IN THE COURT OF APPEAL

AT NYERI

CRIMINAL APPEAL NO. 104 OF 2014

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

BETWEEN

DOMINIC KABURU MUHORO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Nyeri

(Sergon & Wakiaga, JJ.) dated on 18th October, 2012 in

H.C. CR. C. No. 228 of 2007)

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JUDGMENT OF THE COURT

The appellant, Dominic Kaburu Muhoro appeals to this Court against the judgment of the High Court at Nyeri (Sergon and Wakiaga, JJ.) rendered on 18th October, 2012 dismissing his first appeal against conviction on charges of robbery with violence contrary to **Section 296 (2)** of the Penal Code for which he was sentenced to suffer death by the Chief Magistrate's court at Nyeri.

The particulars of the offence were that on the night of 17th October, 2004 at Sangore Ranch Village in Nyeri District, the appellant jointly with others while armed with dangerous weapons namely, pistol, pangas, rungus and sword robbed one Michael Prettee John (PW1), of Karuri, of personal items and cash valued at Kshs 1 Million and at or immediately before or after the time of such robbery injured him. In the second count while so armed they robbed one John Ngare Kariuki of a wrist watch and Ksh. 500 and used personal violence on him. The third count was with respect to one Joseph Ngunjiri Kimata (PW2) from whom they robbed a Siemens mobile phone and a knife both valued at Kshs. 30,000 and also used personal violence.

Following a plea of not guilty by the appellant and his three co-accused, a trial took place in which the prosecution called some twelve witnesses. When placed on their defence, the appellant and his co-accused all gave sworn testimonies denying the charge. The appellant also raised an *alibi.* The trial magistrate then rendered a considered judgment in which she found the offences proved as against the appellant and Peter Gaita Nderitu who had been the 2nd Accused before her but acquitted the other two accused persons. That Peter Nderitu also filed an appeal before this Court but he expired before the

hearing of the appeal which accordingly abated under **Rule 69(1)** of the Court of Appeal Rules.

In both courts below, the guilt or otherwise of the appellant turned on the question of identification. Indeed, it is the single issue that was urged before us by the appellant's learned counsel **Mr. Kimunya** who, abandoning the homegrown grounds of appeal that had previously been filed by the appellant, urged the solitary ground on the supplementary memorandum of appeal:-

> ***"The learned Judge erred in law and facts in finding that the identification of the appellants was proper and sufficient to form a basis for conviction."***

We point out straight away that the ground of appeal as framed is improper for the reason that on a second appeal, an appellant cannot be heard to complain that the High Court erred in facts as our jurisdiction is expressly confined to matters of law by dint of **Section 361** of the **Criminal Procedure Code**. This has been repeated in numerous judgments of this Court including ***NJOROGE vs. REPUBLIC*** **[1982] KLR 388** and ***M'RIUNGU vs. REPUBLIC*** **[1983] KLR 455.**

That misconceived inclusion of facts in the ground of appeal notwithstanding, we accept that in so far as it deals with the issue of identification, it is a proper subject of our engagement. **Mr. Kimunya** in his arguments before us contended that there was not sufficient evidence of identification of the appellant to justify his conviction. He faulted the learned judges for holding that PW 1 and PW 2 were able to identify the appellant at an identification parade yet the trial magistrate had in her judgment discounted that identification parade evidence. He also assailed the learned Judges for relying on the recognition evidence of PW 4 and PW 6 yet the former had indicated in his testimony that the robbers had concealed their faces and so questioned how the witnesses were able to see the robbers. Counsel further contended that the OB report at the Police Station merely shows that the complainants were attacked by about six thugs whose names and descriptions were, however, not given and the appellant was not mentioned as being among the thugs. He attacked the testimony of PW 6 as being contradictory in that he stated that he knew the appellant well yet he did not tell the Police anything on the first instance. Counsel concluded his submission by faulting the learned Judge for "*analyzing the identification evidence cursorily.*"

Rising to oppose the appeal **Mr. Kaigai**, the learned Assistance Director of Public Prosecutions supported the conviction and sentence. He submitted that this was a case of recognition of the appellant at the scene by PW4 and PW 6. He pointed out that PW 4 on being cross-examined by the appellant's then advocate was categorical that he told the Police that the appellant was one of the robbers. The Assistant Director of Public Prosecutions conceded that the learned Judges inadvertently failed to note that the identification parade forms had not been produced but explained that the mistake was not material as this was not a case of identification but of recognition. He asserted that there was sufficient light conducing to an error - proof recognition of the appellant unlike the circumstances in ***DANIEL KIMANYI KAMAU vs. REPUBLIC***, Nyeri Criminal Appeal No. 130 of 2009 and ***STEPHEN MBONDOLA & ANOTHER vs. REPUBLIC*** Mombasa Criminal Appeal No. 162 of 2000, the two cases contained in Mr. Kimunya's bundle of authorities. The Assistant Director of Public Prosecutions urged us to dismiss the appeal as unmeritorious.

We have given due consideration to the submissions made before us and have meticulously gone through the impugned judgment as well as the entire record before us. On a second appeal, we do not lightly interfere with concurrent findings of fact by the two courts below. We would do so as a matter of law only in a limited set of circumstances well expressed thus in **DAVID *NJOROGE MACHARIA vs. REPUBLIC*** **[2011] eKLR**;

> "***Only matters of law fall for consideration and the Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong Principles in measuring the findings. (See also Chemagong vs. Republic [1984] KLR 213)."***

As has been stated by this Court on numerous occasions, the question of identification is one that a court must approach with deliberate circumspection and care for the self-evident reason that the potential for

miscarriage of justice due to mistaken identity is real. One of the most cited decision in this regard is ***WAMUNGA vs. REPUBLIC*** **[1989] KLR 424** where the Court stated thus:

> *"**What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriages 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 one or more identification 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. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J., in the well known case of R v Turnbull [1976] 3 All E.R. 549 at pages 552 where he said:***
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> > '*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'."*

The same theme of caution, care and circumspection runs through other well known cases such as ***CHARLES O. MAITANYI vs. REPUBLIC*** **[1986] KLR 198**; ***PAUL ETOLE & REUBEN OMBIMA vs. REPUBLIC*** **Criminal Appeal No. 24 of 2000 and *KARANJA & ANOTHER vs. REPUBLIC* [2004] KLR 140.**

The judgment of the High Court is rather scanty on the detailed analysis that ought to attend a first appellate court's engagement with the entire evidence as such court is enjoined to do. See, ***OKENO vs. REPUBLIC*** **[1972] E.A 32**. In fact, after summarizing the evidence of the various witnesses called, all that the learned Judges do is address the issue of identification or recognition in a few short sentences as follows;

> "***We shall therefore deal with the issue of identification and recognition. We have looked at the proceedings before the trial court and note that the appellants herein were properly identified at the identification parade. P.W. 6 stated in his evidence in chief that he had earlier seen the appellants herein and talked with them. That he was able to recognize them during the night of the robbery and that there was sufficient light in P.W.1's house to enable him properly see the appellants.***
>
> ***P.W.1 and P.W. 2 also stated that the robbery took place between 50 minutes to an hour and that was sufficient time for them to recognize the appellants. They were subsequently able to identity the appellants at an identification parade***.
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> ***We are therefore satisfied that the appellants were properly recognized at an identification parade."***

As we have already mentioned the learned Judges were faulted by counsel for the appellant which was conceded by the learned Assistant Director of Public Prosecutions for failing to note that the evidence of the identification parade had been discounted by the learned trial magistrate because the same was not produced in court. It was therefore erroneous of the learned Judges to speak of PW. 1 and PW. 2 having identified the appellant and his deceased co-appellant at an identification parade. It is also contradictory of the learned Judges to have in one breath spoken of P.W. 1 and P.W. 2 having *recognized* the appellants during the robbery and in the very next speak of then identifying them at an identification parade. We think that the learned Judges ought to have exercised more care and have been more deliberate in their analysis and treatment of the evidence on record and more expressive on their having done so.

Those failures by the High Court notwithstanding, we think that they nevertheless reached the correct conclusion on the guilt of the appellant. There was ample evidence that the appellant was recognized at the scene over an extended duration of time by P.W. 4 and P.W. 6 whose evidence the trial magistrate

relied to found a conviction in the following terms;

> ***"PW. 4 and PW. 6 knew the 1st accused well in fact PW. 4 had known accused 1 all his life. On the lighting at the scene the court is satisfied that there were sufficient lighting and that the conditions for identification and or recognition were favourable. PW. 4 and PW.6 recognized accused 1 and 2 at the scene. The two witnesses who recognized accused 1 could have not mistaken the accused 1. They knew him well and I am convinced that accused 1 was recognized during the robbery."***

PW 4 had in his evidence testified that he knew the appellant as he used to see him teaching young men karate at Sangare Ranch. He had done so for a month. PW 4 decided not to look at the appellant because he feared that if he noted that he had recognized him (the appellant), he might harm him (PW 4). The witness observed the robbers as they ransacked PW.1's house in a robbery that took 20 to 30 minutes. The house was well lit with electric bulbs. During cross-examination by the appellant's then advocate, PW4 was categorical that he told the police that the appellant was one of the robbers; they had not covered their faces or otherwise cancealed their identities.

The evidence of **Gideon Kipngeno Arap Tunui** (PW6) the manager of the 7000-acre Sangare Farm for over 30 years, was even more emphatic. An hour or so before the robbery he saw some six men walk towards Kiganjo as he sat outside his house reading a newspaper. Among the six was the appellant who he mentioned by name. The appellant greeted him in the Kikuyu language. PW6 knew him as a neighbour whose land neighboured the ranch. They held a conversation about which PW6 testified to as follows:

> ***"I have known both accused when I used to meet them but we have never dealt. When the 1st accused greeted me in Kikuyu I also responded in Kikuyu I later asked the 1st accused where they were going that late with my people and they told me that they are going to Mweiga blooms to look for a job. I asked them how comes that they were going to look for a job that late and on a Sunday. The 1st accused told me in Kikuyu 'usishangee'."***

Shortly after that encounter and conversation, PW6 was informed by the watchman that PW1 and his wife were having a fight, a common occurrence it would seem. He decided to go and check only to find a robbery in progress which he recounted as follows:

> ***"I went round the house and peeped. I saw four men with PW.5. I peeped [at] the bedroom and I saw thugs ransacked (sic?) . All lights in the house i.e. Kitchen, bedroom, sitting room were on. When I looked again I saw the 1st accused on PW.1 threatening him and pointing a gun at him demanding for money. I saw the 2nd accused armed with a sword and he held it on PW.1's knife? (sic?) on the hand and I saw him cut him and I saw PW. 1 bleeding him profusely and I ran away. I recognized that the people are the same that I had seen during the day. The 1st accused moved around with the gun and he was moving round PW. 1 demanding for money and a gun. The 2nd accused was also demanding for money and guns."***

PW 6 was later to attend an identification parade for the 2nd accused but, as for the 1st accused the appellant herein, he testified that he did not need to attend any parade as he knew him well. He stated thus both in examination-in-chief and on being cross-examined by the appellant.

It seems clear to us that given the evidence of recognition tendered by the two witnesses, the conviction of the appellant was safe and based on sound and cogent testimony which the trial court believed and which the High Court, for all its errors of brevity, also found to be well-founded. The length of the time the robbery took; giving the ample opportunity to the witnesses to observe the actions of the appellant and the other robbers; in a house that had many light bulbs on; and without any concealment of face or obstruction of view; all combine to lend great credence to the evidence of the two witnesses that they did indeed recognize the appellant who was a person well and long known to them, as one of the robbers.

Being of that mind, we conclude, as we must, that the appellant was properly convicted and his appeal is therefore devoid of merit. It is dismissed in entirety.

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

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR