IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU & KIAGE, JJ.A)

CRIMINAL APPEAL NO.74 OF 2013

BETWEEN

KIARIE WANGUBA ….....…..... APPELLANT

AND

REPUBLIC …….....…..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. J.A. Emukule and R. Wendoh JJ) dated 29th November 2012) in **H.C. CR. APPEAL NO. 460 OF 2012)**

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JUDGMENT OF THE COURT

1. The appellant, Kiarie Wanguba, was charged with robbery with violence contrary to section **296(2)** of the **Penal Code**. The particulars of the offence were that on the 10th day of November, 2004 at Lesirko village in Nyandarua District of the Central Province, jointly with others not before court while armed with dangerous weapons namely pistols they robbed John Maina Nyambura cash kshs.5,000/= and immediately after the time of such robbery used personal violence to the said John Maina Nyambura.

2. The other accused was acquitted after a trial before the learned Principal Magistrate (Teresia Matheka) in Nyahururu criminal case no.131 of 2005. Aggrieved with that decision, the honourable Attorney General for the State filed an appeal before the High Court. The Attorney General faulted the trial magistrate for not considering that the accused had been properly identified by PW1, the complainant; that the disappearance from home by the respondent immediately the offence was committed was inconsistent with innocence; that the offence of robbery with violence was proved and that the entire evidence was not properly evaluated.

3. The first appellate court was obliged to re-evaluate the evidence on record and satisfy itself that the conviction was well-founded. The learned judges of the High Court indeed appreciated this position in considering the appeal. The judges' consideration in re-evaluating the evidence hinged on the issue whether the appellant was properly recognized and whether the appellant had disappeared from his rural home immediately the offence was committed. The High Court judges in the end found that the trial magistrate had erred in acquitting the appellant and set aside the order acquitting him, substituting it with a finding of guilt. The appellant was accordingly convicted of the offence charged and sentenced to life

imprisonment.

4. The appellant is aggrieved by the judges' decision and has now appealed before this Court. The appeal is based on six grounds which were merged into two by **Mr. Ndubi Robert**, learned counsel for the appellant. The grounds were summarized as follows:

a. There was improper identification of the appellant.

b. The evidence adduced by the prosecution did not warrant the conviction of the appellant.

The appeal was opposed by the state through **Ms. Nyakira Kibera**, Prosecution Counsel.

5.This being a second appeal, **section 361 (1)(a)** of the **Criminal Procedure Code** is instructive on our jurisdiction as a second appellate court. It limits our jurisdiction to points of law only. In highlighting his submissions in line with the stated grounds of appeal, Mr. Ndubi pointed out that the offence was committed at 3.00 am and the complainant was the sole identifying witness in respect of the appellant. Counsel further submitted that the circumstances under which the identification was done were not favourable and the identification of the complainant vide voice was unreliable. It was the appellant's position that the appellant was not placed at the scene of crime as the complainant and the appellant live in two different villages 7 kilometers apart and the complainant never saw the appellant escape. Counsel referred us to the testimony of PW2 to the effect that no light was seen in the complainant's house. The bottom line of counsel's argument is that the Judges of the High Court were wrong in convicting the appellant based on the evidence adduced by the prosecution.

6. The appellant relied on his list of authorities filed in court on10th May 2016 which we have perused and considered without the necessity to reproduce each of them. The authorities supported various legal aspects. These are; what constitutes a point of law for purposes of appeal (**Joshua Ntonja Mailanyi v Republic [2011]eKLR**); identification including identification by voice (**Mbelle v Republic [1984]eKLR**, **Wanjiku v Republic [1990]eKLR**); special need for caution before convicting whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused (**John Stelen Ole Mwenda v Republic [1989] eKLR**); identification by a single witness in very stressful circumstances (**John Wandati Wamalwa & Another v Republic Court of Appeal at Kisumu Criminal Appeal No.49 of 1999**); conditions necessary to support recognition and identification (**Joseph Leboi Ole Oroke v Republic, Nairobi Criminal Appeal No.204 of 1987**; the decision to run away when challenged was not of itself evidence of guilt (**Christopher Mwangi v Republic (1982-88) 1 KAR 1170**). Counsel also referred us to the Ugandan case of **Sekitoleko v Uganda** (**High Court at Kampala Criminal Appeal No.99 of 1967**) to support the position that even if an accused pleads alibi, the burden of proof never shifts back to the accused but still remains with the prosecution.

7. Ms. Nyakira for the state opposed the appeal. She submitted that the identification was proper as it was indeed by recognition. The complainant had named the attacker and a distance of 7 kilometers between the complainants and the appellant's villages was seen as still within the neighbourhood. Prosecution counsel further submitted that there was corroboration of identification by the evidence of PW5 and PW7. In addition, it was prosecution counsel's argument that PW9 knew the appellant well and so when he saw the appellant in Dandora he organized for his arrest. Accordingly, the threshold for identification was met and it was thus safe to convict the appellant on it.

8. In reply, Mr. Ndubi urged that the contradictions in evidence should be considered in favour of the appellant, with the result that the appeal be allowed.

9. We perused the record to ascertain how the appellant was identified. We warn ourselves that we did not have the advantage to observe the witnesses and their demeanor so as to ascertain whether they were trustworthy. We note that PW1, the complainant on the material day said that she recognized the appellant. This was both as a result of peeping through the window when there was a commotion, when the appellant gained access to the house and the brief conversation relating to the Shs.5,000/- which the

appellant said was not enough and the instruction attributed to the appellant asking his accomplice to hit the appellant on the head. We find that that aspect of the evidence was steadfast, proper and unshaken.

10. In **John Muriithi Nyagah v Republic [2014] eKLR**, it is accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger. PW1 testified that he knew the appellant and his accomplice as they were from the neighbourhood. The evidence of identification by recognition remained unshaken.

11. We agree that it was necessary to identify the circumstances of the identification. This was the position well set out by the Court of Appeal in England in **R.v. Turnbull [1976]3 ALL ER 549** thus:

> ***"The Judge ... examines closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance?"***

Without repeating the evidence, we are convinced that PW1 had sufficient interaction with the appellant through peeping when the assailants were still outside and during the conversation in PW1's presence. In addition, we are persuaded that the bulbs with the capacity of 40 watts offer lighting sufficient enough for a person to recognize another person whom he is familiar with. In addition to having identified the appellant at the scene, the witness PW1 on cross examination also confirmed that he saw the appellant run away when PW1, the area chief and police officers visited the home area.

12. In **Peter Mwangi Mungai v Republic [2002] eKLR** this court reiterated that dock identification of a witness needs to be preceded by a report made by the identifying witness as to whether he could identify the witness. Applying this to the circumstances, it is clear that PW1 did report while at the scene of crime that he identified two people by name and voice including the appellant. It is this identification that caused the area chief to lead the policemen to the appellant's house where he was again identified as the person who ran away. Moreover, no ill motive was attributed to PW1 through cross-examination as to explain his possible reason to implicate the appellant.

13. Though the area chief did not testify, the other police officers (PW5, PW7 and PW9) testified as to having visited the accused's place in the company of the chief. The police officers were consistent in their testimony that the appellant's house was broken into and certain exhibits recovered. PW5 further testified that photographs of the appellant were recovered and that is what formed the basis for which the accused was advertised by the police as a wanted person and a warrant of arrest issued. It was in line with this warrant that PW9 caused the arrest of the appellant in Dandora in Nairobi and eventually led to the appellant being arraigned before the trial court in Nyahururu to face the charges now subject of this appeal. Had the appellant not been identified as the person subject of the warrant, there would have been no difficulty in having him released the same way other suspects had been released after arrest.

14. Having been satisfied that the identification was satisfactory in the circumstances, we do not fault the two courts below for rejecting the appellant's alibi. We also do not find it necessary to consider the additional circumstances as to whether the appellant had run away as a result of commission of the crime. We appreciate that any normal trial is likely to have discrepancies. These discrepancies are largely curable under **section 382** of the Criminal Procedure Code unless they go to the root of the prosecution case. We have not come across any material discrepancy in this matter from the record and evidence before us to vitiate the decision of the first appellate court.

15. In the end, we uphold the conviction and sentence of the appellant and dismiss the appeal in its entirety.

Dated and delivered at Nakuru this 2nd day of August, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

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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