REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE , JJA)

CRIMINAL APPEAL NO. 39 OF 2016

BETWEEN

FAITH MUTHONI M'NGONDU.....1ST APPELLANT

BERNARD KARIUKI M'MBURUNGA.....2ND APPELLANT

JOSEPH MWENDA KIREMA.....3RD APPELLANT

DANIEL KAMAU ALIAS KARIAUKI.....4TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Appeals from the Judgment of the High Court at Meru,*

***(Lesiit & Makau, JJ) Dated 4TH July, 2013* in**

H. C. C.R.C NO. 16 of 2011)

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JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of **J. Lesiit & J.A. Makau, JJ** dated the 4th day of July, 2013, arising from an appeal filed by the appellants against convictions and sentences handed down against them by the SRM's court at Maua (**R. Makungu SRM),** for the offence of Robbery with violence contrary to **section 296(2**) of the Penal Code. The particulars of the offences were that on the 14th day of August, 2009 at Kangeta Market, Kangeta location in Igembe District (as it was then known) they jointly with others not before court while armed with *rungus* and *pangas* robbed **Andrew Mutea** of his mobile phone make Nokia 1200 and cash Kshs.6,800/ all valued at Kshs.9,300/= and at or immediately before or immediately after such robbery wounded the said **Andrew Mutea.** In count 2, it was alleged that on the same night, and place and while similarly armed and jointly with others not before the court they robbed **Jacob Karwamba** of Kshs. 8,000/ and at or immediately before or immediate after such robbery wounded the said **Jacob Karwamba.** The appellants denied both counts, provoking a trial in which the prosecution called six (6) witnesses. In their defence, **Faith** and **Stephen** gave sworn evidence and called no witnesses. **Joseph** gave an unsworn evidence and called one witness, (DW5) **Erick Mweti Mutisya**. **Benard** and **Daniel** gave unsworn evidence and also called no witness.

The background to the appeal is that, on the material night, the two complainants **Andrew Mutea (Andrew)** and **Jacob Karwamba (Jacob)** were headed home from Kangeta market when they were accosted by the appellants and robbed of the items enumerated in the charge sheet. It was their evidence that they recognized all the appellants at the scene of the robbery with the help of security lights from Majaliwa Stores located about 20-50 meters away from the scene as they knew all the appellants as local residents of Kengeta. They knew **Faith, Stephen** and **Benard** both by their names and facial appearance; **Joseph** as a driver/Tout and **Daniel** as a shoe shiner in Kangeta Market. PW5, **Joshua Kithinji (Kithinji)** while responding to the distress calls by the complainants and using the same security light from Majaliwa stores, recognized **Faith** and **Stephen** as they sped past him fleeing from the scene of the robbery. They refused to respond to his inquiries as to what was happening at the scene. APC **Joshua Kimeli (APC Joshua)** also responded to the complainants' distress calls and rushed to the scene. The attackers fled the scene on seeing him approach. He chased after Faith as she fled from the scene to a toilet from which he

flushed her out and arrested her. The rest of the appellants were thereafter variously arrested and arraigned in court.

All the appellants raised *alibi* defences that they were not at the scene of the robbery as at the time the robberies were committed against the complainants and that theirs was case of mistaken identity.

The learned trial Magistrate after weighing the appellants *alibi* defences against the prosecution case, rejected them as not credible, found the prosecution's case proved beyond reasonable doubt, and on that account, found all the appellants guilty of the offences charged in both counts, convicted each of them as charged and sentenced them to death but with the sentence on count 2 being held in abeyance

The appellants appealed to the High Court. The learned Judges of the High Court after subjecting the evidence before them to a fresh evaluation and analysis, drew four issues for determination, applied the principles of law enunciated in the case of **Cleophas Otieno Wamunga Versus Republic [1989] KLR; Paul Etole & Another versus R. LRA 24 OF 2000;** and **Francis Kariuki Njuru & 7 Others versus R. CRA No. 6 of 2000 (UR)** to the evidence before them and made findings that the complainants **Andrew** and **Jacob**, gave the full names of **Faith, Stephen** and **Benard** to the police when they made their report as they **(Andrew & Jacob**) had known the three appellants for three to seven (3-7) years and even knew their occupations; that they also knew **Joseph** and **Daniel** by face as local residents and that the two complainants gave a detailed account of the role played by each of the attackers.

The learned Judges then took judicial notice of the fact that security light is always bright; that it was between 20-50 meters from the scene of the robbery; that the complainants saw the attackers standing only 10 meters from the light and even recognized them before the attack; and that **Kithinji** and **APC Joshua** corroborated the complainants' evidence. They found no fault in the learned trial magistrate's finding that lighting from the security light was sufficient to enable the complainants to recognize their assailants and that the prosecution evidence was consistent, and had explained clearly the circumstances which were condusive to positive recognition of the assailants.

Relying on **Njuki versus Republic [2002] KLR 771**, the learned Judges found no discrepancies in the prosecution evidence of such a nature as would create a doubt as to the guilt of the appellants.

Turning to the appellants *alibi* defences, the learned Judges applied the principle in the case of **Charles Anjare Mwamusi versus Republic CRA No. 226 of 226** to those *alibi* defences, and made findings that the evidence of the two complainants as corroborated by the evidence of **Kithinji** and **A.P.C Joshua** placed the appellants at the scene of the robbery; that the appellants were seen and recognized by the key prosecution witnesses who described the role each played in the commission of the crime; that the trial court considered the appellants' defences and rightly rejected them and on that account dismissed the appeals in their entirety.

The appellants now raise three grounds of appeal similar in all material particulars, but separately filed on the 6th June, 2014 by the firm of **J.K Ntarangwi & Co. Advocates** for **Faith, Stephen, Benard** and **Joseph**; and on the 20th day of March, 2017 by the firm of **Mutegi Mugambi Advocates** on behalf of **Daniel.** The appellants complain that the learned Judges of the first appellate court erred on a point of law:

> ***(1) in failing to subject the evidence in regard to recognition to a fresh evaluation, analysis and in failing to weigh contradictory evidence and further erred in failing to take into account that the trial court had not properly tested the circumstances under which identification was done.***
>
> ***(2) in rejecting the appellants defences.***
>
> ***(3) in shifting the burden of proof against the appellants.***

Learned counsel **Mr. Kimathi Kibiti** submitted on behalf of **Faith** and **Stephen** that the learned Judges failed to inquire into the strength of lighting at the scene of the robbery and the distance from the source of the said light to the scene of the robbery as they simply assumed that lighting from fluorescent bulbs located fifty (50) meters from the scene was strong enough to light up a big area; that the learned Judges also failed to reconcile contradictions in the clothes **Faith** wore on the material day, as **Andrew** said that she wore a shirt, while **A.P.C. Joshua** the arresting officer stated that she wore a red Tshirt. In **Mr. Kibiti's** view, a shirt and a Tshirt are two different types of clothing. Also not reconciled was **Andrew** and **Jacob's** testimony that they were walking home with **Kithinji** when they were attacked, only for **Kithinji** to state that he was attracted to the scene of the robbery by the commotion and the screams of the complainants.

To buttress his submission, **Mr. Kibiti cited the** case of **Charles Maitanyi versus Republic [1986] KLR 198** for the principles on identification/recognition of an accused person at night; and the case of **Charles Mwita versus Republic Eldoret Criminal Appeal No. 248 of 2003** on the role of a first appellate court**.**

Learned counsel, **Miss Jacqueline Nelima** on behalf of **Benard** and **Joseph,** submitted that the learned Judges failed to appreciate that if the complainants were lying down and struggling with the attackers, they could not have identified the attackers; that the complainants only mentioned the names of three attackers which means that the other three attackers were not identified; that the complainants never gave a description of anything peculiar about **Joseph's** face which made them register it.

Counsel further submitted that the learned Judges failed to reconcile the discrepancy in the testimony of **Andrew** & **Jacob** with regard to the type of clothing **Joseph** wore during the robbery as **Andrew** said he wore a black jumper, while **Jacob** said it was a black coat. In **Miss Nelima's** view, had there been proper lighting at the scene of the robbery, the two complainants could not have contradicted themselves on the manner of clothing **Joseph** wore on the material night. Lastly, she observed that the learned Judges made no mention of the period the complainants had the assailants under observation before accepting the evidence of identification. The learned Judges also never made any pronouncement on the appellants complaints that the burden of proof had been shifted to them by the trial court, requiring them to prove their innocence by producing receipts to show that they were elsewhere and not at Kangeta at the time the robberies were committed.

To buttress her submissions**, Miss Nelima** cited **Republic versus Turnbull [1976] 3ALL ER 549; (supra); Shadrack Mbaabu Kinyua versus Republic [2013] eKLR; Mwita versus Republic (supra), Patrick Miriuki Kinyua & another versus Republic [2015] eKLR;** on the identification/recognition of an accused person at night.

Learned counsel **Mr. Mutegi Mugambi** for **Daniel,** associated himself fully with the submissions of **Mr. Kibiti** and **Miss Nelima,** and then reiterated that the learned Judges abdicated their role as a first appellate court as they did not say how the witnesses were able to recognize colour; that they simply stated that there was sufficient light without describing the nature of that light; that they did not say how the complainants were able to identify **Daniel** who allegedly attacked them from behind and who was only described as a shoe shiner and not by name; that **Daniel** gave a plausible *alibi* defence which should not have been rejected by the two courts below on account of his failure to produce evidence to support it, which amounted to a shifting of the burden of proof to him to prove his innocence, a matter the learned Judges shied away from making any pronouncement on.

To buttress his submissions, **Mr. Mutegi** cited the case of **John Muriithi Nyagah versus Republic [2014] eKLR** for principles on identification/recognition of an accused person at night and the burden of disproving an *alibi* raised by an accused person which always lies on the prosecution.

In response to the appellant's submissions, **Mr. E.O. Onderi,** the learned Senior Assistant Director of Public Prosecution (SADPP) opposed all the appeals on the grounds that the circumstances prevailing at the scene of the attack were condusive to positive identification/ recognition of the assailants; that the lighting at the scene of the attack came from security lights lighting a wide area that witnesses said were located about twenty to fifty (20-50) meters away, that the appellants were placed at the scene of the attack by the corroborative evidence of the key prosecution witnesses; that the two courts below addressed themselves properly to the circumstance of the case, properly appreciated them, took into consideration the demeanor of both the witnesses and the appellants, and found that the prosecution witnesses were truthful and credible; that, even if there was any shifting of the burden of proof committed by the trial court, that error was corrected by the High Court; and lastly, that contradictions and inconsistencies in any criminal trial are bound to occur; but none were pointed out on the record, and if any are found to exist, then these are inconsequential to the guilt of the appellants and are therefore curable under **section 382** of the Criminal Procedure Code.

In reply to **Mr. Onderi's** submissions, **Mr. Kibiti, Miss. Nelima** and **Mr. Mutegi,** reiterated that the contradictions and inconsistencies admitted by the respondent and which were never reconciled by the two courts below are not inconsequential but fatal to the prosecution case; and lastly, that the appellants were not properly linked to the commission of the offences they faced.

This being a second appeal, by dint of **section 361** of the Criminal Procedure Code, our mandate is restricted to consideration of matters of law only. In **Chemagong versus R. [1984] KLR 213 at page 219,** this Court held:

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 could find as it did. (Reuben Kareri S/O Karanja versus R. 17 ea ca 146)."**

We have given due consideration to the totality of the record in the light of the rival submissions and principles of case law cited by the appellants and in our view, the issues that fall for our interrogation and determination are as follows:-

> ***(1) (a) Whether the learned Judges of the 1st appellate court discharged their mandate properly with regard to subjecting the evidence on identification/ recognition of the appellants to a fresh re-evaluation and analysis.***
>
> ***(2) Whether the learned Judges identified, weighed and reconciled contradictions in the prosecution case if any.***
>
> ***(3) Whether the appellants' alibi defences were erroneously rejected by the two courts below.***
>
> (4) ***Whether the burden of proof was shifted to the appellants to prove their innocence.***

Regarding the first issue, the learned Judges reminded themselves of their role as a first appellate court in the following terms:-

> ***"We are the first appellate court and as expected of us, we have subjected the entire evidence adduced before the lower court to a fresh evaluation and analysis bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance"***

They then drew inspiration from the case of **Okeno versus Republic [1972] EA 32**; and framed four issues for determination whose findings are already set out above. In our view, the appellants' rejection of the findings made by the learned Judges on their grounds of appeal before them is no evidence of abdication of duty on the part of the learned Judges. It simply means that the appellants are dissatisfied with those findings and that is why they have invited us as a second appellate court to intervene and re-interrogate those findings and overturn them in their favour.

The guiding principles that the learned Judges took into consideration when addressing the appellants' challenges to their identification/recognition at the scene of the robbery are the same principles we are enjoined to apply in determining the same issue as now placed before us. These have now been crystallized in a long line of cases. See **Cleophas Otieno Wamunga versus Republic [1989] KLR; Paul Etole & Another versus Republic [2001] eKLR;** and **Francis Kariuki Njuru & 7 Others versus Republic Criminal Appeal No. 6 of 2000 (UR).** They may be summarized as follows:-

> *(i) Evidence of visual identification in criminal cases can bring about miscarriage of justice. It is for this reason that a court is*

enjoined to examine such evidence carefully to minimize such danger.

(ii) Whenever the case against the defendant depends wholly or to a great extend 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 such identification/recognition.

(iii) The court has an obligation to examine closely, the circumstances in which the identification by each witness come to be made.

(iv) The court also had a duty to remind itself of any specific weaknesses which may have appeared in such identification evidence.

(v) It is true that recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knew, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

(vi) Evidence relating to identification has to be scrutinized carefully and should only be accepted upon if the court is satisfied that the identification was positive and free from any possibility of error.

(vii) *Among the factors surrounding evidence of identification/recognition that a court is required to inquire into is whether the witnesses gave either the description or the names of the attackers to either the police or persons who come to the scene of the attack soon after the attack and at the earliest opportunity.*

We have considered the above principles in the light of the findings of the learned Judges on the issue of the identification/recognition of the appellants at the scene of the robbery as already set out above and find no evidence of any misapprehension of the facts or misapplication of the law to those facts as the learned Judges supported their findings with the evidence on the record before them.

Regarding the alleged existence of discrepancies, inconsistencies and contradictions, in the prosecution case, we take it from **Njuki & 7 others versus Republi [2002] KLR 771** where the court held that discrepancies, inconsistencies and contradictions are sometimes inevitable in a criminal trial; and that when they do occur, the role of the court is to reconcile these and then determine whether they vitiate the prosecution case or not. The learned Judges took note of the alleged existence of contradictions in the prosecution case, but dismissed them as being inconsequential to the otherwise proven prosecution case, without specifying them. Those highlighted by **Mr. Kibiti** related to **Andrew** claiming that **Faith** wore a shirt and a trouser while the arresting officer **P.C. Joshua claimed** that she wore a red Tshirt on the material night. Those highlighted by **Miss Nelima** related to **Andrew** saying **Joseph** wore a black Jumper, while **Jacob** said he wore a black coat.

While we agree that the above mentioned items of clothing were not one and the same, we do not agree with the submissions of **Mr. Kibiti** and **Miss Nelima** that the alleged contradictions with regard to those types of clothing vitiate the prosecutions case as **Faith** and **Joseph** were not placed at the scene of the robbery by reason of the type of clothing they wore during the attack, but by virtue of their identification/recognition by the complainants both by their names and facial recognition. We therefore find no error in the learned Judges' conclusion that any alleged contradictions in the prosecutions case were inconsequential to the otherwise proven prosecution case. The failure of the learned Judges to highlight the alleged contradictions before making a conclusion on their effect to the prosecution case occasioned no miscarriage of justice to either **Faith** or **Joseph** and are therefore curable under **section 382** of the Criminal Procedure Code.

As for alleged erroneous rejection of the appellants *alibi* defences, in **Saidi versus Republic [1963] EA 6** page 8, it is the law that:

"An accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer."

This is the principle that was restated in the case of **Charles Anjare Mwamusi C.A Criminal Appeal No. 226 of 2002, t**hat the learned Judges referred to in their judgment. See also **Sekitoleko versus Uganda [1967] EA 531**.

When rejecting the appellants' *alibi* defences the learned Judges concurred with the trial magistrate's findings that the corroborative evidence of both complainants, **Kithinji** and **A.P.C. Joshua,** all of whom the trial court found truthful and credible placed all the appellants at the scene of the robberies. These were impressions formed by the trial court on the demeanor of both the prosecution witnesses and the appellants. We are enjoined by law to give deference to that impression and not to interfere with it unless we are satisfied that the two courts below misapprehended the facts or misapplied the law to those facts. We find none on the record before us as the concurrent findings by the two courts below that appellants were placed at the scene of the robbery were supported by what both courts below found as corroborative prosecution evidence on the issue of positive identification/recognition of the assailants.

With regard to the alleged shifting of the burden of proof, we find this arose from the remarks made by the trial magistrate in her judgment that, **Stephen,** failed to explain where he was on the night of the robbery; that **Joseph** failed to produce a receipt to show that he had travelled out of town; and also that his witness **Erick** had produced nothing to show that **Joseph** spent the night of the robbery at **Erick's** house in Nairobi. **Daniel** on the other hand had failed to produce any document or the daily log book from the owner of the *matatu* he alleged he was driving in Nanyuki.

Our take on the above remarks is that, these could be construed as tending to shift the burden of proof on the three affected appellants namely **Stephen, Joseph** and **Daniel** to prove their innocence. Those defences were raised in the affected appellants' defences. The prosecution elected not to call evidence in rebuttal and instead left it to the trial court to weigh them against the totality of the prosecution evidence. The trial court did so and dismissed those defences as they were ousted by the cogent and corroborative prosecution evidence. As submitted by **Mr. Onderi,** the trial court was in a better position to gauge the demeanor of both the prosecution witnesses and the appellants. It settled for that of the prosecution witnesses as being truthful and credible and rejected that of the appellants as not credible.

It therefore follows that the above unfortunate remarks by the trial magistrate notwithstanding, the record before us demonstrates clearly that both courts below considered the appellants *alibi* defences against the totality of the prosecution evidence on the record before them and found them ousted. The findings made by the two courts below do not in our view amount to a misapprehension of facts or a misapplication of applicable principles of the law to those facts to warrant our interference.

In the result, and for the reasons given in this assessment, we find no merit in these appeals. They are accordingly dismissed.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF NOVEMBER, 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 a true copy of the original

DEPUTY REGISTRAR