IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 38 OF 2015

BETWEEN

PETER KINYUA MUMBI …… APPELLANT

AND

REPUBLIC ……..…… RESPONDENTS

(Appeal from a judgment and Order of the High Court of Kenya at Nairobi delivered by, (Korir & Marete, JJ) dated 19th March, 2014

in

H.C.CR. A NO. 373 OF 2009)

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JUDGMENT OF THE COURT

The appellant **PETER KINYUA** was charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars in count 1 are that on 11th day of July 2008 near Thiririka River in the then Gatundu District within Central Province, jointly with others not before court robbed **SAMUEL MUHIA KIMANI** of a numberless motor-bike red in colour, Chasis No. S8600383, Engine No. 0688 make Jincheng valued at Kshs. 68,500/= and cash Kshs. 350/= all to the total value of Kshs. 68,850/= and immediately before the time of such robbery threatened to use actual violence to the said **SAMUEL MUHIA KIMANI**.

In count II, it was alleged that on the 11th day of July 2008 near Thiririka River in Gatundu District within Central Province, jointly with others not before court robbed **SAMUEL NJOROGE NDUTIRE** of his mobile-phone Motorolla C168 valued at Kshs. 4,500/= and cash Kshs. 900/= all to the total value of Kshs. 5,400/= and immediately before the time of such robbery threatened to use actual violence to the said **SAMUEL NJOROGE NDUTIRE**.

The trial commenced before **L. WACHIRA** the then Senior Resident Magistrate, Thika who, recorded the evidence of two witnesses namely **SAMUEL NJOROGE RUTERE (PW1)** and **SAMUEL MUHIA KURIA (PW2)**. On 2nd April, 2009 the trial was taken over by **A. K. KANIARU (PRINCIPAL MAGISTRATE)** who in informed the appellant of his rights under Section 200 of the Criminal Procedure Code. The appellant opted not to have any of the witnesses recalled. **KANIARU** Esq recorded

the evidence of **JOHN GITAU NGARU (PW3)** before the trial was taken over by **L. W. GICHEHA**, Senior Resident Magistrate, who also informed the appellant of his rights under Section 200 of the Criminal Procedure Code. **GICHEHA** Esq recorded the evidence of **CPL ANDREW KHASUGULI (PW4)**. On 16th July, 2009 the appellant was found to have a case to answer.

The appellant chose to make a sworn statement in defence and he had no witness to call.

On 1st September, 2009 the appellant was found guilty of count 1 & II and sentenced to death as by law prescribed. The appellant was dissatisfied by the outcome of the trial and he filed an appeal in the High Court.

On 19th March, 2013 Korir and Marete, JJ dismissed the appellant's appeal, thus provoking this appeal.

This is a second appeal and by dint of Section 361 of the Criminal Procedure Code, this Court is restricted to address itself on matters of law only. It will not interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making their findings: See ***Chemagong versus Republic*** ***[1984] KLR 611***. See also ***Karinga versus Republic*** ***[1982] KLR 213*** at page 219 where this Court had this to say:-

> ***"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 could find as it did (Reuben Kareri S/O Karanja versus Republic [1956] 17EACA 146]"***

When the matter came before us for plenary hearing on 1st February, 2016, Mr. Ratemo Oira learned counsel for the appellant urged us to find that the appellant was entitled to an acquittal as no identification parade was carried out and that the Occurrence Book was not produced for the purposes of verifying whether or not PW2 had given the appellant's name to the police.

In his response, Mr. O'Mirera, the learned Senior Assistant Director of Public Prosecutions conceded the appeal. His contention was that the trial court and the 1st appellate court failed to test with greatest care the evidence adduced during the trial.

The evidence recorded by the trial court was that **PW1 SAMUEL NJOROGE RUTERE** was on his way home on 11th July, 2008 at about 9.00 p.m. He rode on a motor-cycle together with **PW2 SAMUEL MUHIA KURIA** when they were attacked. He was robbed of his personal effects and cash. He was not able to identify any of the assailants. On the other hand **PW2, SAMUEL MUHIA KURIA** told the trial court that he was able to recognize the appellant on that night as he knew ***"… him and I usually see him at Gatundu."*** He recognized the appellant from ***"… the lights of the motor cycle."***

PW3 JOHN GITARU NGARU was the owner of the motor-cycle. He was informed on 11th July, 2008 of the robbery, by PW2 whom he had employed as a rider of the motor-cycle. His motor-cycle was never recovered.

In his defence, the appellant made a sworn statement. He denied committing the offence.

Suffice to state none of the prosecution witnesses linked the appellant to the offence save PW2 who was the only single identifying witness. The robbery was at night. We are not told whether it was a bright or dark night. PW2 told the trial court that he identified the appellant using the motor-cycle lights. However, PW2 did not tell the trial court the intensity of the lighting that enabled him identify the appellant. All he said was that he saw him using the lights from the motor-cycle. What was the intensity of this light? What was the position of the appellant vis-à-vis the light emanating from the motor-cycle? In **Abdallah Bin Wendo vs Republic 20 EACA 168** it was held that:

> ***"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."*** (emphasis added).

Whilst appreciating the above *dicta*, the 1st appellate court proceeded to state:

> ***"In the present appeal, it cannot be said that the court relied solely on the evidence of PW2. PW1 was also a victim of the same robbery and his account corroborates that PW2. PW3 the investigating officer testified that when he commenced investigations into the case, the appellant (then a suspect) told him that the stolen motor cycle was in the custody of his accomplice. He subsequently led him to two different houses in Rwera farm and Gituamba respectively but they neither found the motorcycle nor the suspect's accomplices.***
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> ***These facts were not challenged by the appellant while cross-examining the witness. From our analysis of the testimonies PW1 & 3, we find other evidence which point to the guilty of the appellant. We find that the caution in Abdalla Bin Wendo (supra) was indeed exercised by the trial court."***

With respect to the two appellate judges, PW1 testified that he did not identify anyone. His evidence cannot therefore be said to have corroborated that of PW2, the single identifying witness. The fact of the commission of the offence was not in dispute. The issue is whether the appellant was one of the robbers. It is immaterial that the appellant led PW4 to Rwera farm and Gituamba. The fact of the matter is that no motor-cycle was recovered from these two places. For PW1 to merely confirm the occurrence of the robbery with violence does not afford corroboration as to who committed the offence. It was therefore wrong for the 1st appellate court to have found that the evidence of PW2 was corroborated by the evidence of PW1. In the absence of corroborative evidence and due to the failure of the trial court and the 1st appellate court to test with the greatest care the evidence of PW2, we find that the conviction was based on no evidence. We further find that the 1st appellate court misapplied the doctrine of corroboration when there was no corroboration. It is because of the above reasons that we have come to the conclusion that the conviction of the appellant was not safe and Mr. O'Mirera was right in conceding the appeal.

The conviction of the appellant in counts 1 & II is quashed, the sentences set aside and he is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 22nd day of February, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR