IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, KOOME & KIAGE, JJA)

CRIMINAL APPEAL NO. 121 OF 2014

BETWEEN

JOHN NDUATI NGURE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Wakiaga, Ngaah, JJ.) dated 26th September, 2014

in

H. C. Cr. A. No. 35OF 2013)

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JUDGMENT OF THE COURT

1. The appellant was the 3rd accused in the trial before Karatina Senior Principal Magistrate, **L. Mutai**, where all the three accused persons faced two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The others were **Christine Martha Nzioka** (1st accused) and **Benjamin Musembi Matheka (**2nd accused). It was alleged in the first count that on the 6th day of October 2011, at Kiamabara Trading Centre, in Mathira, Nyeri, they all, together with others not before court, while armed with *pangas* and metal bars, robbed **Stephen Waithaka Githaiga** (Githaiga) of his Safaricom phone and cash all valued at Kshs. 2,600 and used violence on him. On the second count, it was alleged that at the same time and place, they robbed **Stephen Mwangi Muthee** (Muthee) of his Vodafone mobile phone and cash all valued at shs. 2900 and used violence on him. The 1st accused alone was charged with the alternative count of handling stolen property contrary to **Section 322(1)** of the Penal Code, in that on 3rd December 2011 in Kitui town, she dishonestly retained one Vodafone mobile phone knowing or having reason to believe it was stolen. After hearing the testimony of 11 prosecution witnesses and the three accused persons, the trial court acquitted the 1st and 2nd accused of all charges but convicted the appellant on the two counts of robbery with violence and sentenced him to death. His appeal to the High Court **(Wakiaga & Ngaa JJ.)** was rejected, hence this second and final appeal.

2. The evidence that led to the appellant's conviction fell into two categories; direct and circumstantial. On the direct evidence, Githaiga (PW1) had closed his bar in Kiamabara Shopping Centre at 11.30 pm

and was in the process of taking his final stock. With him was Muthee, a secondary school cook and **Elias Mathathi**, a *boda boda* operator waiting for him to wind up. Electricity lights were on both inside and outside the bar. As Mathathi opened the rear door to go for a short call, he was pushed back by 'a brown man' who was holding a long metal bar. Behind the man were three others one of whom headed towards Githaiga demanding money and phones. Githaiga gave out his cell phone and cash Kshs 1,400 before he was ordered to lie down. As he did so he saw Mathathi being hit hard on the head several times with a metal bar when he became difficult, and he fell on the table. Githaiga was hit on his leg with a metal bar fracturing it while Muthee was also set upon and hit on the face before being robbed of his Vodafone mobile phone and cash Kshs 2,600. The robbers then left and locked the three victims inside the bar. The victims raised alarm and were soon rescued by Administration Police Officers from Kiamabara AP camp and the Assistant Chief of Kiamabara location who arrived shortly after midnight. They arranged for medical attention for the victims at Karatina District Hospital where Githaiga and Muthee were treated and later discharged, but Mathathi succumbed to the head injuries. The robbery was reported to Karatina Police Station for investigation. At the trial Githaiga pointed out the appellant in the dock as the person who robbed him, since he saw his face at the time of the robbery.

3. About two months later, on 3rd December 2011, a breakthrough was made in the investigations. The Vodafone mobile phone signal was tracked to a location in Kitui area, and Karatina police sought the assistance of Kitui police who traced the person in possession of the phone. It was business woman **Christine Martha Nzioka** who was arrested and later charged as the 1st accused. She explained that she had bought the phone from one **Dama Wambui** of Kitui town for Kshs 700 and did not know it was stolen. Dama was arrested but was released by the police and was neither charged nor called as a witness. According to the police, Dama explained that she was given the phone by **Lena Beatrice Wambua (**PW7), a green grocer at Kalundu market in Kitui town. Lenah in turn explained that she was given the phone by **Benjamin Musembi Matheka** (2nd accused), a matatu conductor who sought overnight sexual favours from her at the price of sh. 500 but who turned out to have no money in the morning. He gave out the said phone and told Lenah to sell it and recover her money for services rendered. The 2nd accused explained that he had bought the phone two weeks earlier from **Boniface Kanzila Mutunga** (PW11) for Kshs 600. PW11 was also a green grocer owning a kiosk in Kalundu market in Kitui town. He testified that in October 2011, the appellant went to his kiosk and told him he had a phone for sale at Kshs 500. They bargained to Kshs 400 which he paid and took the phone but later sold it to the 2nd accused for Kshs 600. He was arrested on 7th February 2012 but was later released after explaining his role and led the police to the arrest of the appellant. He told the police that he had known the appellant before. That was the circumstantial evidence connecting the appellant with the offence.

4. In his sworn defence, the appellant denied that he was in Kiamabara on 6th October 2011. His father was from Thika while his mother was from Kitui and he had been engaged in hawking business in Kitui town for one year. On that day he was at his place of work in Kalundu market, Kitui, and retired to sleep in his house at 9 pm. He was arrested on 8th February 2012 and taken to Karatina Police Station where he was told about robbery investigations he was not aware of. He did not know any of his co-accused and did not know PW11 to whom he allegedly sold a mobile phone.

5. The trial court relied on the sole evidence of Githaiga that he saw the appellant's face on 6th October 2011 and was able to remember that face later when he testified in January and May 2012. The trial court further accepted the evidence of PW11 that he bought the stolen phone from the appellant whom he knew before. After re-evaluating the direct evidence, the High Court found as follows:-

> ***"According to the complainant's evidence, there was sufficient lighting on the material night; the electricity lights were on throughout the entire robbery ordeal. <u>The first complainant had a face to face encounter with the appellant whom he identified in the dock as the man who robbed him. He described him as "a brown man".</u>***
>
> ***We are of the view that the conditions were favourable for the 1st complainant to have positively identified his assailant; the prosecution evidence was consistent that there was sufficient lighting from the electricity lights. If there were such lights, it is possible beyond per adventure that the***

first complainant could not have missed the appellants face considering he was directly confronted by the robbers and more particularly the appellant with whom he had a one-to-one encounter as he robbed him of his phone and money. (Emphasis added)

6. On the issue of identification parade which the appellant had contended was necessary, the court stated:-

"The appellant has argued that he ought to have been subjected to an identification parade and the learned magistrate erred in law in relying on the evidence of a single identification witness to convict him. As we understand the law on identification of suspects, identification parades are useful but they are not always mandatory; dock identification may be sufficient if a trial court may, depending on the circumstances of the case, find the identification to be sufficient. We suppose this is what the Court of Appeal meant in Muiruri & Others vs. Republic [2002] 1KLR 274 where it stated:

"It is believed because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of...we do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo versus Republic [1953] 20 EACA 166, Roria versus Republic [1967] EA 583 and Charles Maitanyi versus Republic [1986] 2KLR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases the courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case the evidence must be true and is prior thereto the court warns itself of the possible danger of mistaken identification."

7. Finally on circumstantial evidence, the High Court found that the appellant was in recent possession of the stolen phone shortly before he sold it to PW11 and stated thus :-

"Besides the direct identification evidence, we find that the circumstantial evidence available pointed more to the guilt of the appellant than to his innocence. This evidence revolved around the recovery and possession of the second complainant's phone. We are convinced by the evidence on record that the trail of evidence on the movement of the second complainant's phone after the robbery was traced to the appellant."

8. It is those findings that the appellant challenges before us on six grounds drawn up by himself in person and argued by learned counsel for him **Mr. Warutere**. They may be summarized:

"The High Court erred in law in:

- ***Failing to re-evaluate the evidence of the single witness on identification and dismissing the necessity for an identification parade.***
- ***Failing to interrogate the evidence of PW11 which was untruthful;***
- ***Failing to appreciate that vital witnesses were not called to support the circumstantial evidence.***
- ***Breaching the appellant's right to a fair hearing under section (2) (a) of the Constitution.***

- ***Disregarding the appellant's defence.***

9. On identification, Mr. Warutere submitted that the robbery took place late at night and the conditions were not conducive to positive identification of the attackers. It was only PW1 who purported to have identified the appellant at the scene, a total stranger to him, and then from the dock several months later. He never gave any description in his first report and never participated in any identification parade. Counsel further submitted that the evidence of PW11 was not properly evaluated and was without probative value. On circumstantial evidence, counsel contended that the chain of events was broken by failure to call essential witnesses and accepting without question, the evidence of accomplices. The defence of the appellant which was on oath and was truthful was also not properly evaluated. Finally, Mr. Warutere made a submission on jurisdiction which was not raised in the memorandum of appeal, contending that the judgment of the High Court which was dated and signed by two High Court Judges, was a nullity because it was delivered by a Judge of the Employment and Labour Relations Court.

10. In response to those submissions, learned Assistant Director of Public Prosecutions, **Mr. Kaigai,** supported the findings of the two courts below. He submitted that the appellant was convicted on the strength of a single identification witness in count 1, and that in count 2 there was additional circumstantial evidence of recent possession. PW11 was the star witness on circumstantial evidence and was believed by the trial court. So was PW7 who was not arrested and was an independent witness. According to counsel, the defence was properly considered and rejected. As for the validity of the judgment, counsel submitted that it was properly made, dated and signed, and the delivery of it was a mere administrative function which any Judge of equal capacity could perform.

11. We have anxiously considered this appeal and the profound submissions of counsel on both sides. The appeal of course may only lie on issues of law by dint of **Section 361** of the **Criminal Procedure Code** and we surmise that the two central issues of law are the identification of the appellant and the probative value of circumstantial evidence. Before we consider those issues, we must dispose of the jurisdictional issue on the validity of the High Court judgment.

12. No authority was cited by Mr. Warutere on the jurisdictional issue, but we are aware of various decisions made by this Court holding that Judges of the specialized courts of Environment and Land (ELC) as well as Employment and Labour Relations (ELRC) have no jurisdiction to hear and determine criminal matters. See for example, the Malindi case of ***Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR***. The decision is currently before the Supreme Court on appeal but the position taken by this Court remains valid in the meantime.

13. The case before us is distinguishable. There is no contention that the first appeal was heard before two judges of the High Court who were qualified to do so under **Article 165** of the **Constitution** and **Section 359** of the **Criminal Procedure Code.** There is no contention that the same two judges considered the record of appeal as well as the submissions made before them and drew up, signed and dated the judgment they arrived at. However, owing to their absence, the judgment was read out to the parties by a Judge of the ELRC. In our view, this was purely an administrative function which did nothing to nullify the decision validly arrived at by the two Judges of the High Court. We reject that ground of appeal.

14. As regards the other two issues, the principles are clear that this Court will defer to concurrent findings of fact by the two courts below unless they are bad in law. As this Court put it in the case of ***Christopher Nyoike Kangethe v Republic [2010] eKLR*** :-

> ***"an invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law."***

They will be bad in law if they are based on no evidence at all, or on a perverted appreciation of the evidence on record.

15. On the issue of direct identification evidence, we must re-examine the sole evidence that was relied on to convict the appellant on the two counts of robbery; that of ***Githaiga*** *(PW1). He testified on three different occasions: firstly on 30th January 2012 when he stated in relevant part thus:*

> ***"As I did stock taking, Elias Mathathi had waited for me on a boda boda motor cycle operator(sic). So he opened back door in order to go for a call of nature. The door was a steel one. There were electrical lights in my bar and even outside.***
>
> ***The moment he opened the door, a brown man pushed him and 3 more people entered. The brown man started to attack Elias whereas the others came to me. The brown man had a long metal rod. The one who came to me had a panga and he demanded for money and phone whereas the other went to the counter.***
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> ***The thugs were four. The thugs took my phone Kambambe make (Safaricom offer) worth Sh. 1500, Sh. 1,100 all worth Sh. 2,600. My assailant then told me to step(sic) on the floor. I lay on the ground facing up. The thugs went to the counter.***
>
> ***The brown man asked Elias to produce money as he said he had none and so Elias was hit on the head with the metal rod."*** (Emphasis added)

16. He was recalled on 24th May 2012 when the hearing of the case commenced de novo and he gave a slightly different version as follows:

> ***"I opened the bar ready to leave when 4 men entered therein. The electricity lights were still on. The 4 men's faces were uncovered. They were armed with a metal bar, whips and panga.***
>
> ***The electricity shone with no inhibition. One demanded for money from Elias.***
>
> ***One came to me and demanded for phone and cash from me. I had about 1400/- which I was robbed and a cell phone - Safaricom 'offer'.***
>
> ***I was ordered to lie down and I complied.***
>
> ***Stephen Mwangi was the next to be robbed.***
>
> ***Before I was asked to lie down, Elias aforementioned became difficult and he was hit hard on the head with the metal bar. Elias fell on a table. He was hit again on the head. He was hit again and again. I went down and covered myself leaving gaps. The 4 entered the counter - I was hit on the right leg with the metal bar by the person who hit Elias. I fractured the leg.***
>
> ***The four left and locked us from outside."***

17. Lastly, he was recalled on the application of the appellant who sought to cross examine him further on 10th July 2012 and he responded thus:-

> ***"When reporting the ordeal to police I explained that there was electricity lighting then and that I saw a brown man whose face was uncovered and that there were three other men behind him.***
>
> ***You were among the said three men behind the first one. You were arrested after police conducted their investigations.***
>
> ***I wasn't called by the police to identify you in an identification parade."*** (emphasis added)

Those excerpts clarify the evidence of Githaiga that the attacker who registered in his mind as he was the first to enter and was most violent, was ***'the brown man with a long metal rod'****. The attacker used the*

rod to batter Mathathi to death and also used the same rod to break Githaiga's leg. But this was not the appellant, as Githaiga clarified in further cross examination. According to him the appellant was in the group behind the 'brown man'. Other than stating in evidence that he saw the appellant's face, there is no evidence that Githaiga gave any description of the appellant to the Assistant Chief (PW4) and AP officer (PW5) who arrived first on the scene or the investigating officer P.C Miriti (PW10). In matters of identification this is an important factor to consider. We may repeat what this Court has stated before in ***Maitanyi -vs- R(1986) KLR 198*** *:-*

"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description."

18. *How did the High Court evaluate the evidence of Githaiga? As is evident from the first excerpt, it categorized the appellant as* ***'the brown man'*** *who was clearly seen by Githaiga. This was a perverted appreciation of the evidence on record and it calls for our intervention. The appellant was not the brown man, and we do not know what the High Court would have found if it was aware that the appellant was not '****the brown man'****. The conditions for positive identification at the scene may well have been suitable, but it is not lost to us the complainant in the 2nd count, Muthee, who was in the same room under the same circumstances confessed that he was unable to identify any of the robbers.*

19. Once again, this Court has repeatedly stressed that:

> ***"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".*** See ***Wamunga v Republic [1989] KLR 424.***

20. Furthermore, the High Court was of the view that an identification parade was not mandatory and that dock identification may be sufficient, citing the ***Muiruri case*** *(supra). While it may not be mandatory, this Court has underscored the utility of identification parades in order to minimize the danger of mistaken identity. We take it from the case of* ***James Tinega Omwenga –vs- R- Criminal Appeal No. 143 of 2011****, where the Court expressed itself as follows:-*

> ***"The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless."***

Earlier decisions of ***Gabriel Njoroge v R [1982-1988] 1 KLR 1134*** and ***Amolo v R [1991] 2 KLR 254*** explained the rationale for reluctance by the courts to accept dock identification as:

> ***"…part of the wider concept, or principle of law that it is not permissible for a party to suggest answers to his own witness, or as it is sometimes put, to lead his witness."***

21. *In our view, the* ***Muiruri case*** *did not overrule the rationale for exercising caution when dealing with dock identification evidence. The bottom line in the authorities is that the court will only base a conviction on such evidence:*

> ***"…if satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."***

22. We find and hold that in the circumstances of this case, it was necessary to hold a properly organized identification parade for Githaiga to affirm his identification of the appellant as one of the attackers at the scene. The dock identification which came three or seven months later was of little, if any, probative value.

23. That leaves the circumstantial evidence connecting the appellant to the offence. It is important to underscore that the stolen mobile phone was not found in possession of the appellant. On the evidence, it took a circuitous journey through five different persons over a period of about two months before being found in possession of the 1st accused. The possession story then travelled back to PW11 who was the sole witness connecting the appellant with the stolen phone. The arrest of the appellant was however caused by one **Boniface Gichira**, who according to the investigating officer, PW10, gave the police "*more information*" leading to the arrest. Gichira seems to have been an important and independent witness since the prosecution applied for and was granted leave to summon him to testify. But he never testified. Another link in the circumstantial chain of events was one **Dama Wambui** who is alleged to have received the phone from PW7 for sale. Again, she was not called to testify. All the other four persons who handled the stolen phone were arrested and two were charged together with the appellant while two became prosecution witnesses.

24. The entire circumstantial evidence thus became accomplice evidence, which though admissible, requires corroboration in practice. The court in ***Kinyua vs. R [2002] I KLR 257*** held as follows:

> ***"7.The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the court duly warning itself… on the dangers of doing so.***
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> ***8.Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.***
>
> ***9. If the court decides that the accomplice witness' evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence."***

25. In this case, the trial court did not warn itself about the credibility and the need for corroboration of the evidence of PW11. It was not only accomplice but also evidence of a co-accused because PW11 had been arrested and charged as the 3rd accused before the prosecution turned him into a witness. In the case of ***Joseph Odhiambo vs. Republic Cr. Appeal No. 4 of 1980*** **this Court held** that '*an exculpatory extra judicial statement by one accused cannot be used as evidence against a co-accused'. Even if the statement was a confession, the law is that 'the statement and evidence of a co-accused person is evidence of the weakest kind since an accused person can implicate another, intending to save himself from blame'*. See ***Gopa s/o Gidamebanya & Others vs. Republic Cr. Appeal No. 106 of 1983***. **In our view, the investigation as well as the prosecution of this case appears to have been poorly handled. We find and hold that the circumstantial evidence was also of doubtful probative value.**

26. We have said enough to persuade ourselves that the two main issues of law raised by the appellant are meritorious and we need not explore the other grounds. The appellant was entitled to the benefit of doubts inherent in the evidence on record. We allow the appeal, quash the conviction, and set aside the sentence of death imposed on the appellant. He shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 6th day of April, 2016.

P. N. WAKI

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JUDGE OF APPEAL

M. K. KOOME

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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