IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE, & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 8 OF 2014

BETWEEN

PETER KARIUKI MBURU.....….....APPELLANT

AND

REPUBLIC…….....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Mbogholi and Achode, JJ.) dated 1st July 2013 in H.C.CR.A. No. 285 of 2008)

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JUDGMENT OF THE COURT

On 6th August 2008 the Chief Magistrate's Court at Kiambu, convicted the appellant, ***Peter Kariuki Mburu*** of the offence of robbery with violence contrary to ***section 296(2)*** of the ***Penal Code*** and sentenced him to death. Quite properly, the trial court did not make any finding on the alternative count of handling stolen goods contrary to ***section 322(2) of*** the Penal Code, with which the appellant was also charged. (See ***M.B.O. v Republic, Cr. App. No 342 of 2008***). His first appeal to the High Court was heard and dismissed by ***Mbogholi*** and ***Achode, JJ.*** on 1st July 2013. The appellant now brings this second appeal in which he impugns the judgment of the High Court on three grounds, namely that the court erred by failing to properly re-evaluate the evidence; by relying on unsafe evidence of identification and by introducing extraneous matters.

Five prosecution witnesses adduced the evidence upon which the appellant was convicted. The gist of that evidence was that the appellant was a former tenant of the complainant, ***Esther Njoki Ndungu (PW1)*** and the two were known to each other for more than 10 years. On 20th January 2008, at about 7.15 pm, the appellant, in the company of another person who was not known to PW1, visited PW1 at her home in ***Kagondo village*** in ***Kiambu County***. When the appellant knocked on the door, PW1 peeped through the window and seeing the appellant, she readily opened for them, assuming that he had come to settle his two months rent arrears outstanding since he had moved out of her premises, and to pay some Kshs 10,000 which he owed her.

PW1 welcomed the appellant and his friend, whom PW1 introduced as a prospective tenant, and they made themselves at home. The house was lit by electric light. PW1 prepared and served them tea and supper. After watching news at 9.00 pm, the appellant and his friend suddenly turned upon PW1. The accomplice drew a machete and together with the appellant demanded money from her, threatening to chop off her head. The two robbed PW1 of ***Kshs 12,340***, a *Nokia* phone, a *Sony* television set, a *Philips*

DVD player, cassettes and remote controls, which they carried away in a gunny bag. Before leaving they tied a T-shirt and a gunny bag over PW1's head. Subsequently PW1 managed to free herself and reported the incident to her neighbours. The following morning she reported the robbery at ***Rueno Police Post***, naming the appellant as one of the robbers, and moved out of her premises fearing further attacks.

About two months later, on 18th March 2008, PW1's son ***Joseph Muchai Ndungu (PW3)*** spotted the appellant at a *posho* mill at ***Mindo*** and passed the information to ***Kirwa Police Post***. ***Sergent Wario Roba (PW2)*** proceeded to Mindo with PW3 and arrested the appellant after recovering PW1's television set and DVD player in the appellant's house. When PW1 testified, she produced as exhibits receipts for the television set and DVD player, which the trial court noted bore numbers corresponding to the serial numbers on those electronic equipment.

When the appellant was put on his defence, he gave an unsworn statement and called no witness. The gist of his defence was that he was working at a *posho* mill at Mindo on 18th March 2008 when the police arrived, arrested him and took him to Rueno Police Post. The reason that he was given for his arrest was that PW1 had complained that he had refused to pay back her money. After that he was charged in court for offences, which he knew nothing about.

Convicting the appellant, the trial magistrate observed that the case against him was not only one of identification, but of recognition. She also held that the recovery of the stolen television and DVD player in the possession of the appellant corroborated his identification as one of the robbers. The court rejected the appellant's defence, noting that in his cross-examination of PW1, he had merely suggested that she had framed him because she had requested him to sleep with her, which he had declined, but in his defence he merely denied having committed the offence. As we noted earlier, the High Court dismissed the appellant's first appeal and affirmed the judgment of the trial court.

Prosecuting the appeal, ***Mr. Oluoch,*** learned counsel for the appellant

submitted, on the authority of ***David Njuguna Wairimu v. Republic, Cr App No 28 of 2009*** that the first appellate court erred by failing to analyse and re-evaluate the evidence and come to its own independent conclusion, thus prejudicing the appellant. Counsel urged that had the court properly evaluated the evidence, it would have noted that the entire prosecution case was founded on PW1's grudge against the appellant. Counsel contended further that PW1's grudge against the appellant was based on the fact that he owed her money and had demurred when PW1 tried to seduce him on the material night. He relied on the judgment of this Court in ***John Muriithi Nyagah v Republic, Cr App. No 201 of 2007***, but with respect, as far as it is relevant to this appeal, that case is only authority for the proposition that the court should not rely on alleged grudge or vendetta in the absence of evidence or merely to justify its conclusion.

The appellant's counsel did not address the other two grounds of appeal, namely why the evidence of identification of the appellant was unsafe in the circumstances of this appeal, and the extraneous issues that the court allegedly introduced.

Mr. Wanyonyi, Senior Assistant Director of Public Prosecutions opposed the appeal on behalf of the respondent, submitting that the recognition of the appellant was safe and sound because PW1 knew him for more than 10 years as her tenant. PW1 and his accomplice were with the appellant for a period of more than two hours in a room that was lit by electric light. Counsel further submitted that the two courts below had properly evaluated all the evidence and after duly considering the appellant's defence, found it to have no basis and to be an afterthought. We were accordingly urged to dismiss the appeal for lack of merit.

We have carefully considered the record of appeal, the judgments of the two courts below, the grounds of appeal and the respective submissions by learned counsel. As we have stated the appellant did not address us on the question of identification, which he alleged was unsafe. On our part, we do not see how the identification of the appellant could have been unsafe in the circumstances of this case. PW1 knew him for more than 10 years as her tenant. According to PW1, she opened for him precisely because she knew

him. He was in her house for almost two hours during which PW1 made tea and supper for the appellant and his accomplice. The room where they were was lit by electricity light. The trial court warned itself of the dangers of relying on the evidence of a single identifying witness and even quoted ***Abdalla Bin Wendo v. Reginum [1953] 20 EACA 166*** in that regard. Nevertheless that court was persuaded that it was not dealing with a case of mere identification, but one of recognition, which on the authority of ***Anjononi v. Republic [1980] KLR 59*** is more satisfactory, more assuring and more reliable than identification of a stranger. This complaint has no merit and we accordingly reject it.

As regards the issue of evaluation of evidence, it cannot be gainsaid that it is the bounden duty of the first appellate court to carefully analyse and re-evaluate the evidence on record before coming to its own independent decision. In the oft-cited case of ***Okeno v. Republic [1972] EA 32***, the duty of the first appellate court was explained as:

> ***"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya v Republic (1957) EA 336] 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 [Shantilla M. Ruwala v Republic (1957) EA 570]. 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. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. [See Peters vs Sunday Post 91958) EA 424]."***

In ***Attorney General & 2 Others v. IPOA & 2 Others, CA No 324 of 2014*** this Court explained what re-evaluation of evidence entails in these terms:

> ***"Re-evaluation is not merely a rehashing of the evidence or findings of the trial court. It entails reconsidering the evidence afresh with a clear mind devoid of any influence from the findings of the trial court."***

In this appeal, the appellant seeks to demonstrate failure by the first appellate court to discharge its duty as regards re-evaluation of the evidence, by relying on the fact that it did not uphold his contention that his prosecution was founded on a vendetta and grudge. In a sense, the appellant proceeds on the faulty assumption that the first appellate court will have re-evaluated the evidence only if it agrees with his submissions. Having carefully considered the record, we cannot agree with the appellant that the first appellate court did not re-evaluate the evidence. In particular as regards his defence that the prosecution was a result of grudge or vendetta, both courts considered the issue, noting that he only raised the issue in cross-examination but when he gave his unsworn defence, he merely denied having committed the offence. That of course does not mean that the courts below were entitled to disregard the issue of grudge or vendetta. They did not. This is how the first appellate court dealt with the issue of grudge and vendetta:

> ***"We note that the issue of a pre-existing grudge between the appellant and PW1 as stated in one of his grounds of appeal did not arise in cross-examination of PW1 or in the appellant's own defence. PW1 served supper to the appellant and his companion and from his line of cross-examination of PW1, the appellant seemed to suggests that they had eaten from one plate with PW1 and that she had asked him to sleep in her house that night, which she refused. We were of the humble view that these were not the interactions of people who bore each other a grudge. After duly cautioning ourselves on the dangers inherent in basing a conviction on the evidence of a lone witness in line with Ogeto v. Republic [2004] 2 KLR 15 and Abdalla Bin Wendo v. Republic [1953] EACA 166, we analyzed the testimonies of all witnesses including the appellant and are of the same mind as the trial magistrate that it was the evidence of the prosecution which was credible."***

Other than the fact that the first appellate court properly appraised and re-evaluated the evidence, we have before us concurrent findings by the two courts below which we are obliged to pay homage to, having

found no error justifying interference. (See ***Boniface Kamande & 2 Others v. Republic, Cr. App. No. 166 of 2004).*** Accordingly this appeal is wholly bereft of merit and is hereby dismissed in its entirety. It is so ordered.

Dated and delivered at Nairobi this 14th day of July, 2017

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR