IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

CRIMINAL APPEAL NO. 148 OF 2011

(CORAM: NAMBUYE, MWILU & KIAGE, JJA)

BETWEEN

SIMON MAINA KARANJA.....1ST APPELLANT

WILLIAM MUGO KINUTHIA.....2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru

(Emukule, J.) dated on 10th day of June, 2011

in

H. C. Cr. C. No. 114 of 2007

****

JUDGMENT OF THE COURT

The two appellants **SIMON MAINA KARANJA** and **WILLIAM MUGO KINUTHIA** were jointly charged with another with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars were that on the 27th day of December 2006 at 9.00 pm at Kwa Amos Trading Centre Bahati in Nakuru District of the Rift Valley Province jointly with others not before court, being armed with dangerous weapons namely panga, robbed Peter Kinuthia Mugo of cash money Kshs 63,000/- and at or immediately after the time of such robbery used personal violence to the said Peter Kinuthia Mugo.

The appellants denied the charge prompting a trial in which the prosecution tendered evidence through five (5) witnesses to prove the charge, namely Peter Kinuthia Mugo (Peter), the complainant, Daniel Gichuki (Daniel), PW2, P. C. Bernard Bore (PC Bernard), PW3, C. I. Julius Nzomo (CI Julius), PW4 and Dr. John Omboga (Dr. John), PW5.

In brief, the prosecution's evidence was that Peter, PW1 owned a shop and his daily routine was to close it

between 8-9 pm. On the date in question he was just about to close it when he was accosted by robbers among them William Mugo Kinuthia and Simon Maina Karanja popularly known as *Rasta* whom Peter used to see pass at his shop every morning. It was Peter's assertion that there was electric light supplied by a bulb both from the inside and outside of the shop. The place was therefore well lit. He was injured by a sharp object, gagged and could not scream. The robbers robbed him of the amount indicated in the charge sheet.

He then left the shop headed home and on the way he met two of his other sons. Daniel Gichuki, David Wanjau and his wife who accompanied him back to lock the shop.

Meanwhile Daniel PW2 was at home asleep. He does not say in his testimony what woke him up but he woke up and foot ran to the father's shop. On arrival he found the 2nd appellant William Mugo Kinuthia outside the shop holding a *panga.* He did not talk to him. On peeping inside the shop Daniel saw the first appellant Simon Maina Karanja popularly known as *Rasta* inside the shop searching for money inside the shelves. Daniel ran home and armed himself. On coming back he found the robbers gone.

P.C Bernard (PW 3) was among the police party that responded to the robbery report and visited the scene where they found the complainant Peter, PW1, who briefed them on how the robbery had occurred. He had injuries on the head and hands which were also bleeding. There was fresh blood stains both outside and inside the shop. PW1 was escorted to hospital for treatment where he was attended to. The P3 form was filled later on by Dr. John Ombogo (Dr. John) from the medical notes and produced in evidence as an exhibit.

The appellants were variously arrested whereupon CI Julius, PW4 conducted identification parades in which Peter, PW1 and Daniel PW2 pointed out the appellants as the persons who attacked and robbed the complainant. When put to his defence, the second appellant William Mugo Kinuthia set up an alibi alleging that he was not at the scene of the robbery on the material date as he was away in Thika where he worked. He came to learn of the attack on his father, much later through the elders. He was later arrested and put in an identification parade. He was surprised when his father the complainant and brother Daniel PW2 came to pick him out as one of the robbers. He attributed this to the father's dislike of him because he (appellant) used to drink of which his father did not approve. They had also disagreed over his father taking on another wife and had started harassing his own mother. It was also his contention that he had no grudge with his brother Daniel, but Daniel testified against him because he was forced to do so by their father.

The first appellant Simon Maina Karanja also gave sworn evidence alleging that he spent the day at the shop he was running on the 27th day of December 2006 and closed shop at 10.00pm. He was arrested the next day at 11.00 am as he was preparing to go and buy goods on allegation of being a member of the *mungiki* which he denied saying that he was only a member of the Independent faith, whatever he meant by that, but conceded that he was popularly known as *Rasta.* He added that it was correctly stated that an identification parade was conducted for him where both the complainant Peter, PW1 and his son Daniel, PW2 picked him out. He confirmed their evidence in cross-examination (PW1 & 2) that he (1st appellant) was the only one with *rastas* (dreadlocks) at that identification parade.

In a judgment dated the 9th day of December 2009, D. K. Mikoyan SRM found both appellants guilty as charged, convicted them and sentenced them to death. The appellants were aggrieved and appealed to the High Court raising various grounds. In a judgment dated the 10th day of June 2011, M. K. Anyara Emukule J, and W. Ouko J. (as he then was) dismissed their appeals.

The appellants are now before us on a second appeal raising six (6) grounds in supplementary grounds of appeal namely;

"The Judges erred in law in;

- **finding that the appellants herein committed the offences of robbery with violence yet no**

weapon was produced at the trial

- **finding that the appellants herein committed the offence of robbery with violence yet only two main witnesses were called out i.e. the father and the brother to the 2nd appellant.**
- **finding that the appellants herein committed the offence of robbery with violence yet the doctor who treated the complainant was not bonded to appear in court to testify and no treatment cards of the treatment were produced in the trial.**
- **finding that the appellants herein committed the offence of robbery with violence yet there was a lot of inconsistence in the evidence tendered.**
- **finding that the appellants herein committed the offence of robbery with violence yet the identification parade was prejudicial and unprocedural especially to the 1st appellant herein.**
- **finding that the appellants herein committed the offence of robbery with violence yet the two appellants were not present in court when the sentence was being passed as pursuant to Section 382 of the Criminal Procedure Code."**

In his submissions to Court, **Mr. James Ngamate Kireru**, learned counsel for both appellants argued that the prosecution did not meet the threshold for proof beyond reasonable doubt because the *panga* allegedly used in the course of the robbery was never produced as an exhibit; medical evidence was faulty as the P3 form was prepared two (2) months after the incident when wounds had healed resulting in an inaccurate assessment of the degree of the injury; the P3 was also filled by a Doctor who did not treat the complainant. A proper approach according to Mr. Ngamate, would have been that the doctor who treated the complainant should have been the ideal person to fill the P3 form for him. Treatment notes should also have been tendered in evidence as exhibits.

With regard to witnesses, Mr. Ngamate argued that independent witnesses should have been called in order to rule out the possibility of existence of a grudge as the driving force behind the robbery allegations against the appellants.

Other arguments put forth by Mr. Ngamate were that it was not clear whether Kshs 63,000.00 was the amount robbed from the complainant or the amount used in his treatment; the purported identification parades were flawed and therefore of no evidential value; there were discrepancies in the trial Magistrate's signature and lastly that the appellants were not allowed to mitigate. On account of all the above, Mr. Ngamate urged us to find that there had been a miscarriage of justice and allow both appeals and set the appellants at liberty.

To buttress his arguments, Mr. Ngamate cited Nyeri (Sitting at Nakuru) **Criminal Appeal No. 7 of 2011, Alex Mwangi Waweru versus Republic** on the standard of proof required to be met in order to sustain a charge of robbery with violence. Also **Meru High Court Criminal Appeal No. 171 of 2008** in which the High Court approved the case of **Mwangi versus Republic [1976] KLR 127** and **Joseph Kariuki versus Republic [1985] KLR 507** for the proposition that whether or not the conduct of an identification parade is so flawed as to necessitate its being disregarded is a question of degree to be decided in the light of the circumstances of each case.

Miss Nelly Ngovi, the learned Prosecution Counsel (P.C) opposed the appeals on the grounds that elements for the offence charged were proved to the required threshold as the appellants were more than one; they were armed and they also injured the complainant. In her view, it mattered not that the weapon used in the attack was not recovered and produced as an exhibit. It was sufficient to demonstrate by way of evidence, which the prosecution did, that a *panga* was involved in the attack and that the injuries inflicted on the complainant were caused by a sharp object. A *panga* qualifies as a sharp object, added counsel.

As for medical evidence, Miss Ngovi urged that the P3 form was properly filled and tendered in evidence as the failure to call the doctor who initially treated the complainant was not fatal to the prosecution's case as sufficient explanation was given as to why it was not possible for the said doctor both to fill the P3 and attend court to give evidence as he had left on transfer from the hospital where the complainant was initially treated.

Turning to the issue of the quality of the prosecution evidence, she argued that the same was credible as the two eye witnesses were believable; there was nothing on the record to suggest the existence of a grudge that could have necessitated the fabrication of the charge against the appellants. There was also clear demonstration that Kshs 63,000 was the amount of money robbed from the complainant.

With regard to the concurrent findings on the culpability of the appellants for the offence charged, it was Miss Ngovi's view that these were well founded as they were based on proven evidence on the record. There was therefore no miscarriage of justice because, first, the matter was heard *de-novo;* the charge was not defective and; lack of opportunity to mitigate was not one of the grounds of appeal raised by the appellants. In the alternative, even if mitigation were permitted, it would not have made any difference in the sentencing of the appellants as the penalty provided for the offence charged is mandatory. The discrepancy in the signature could be due to another Magistrate reading the judgment on behalf of the one who drafted it. On the totality of the above arguments, Miss Ngovi urged us not to interfere with the concurrent findings reached by the two courts below on the culpability of the appellants.

This is a second appeal, our mandate has been clearly spelt out in **Section 361** of the **Criminal Procedure Code** namely, that only matters of law fall for our determination with the only caveat being that any move to interfere with the concurrent findings of fact by the two courts below should only be invoked where there is demonstration that these were not based on any supportable or proven evidence (see **Njoroge versus Republic [1982] KLR 388** and **Sai versus Republic [2009] KLR 353).** Second, or that these were based on a misdirection or a misapprehension of the evidence to such a nature and magnitude so as to render such a finding bad in law and untenable (see **Kiarie versus Republic [1984] KLR 739** and **Christopher Nyoike versus Republic [2010] eKLR.**

We bear all the above principles in mind in the light of the totality of the record as summarized above. In our view, three issues arise for our consideration namely, first whether the prosecution evidence placed the appellants at the scene of the robbery; second, whether the offence charged of robbery with violence was proved to the required threshold; and, third whether the irregularity, if any, of the identification parades subject of this appeal vitiates the appellants' conviction and sentence subject of this appeal.

With regard to issue number one, the learned Judges made the following observation on the evidence tendered on this aspect of the appeal:-

> ***"The evidence of PW1 was clear. He recognized the 1st appellant, Mugo his son. He saw him clearly, and Mugo, 1st appellant spoke to him and asked him what he (the father) thought he was. Although PW1 was not sure of who struck him with the sharp object, he was sure that he saw his son, the 1st appellant who following the incident ran away to his sister in Thika where he was arrested.***
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> ***PW2 too testified that he instinctively woke up at about 9.30 pm and run towards the shop where he saw his brother Mugo with a panga, and refused to talk to him. He saw the 2nd appellant who was known to him as 'Rasta'.***
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> ***As to the defence of alibi, the evidence of PW1 and PW2, father and son, and brother to the 1st appellant is clear that they recognized the 1st appellant, a person whose identity was well known to PW1 as his son, and to PW2 as his brother. The chances of mistaken identification at the scene of the crime are remote.***
>
> ***The 2nd appellant was a neighbor who operated a kiosk in the same Kwa Amos Trading Centre, and passed by the home and the shop of PW1. The chances of mistaken identification by recognition at the scene of the crime were equally minimal and in this case non-existent.***
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> ***The appellant's defence of alibi is entirely displaced by the evidence of the prosecution."***

In finding as they did above, the learned Judges were simply concurring with the findings of the learned

trial Magistrate; which concurrent findings the appellants have invited us to interfere with. In deciding either way, we have to bear in mind the decision of the Court in the case of **Daniel Kabiru Thiong'o versus Republic, Nyeri Criminal Appeal No. 131 of 2002 (UR)** thus:-

> ***"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."***

The principles we are enjoined to bear in mind in deciding either way now abound. We cite a few by way of illustration. In **Republic versus Turnbull [1977] QB 224,** it was stated, *inter alia,* that the quality of identification evidence is good for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, or a workmate, it is safe both to assess and rely on such evidence even though there is no other evidence to support it, provided, always that an adequate warning has been given about the special need for caution especially where circumstances of identification are difficult.

In **Anjononi & another versus R [1976-80] KLR 1566,** the Court stated *inter alia* that:-

> ***"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

Lastly, see also **Wamunga versus Republic [1989] KLR 424** for the holding *inter alia* 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 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 on reliance on the correctness of the identification."***

In the instant appeal, there is no dispute that the second appellant Wilson Mugo Kinuthia was a son to the complainant, Peter, PW1 and a brother to Daniel PW2, while the 1st appellant Simon Maina Karanja ran a shop in the same Trading Centre and used to pass the complainant's shop daily on his way to his shop. The second appellant talked to his father PW1 during the incident of robbery. There was no suggestion that the conversation was not normal so as to disrupt the recognition of voice. There were also electric lights from bulbs placed both outside and inside the shop. There has been no suggestion that PW1 and 2 invented the existence of this lighting system to serve any hidden agenda. The description of the role played by each appellant by PW1 tallied that described by Daniel PW2. For example PW1 said the son was outside when he was confronted by the robbers. This location on the part of PW1 was confirmed by Daniel PW2 who came across the 2nd appellant Mugo holding a *panga* standing outside PW1's shop but chose not to talk to his brother.

PW1 said that it is the first appellant Simon who collected money from him and when directed to the shelves after they had demanded more money from PW1, he is the one who did the emptying of those shelves, a version confirmed by Daniel who also said that he saw Simon scouring the shelves for money. With the exception of Simon who had a knit cap and tried to pull it over his head, there was no evidence that the attackers did anything to conceal their identities. They could therefore easily be identified with the help of electric light then lit as it had not been interfered with.

For the reasons given in our reasoning above, we find nothing to justify any interference with the concurrent findings of the two courts below. We affirm them. that on the basis of the record, there was sufficient material that placed both appellants at the scene of the robbery.

With regard to the ingredients of the offence charged, the learned Judges made the following observation:-

"There is no challenge that the ingredients of the offence of robbery were not proved. But to repeat them, the appellants were armed with a panga – a dangerous weapon with which they inflicted injuries upon PW1 in the course of the robbery of Kshs 63,000/- from the complainant PW1. They were the prime suspects whose names were mentioned when the first complaint or report was made to the police."

The principles applicable in determining whether the threshold for the commission of the offence charged had been met or not have also been crystallized by case law from this Court. We cite a few to illustrate the point. In **Johana Ndung'u versus Republic – Criminal Appeal No. 116 of 1995 (UR)** the Court set out ingredients for robbery with violence pursuant to **Section 296 (2)** of the **Penal Code** as follows:-

"(a) If the offender is armed with any dangerous or offensive weapon or instrument, or;

(b) If he is in the company with one or more other person or persons; or

(c) if at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person"

The Court went further to add that proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the Penal Code (see **Oluoch versus Republic [1988] KLR 549).**

In **Juma versus Republic [2003] 2 EA 471**, the Court held *inter alia* that where the prosecution is relying on the ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was dangerous or offensive. In **Moneni Ngumbao Mangi versus Republic [2006] eKLR**, it held *inter alia* that:-

"The word "robbed" is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property."

See also **Opoya versus Uganda [1967] EA 752.**

In the light of the above principles we agree with the submissions of Miss Ngovi that the two courts below were in order when they concurrently held that the threshold for sustaining the offence charged had been met. This is because the evidence tendered clearly demonstrated that appellants were more than one; they were armed and violence was used on the complainant PW1, as he was injured in the course of the robbery. They believed evidence of PW1 and 2 that the two saw the appellants armed with a *panga* and that is why PW2 said he also decided to run back to his home to arm himself.

Although the complainant PW1 does not say that it is the second appellant Mugo who cut him, he was nonetheless cut by a sharp object as confirmed by the medical report.

We are alive to Mr. Ngamate's argument that, medical evidence was flawed due to the failure of the prosecution to have the medical report tendered in evidence filled by the Doctor who had initially treated the complainant and its being filled two (2) months later on the one hand, and on the other hand for the alleged failure on the part of the prosecution to produce the treatment chits to back up the medical report. As submitted by Miss Ngovi, this was not material because the ingredients for sustaining an offence of robbery with violence simply talks of *"wounding, beating, striking or using any other form of violence"*. In these circumstances, PW1's oral testimony that he was wounded as supported by the evidence of Daniel and the police officer who responded to the report of robbery and visited the scene that they saw PW1's hands cut and bleeding and that there was fresh blood both in the shop and outside the shop would have sufficed. Even a mere threat or intimidation would also have sufficed.

It is further our view that the filling of the medical report two months after the incident and the failure to produce the hospital treatment chits was not fatal to the prosecution's case because such is not a

requirement for the sustenance of the offence on ingredient (c). Second the complainant explained that the P3 was filled after he had completed treatment and he was not challenged on this assertion. Third, Dr. Ombogo explained the non availability of the doctor who initially treated the complainant namely that the said doctor had left on transfer. Nowhere in the evidence did the appellants apply to have the prosecution avail the said doctor as a witness even for their cross-examination. The complaint is not only belated but also baseless.

Turning to the issue of the identification parades, there is no dispute that they were held. The weight attached to the said evidence by the learned Judges is clearly borne out by their observations made thus:-

> ***"Both PW1 and PW2 identified the appellants at an identification parade which was conducted by CIP Nzomo who testified that there were 8 people to the parade at three different identification parades, the 9th being the accused persons who all took positions which they chose. It is not correct as PW1 and PW2 suggested that there were between 10-20 people. The Force Standing Orders Chapter 46, 5-6 (a) refers to at least 8 people in the parade. No prejudice was done to the appellants if there were more than 8 persons in the parade. We therefore find and hold that the identification parade was conducted in accordance with the Force Standing Orders."***

With respect to the learned Judges, it was PW1 and 2 who attended the identification parades, and not them. They were not present during the conduct of the said parades. They had no reason to dispute PW1 and 2's evidence that the parade members were between 10-20 persons and that the first appellant Simon was the only one with dread locks. We therefore agree with Mr. Ngamate's arguments that the conduct of the identification parades was flawed. We however do not agree with his assertion that this flaw vitiates the concurrent findings on the culpability of the appellants for the offence charged. This is because there being other evidence that appellants were well known to both PW1 and 2 and being satisfied that the circumstances were conducive to positive identification of the assailants, the holding of the said identification parades even if they had been regular would simply have been superfluous as appellants would have been picked anyway as they were well known to the identifying witnesses. See **Martin Oduor Lango & 2 others versus Republic [2014] eKLR** where the Court held that as the witnesses indicated that they had recognized the assailants as people they had known, it was pointless to hold an identification parade. The Court went further in **Patrick Muriuki Kinyua versus R [2015] eKLR** to rule that evidence of an identification parade is of no probative value in instances where appellants were well known to the complainants.

In the result, we find no merit in these appeals. They are accordingly dismissed.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

P. 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