The appeal on the 1st count is dismissed.

Orders shall issue accordingly.

Dated and delivered at Nyeri this 25th day of January, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

……..……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR