IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & G.B.M KARIUKI, JJ.A)

CRIMINAL APPEAL NO. 276 OF 2007

BETWEEN

JESSE MWANGI THEURI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi

(Lady Justice J. Lesiit & Makhandia, JJ.) dated 20th September, 2005

in

H.C.CR. A NO. 303 OF 2003)

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JUDGEMENT OF THE COURT

[1] This is a second appeal by ***Jesse Mwangi Theuri,*** the appellant, against the judgment of the High Court at Nairobi (J. Lesiit & Makhandia JJ.), dated ***20th September, 2005*** in H.C.CR.A No. 303 of 2003. In the said judgment, the appellant's appeal was dismissed and being dissatisfied, he filed the present appeal which by dint of the provisions of ***Section 361 (1) (a)*** of the ***Criminal Procedure Code***, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered or looking at the entire case, their decisions on such matters of facts were plainly wrong in which case this Court will consider such omission(s) as matters of law.

[2] Both courts below clearly set out the facts of the matter but in order to put this judgment in perspective we briefly set out the facts that were before the trial court. It was the prosecution's case that on 3rd December, 2002 at around 9.40p.m, the complainant, David Mwangi (PW1) hereinafter referred to as David escorted his friend one Jairo Mbuthia (PW2) to a bus stage at University way to take a matatu to wherever he was going. As David was walking back, along Koinange Street, he was accosted by four men, who grabbed him, and as one of them tried to strangle him, another one pointed a knife on his face, while the others frisked his pockets and robbed him of cash, Kshs 1800/=, identity card and a mobile phone worth Kshs 10,000/=. David shouted for help, and some police officers who were on patrol within the area responded promptly by shooting in the air. These assailants took to their heels, except the appellant whom David grabbed by his hand and refused to let go until the police came and re-arrested

him.

[3] PC Kipkurui (PW3) told the trial court that while he was on other duties in the company of another police officer by the name Suli Moshe, they saw four young men walking fast as if they were following somebody. They asked the driver to stop the vehicle, soon thereafter they saw a commotion as the complainant was being attacked, the other attackers managed to escape, but they arrested the appellant and handed him over to another team of police officers who were patrolling the area. The person who was arrested was the appellant, he was taken to Central police station. PC Dominic Murage PW4 found the appellant in the cells when he began investigations. This is how the appellant was arrested and was subsequently charged with one count of robbery with violence contrary to **section 296 (2)** of the **Penal Code,** Chapter 63 of the Laws of Kenya, before the Chief Magistrate's Court at Nairobi.

4. The particulars of the offence were that on the 3rd day of December 2002 at 9.45p.m along Koinange Street Nairobi within the Nairobi area, jointly with others not before court while armed with dangerous weapons namely daggers, robbed David Mwangi of his cash Kshs 1800/=, a mobile phone make Nokia 3310 valued at Kshs 10,000/=, a driving licence and a National Identity Card all valued at Kshs. 11,800/= and at or immediately before or immediately after the time of such robbery used actual violence to the said David Mwangi.

5. The prosecution called a total of four (4) witnesses in support of its case against the appellant. They included PW2 who confirmed the complainant had escorted him from Karanja Bar and Restaurant which is at Munyu road to University Way bus stop where he boarded a bus and left. PW2 did not witness the robbery, but he told the court that the complainant told him in the course of the week that he was attacked by thugs and thus PW2 recorded a statement with the police. PW4, the investigating officer told the trial court that he was assigned the case, in regard to the appellant who was already in the police cells; he recorded statements from the complainant and proceeded to charge the appellant with the offence of robbery with violence.

[6] After considering the evidence by the prosecution witnesses the learned trial magistrate was satisfied the appellant had a case to answer and placed him on his defence. In his defence, the appellant gave unsworn evidence, in which he testified that he was a matatu operator on route No. 6. He said that on the material night, he stopped to ask somebody for change when David who had been accosted by thugs claimed he was one of the assailants and that that is how he was arrested and charged with the offence of robbery with violence which he claimed he knew nothing about.

7. Being convinced that the prosecution had proved its case the trial court convicted the appellant for the offence of robbery with violence and sentenced him to death. Aggrieved by the said decision, the appellant filed an appeal in the High Court. The High Court **(*J. lesiit & Makhandia JJ.*)** vide a judgment dated 20th September, 2005 upheld the conviction and confirmed the sentence meted out by the trial court. That decision is what has provoked this second appeal.

8. Although the appellant proffered some lengthy supplementary memorandum of appeal with about ten (10) grounds of appeal, during the hearing of this appeal, Mr. Ondieki, learned counsel for the appellant, urged only four grounds to wit;-

- ***That the charge was defective;***
- ***That the appellant was not properly identified;***
- ***Identification.***
- ***That the first appellate court failed in its duty to re-evaluate and reconsider the evidence on record;***
- ***That there was insufficient evidence to support the conviction andsentence thereof;***

9. In expounding the above grounds, counsel for the appellant submitted that there was no re-evaluation of evidence by the High Court as the court merely recited what was stated by the trial magistrate; that had the judges performed their duty, it would have become apparent that the trial magistrate haphazardly took evidence as it is not at all clear from the records whether PW3 was sworn before testifying. Related to the issue of re-evaluation of evidence, counsel argued that the charge sheet stated the offence and the particulars indicated in the charge sheet were at variance with the evidence of David who stated in evidence that he was robbed of Kshs 1,800/=, a mobile phone, an identity card and new clothes which were not in the charge sheet. In addition, there was no evidence that an offensive weapon listed in the charge sheet was a dagger, because David, the only eye witness of the incident, stated the assailants were armed with a knife. Counsel for the appellant faulted both courts below for failing to consider that the offence was committed at night, and the evidence of PW1 required corroboration. At worse, Mr Ondieki, submitted the facts of the case revealed an offence of mugging and not robbery with violence.

10. On the issue of identification, Mr. Ondieki, submitted that the appellant's conviction was wrongly based on the evidence of a single identifying witness. He stated that the evidence of PW3 did not corroborate that of David. We were referred to the case of ***Kiarie vs R [1984] KLR at 739*** where the court held that a witness can be honest but terribly mistaken on identification. Counsel argued that the evidence of identification did not meet the thresh-hold of proof beyond any reasonable doubt. Furthermore, counsel argued that the appellant was not subjected to an identification parade yet what was before the trial court was not evidence of recognition but an arrest at night. Consequently, counsel urged us to allow the appeal and acquit the appellant as the prosecution failed to prove its case to the required standard.

11. On the part of the state, Mr. Mureithi, learned principal prosecution counsel opposed this appeal and submitted that the case was proved to the required standard. The appellant, he said, was arrested by police officers who were passing along Koinange Street when they heard David shout for help. David never let the appellant go until the police came and re-arrested him. Counsel argued that the evidence of David was corroborated by that of PW3, whose evidence showed that the distance between where the police were and the scene of robbery was only 20 meters; also, he said, the circumstances for a positive identification were obvious and the fact that PC Suli Moshe was not called to testify did not in any way affect the weight of the prosecution evidence. He asked us to dismiss the appeal.

12. As stated earlier, this is a second appeal and by dint of **Section 361 (1)** of the **Criminal Procedure Code,** Chapter 75, laws of Kenya**,** this Court's jurisdiction is limited to matters of law only. See ***Chemagong vs. Republic (1984)*** **KLR 213 at page 219** when 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 Karari s/o Karanja vs. Republic 17 EACA (146)."***

[13] We have considered the record of appeal, the grounds of appeal, able submissions by counsel and the law. Counsel for the appellant, in his address to us argued that the circumstances under which the appellant was arrested were not safe to sustain a conviction that is free from error. He argued that the appellant was convicted based on evidence by a single identifying witness. This definitely will lead us to the question of whether the appellant was positively identified as one of the perpetrator(s) of the offence of robbery that took place along Koinange street in Nairobi on the material night and whether there is a possibility of error. It is clear the conviction of the appellant for the offence of robbery with violence was based on the evidence of David because PW3 did not witness the actual attack, nonetheless he had seen four young men walking fast, but by the time he reached the scene, he saw David holding on to one assailant. The others had fled the scene. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on evidence of a sole identifying witness to convict, the law requires the evidence of such witness to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favoring a correct identification are difficult.

14. In ***Wamunga vs. Republic (1989) KLR 424***, this Court held,

> ***"... it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.'"***

We have to re-visit the issue of whether the appellant was positively identified in this case. Both courts below were concurrent in their conclusions that the evidence of identification was sufficient to sustain the appellant's conviction. The trial court in its judgment held,

> ***"The accused person does not deny having been arrested at the time of incident. The police officers who arrested him saw him together with others quickly trailing the complainant. They decided to follow and soon enough the accused person was caught in the very act. He could not escape because the complainant got hold of him and wouldn't let go. Indeed this is a case where identification is not an issue."***

The High Court in its judgment held that:

> ***"The evidence of identification was very clear and without doubt. The appellant was apprehended by the complainant at the scene of crime after the appellant's accomplices had robbed the complainant before fleeing from the scene. The complainants' evidence that he held onto the appellant until police re-arrested him was corroborated by PW3, PC KIPKURUI is the police officer who re-arrested the appellant from the complainant at the scene of incident. PC KIPKURUI said that he witnessed the entire incident from the time the four men surrounded and robbed the complainant while one of them tried to strangle him to the time the robbers fled leaving the appellant behind. The appellant is the one who had been strangling the complainant. The complainant grabbed the appellant before he could escape with his accomplices."***

[15] From the foregoing, the two courts below were persuaded that since the appellant was arrested while the complainant was grabbing on his hand, the prosecution's case was proved. Thus we are persuaded there is no apparent error on the evidence of identification of the appellant as the assailant who attacked David on the material day. We say so because David testified that the appellant was the one who was strangling him until when the police arrived and re-arrested him. This evidence was corroborated by PC Kipkurui who arrived at the scene and re-arrested the appellant from the grips of the complainant. We further find that the evidence tendered by David and PC Kipkurui concerning the incident was sufficient and there was no need for the prosecution to call PC Suli Moshe and/or other officers who were present during the incident. **Section 143** of the **Evidence Act**, Chapter 80, Laws of Kenya provides,

> ***"No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact."***

[16] This now leads us to the second and third issues as to whether the charge sheet was defective and whether the superior court properly re-evaluated the evidence before it. We note that the charge sheet indicated the appellant and others not before the court were armed with offensive weapons namely daggers. It would appear to us that the alleged possession of the offensive weapons and "**being in the company of others"** is what formed the basis for the charge of robbery with violence. We also note from the evidence of PW3 who testified that he had witnessed the entire incidence, did not mention that he saw the four young men actually attack the complainant nor did he say they were armed with any dangerous weapon. That was an aspect that needed to be considered carefully because the offence happened at night when it was dark, the attack also happened too first when David was accosted and frisked of his properties. The evidence of the attack by four assailants came from David alone; it is necessary to observe that by the time PW3 reached the scene, he only found David holding on to the appellant. The other alleged attackers had run away. One aspect that the two courts did not address is whether there was a possibility that the attack was only executed by the appellant. In our view this was an important aspect as it will determine the dichotomy between the offence of robbery with violence and a simple robbery. The record shows that there was evidence that police fired shots in the air when David screamed for help. In the circumstances, we find the evidence that the complainant was robbed to be cogent, but the evidence

does not show beyond any reasonable doubt that the appellant was in company of others and hence does not support the offence of robbery with violence, which was not corroborated. This was a case of simple robbery or mugging as suggested by counsel for the appellant.

[17] In the circumstances we are of the opinion that the superior court failed to properly re-evaluate the evidence on the prevailing conditions of how the complainant was attacked; it was at night, PW3 did not witness the attack, but saw David holding onto the appellant while the other attackers took off. The evidence of how David was attacked by the appellant was cogent and corroborated but the evidence that the appellant was armed with a dangerous weapon or was in the company of others was not substantiated. What was proved was a lesser cognate offence of simple robbery contrary to **Section 295** of the **Penal Code** which provides,

> ***"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery***."

[18] The learned judges clearly overlooked that aspect of the evidence, had they done so they would have reached the same conclusion as we have, and upheld a conviction of a lesser charge under **Section 179** of the **Criminal Procedure Code** which provides as follows:-

> ***"179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

[20] It is our considered view that the offence of robbery is cognate in nature, and since the two courts below did not address this aspect we would adopt the words of Spry, J. (as he then was) in ***Ali Mohammed Hassani Mpanda v Republic, [1963] EA 294***, wherein he interpreted the Tanzanian equivalent of **Section 179** of the **Criminal Procedure Code** as follows:

> ***"Sub-section (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate offence (proved) and may then, in its discretion, convict of that offence."***

See also ***Robert Ndecho& Another v Rex, (1950- 51) EA 171***, ***Wachira s/o Njenga v Regina ,(1954) EA 398*** and ***Robert Mutungi Muumbi v Republic, [2015] eKLR***. Accordingly, we find and hold that the offence which commends itself to us for purposes of sentencing the appellant is that of simple robbery. We think we have said enough to show that there are compelling reasons to depart from the concurrent findings of fact by the two courts below.

[21] The upshot is, this appeal partially succeeds. We quash the conviction entered against the appellant and set aside the death sentence, and substitute therefore a conviction for the offence of robbery contrary to **Section 295** as read with **section 296**

(1) of the **Penal Code**. We take into account that the appellant has been in prison for a period of over 13 years since conviction. We therefore commute the sentence for the offence of robbery under **Section 295** (supra) to the period he has already served. Thus, the appellant is to be set at liberty forthwith in regard to the sentence unless otherwise lawfully held.

Dated and delivered in Nairobi this 1st day of July, 2016.

E.M. GITHINJI

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR