IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 369 OF 2012

BETWEEN

ROBERT KARIUKI WACHIURI.....1ST APPELLANT

TIMOTHY GACHICHIO THIGA.....2ND APPELLANT

AND

REPUBLIC .....RESPONDENT

(*Appeal from a judgment of the High Court of Kenya at Nakuru (**Ouko & Omondi, JJ**) dated 12th October, 2012*

in

Criminal Appeals No. 101 and 102 of 2010 (Consolidated)

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JUDGMENT OF THE COURT

The Appellants Robert Kariuki Wachiuri and Timothy Gachichio Thiga were jointly arraigned before the Principal Magistrate's court at Narok on two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence in count 1 were that on the 24th day of June 2007 at Narok Township in Narok District of the Rift Valley Province jointly with others not before court while armed with dangerous weapons namely an A.K 47 Rifle and two pistols they robbed Abdi Yusuf of his Ksh.250,000 in cash and at or immediately before or immediately after such robbery threatened on use actual violence on the said Abdi Yusuf. In count 2, that on the same date, month, year and place and while armed in the same manner they robbed Kennedy Momanyi Mose of his motor vehicle registration number KAQ 166 K Toyota Marino A – 100 green in colour and at or immediately before or immediately after such robbery threatened on use actual violence on the said Kennedy Momanyi Mose.

The appellants denied both offences prompting a trial in which the prosecution called six (6) witnesses in support of the charges. At about 3.00 p.m. on the material day within Narok Township Abdi Yusuf (PW1) owner of Yusuf Wholesalers and his employees were ferrying goods from the store to the front of the shop for display on the shelves. PW2, another employee was busy attending to customers, when they were accosted by between five (5) to six (6) robbers who robbed PW1 of the cash stated in count 1. PW1 identified the 1st appellant at a subsequent identification parade as the robber who pointed a gun at him

and ordered him to lie down. He defied those orders and instead walked to the back of the shop to pick up stones to attack the robbers but found them gone. PW2 identified the 1st appellant in the dock as the robber he described to police as "**stout and brown**" and who had ordered him to lie down. He pretended to have covered his face and instead kept peeping and looking at the robber. He picked the second appellant from an identification parade as the robber who took the money from safes and stashed it into a carton which they carted away with them. PW3 identified the first appellant in the dock as the customer who had hired his taxi registration No KAQ 166 K a Marino Toyota at a fee of Kshs.100/=, while the second appellant was the robber who opened the black bag at the back seat of the taxi and showed him a gun after he had picked him en route on the instructions of the 1st appellant.

Cpl. Churchill Owili (PW5) and Cpl. Josephat Murage (PW6) who were on routine patrol within Narok rescued PW3 who had been tied and covered with a blanket in the hijacked taxi KAQ 166K Toyota after five (5) to six (6) people had disembarked from it six meters ahead of them and just walked past them. They are informed by PW3 that he had been hijacked by the people who had disembarked. The officers turned to chase after them but they escaped in motor vehicle registration No. KAW 871 P Toyota Corolla white in colour. PW5 and PW6 pursued the vehicle only to find it abandoned at a place called Siyapei on the Narok-Nairobi road. Acting on information from members of the public PW5 and PW6 pursued motor vehicle registration No. KAS 146G Nissan matatu which the 1st appellant had boarded to Nairobi and caught up with it at a road block where it had been detained by police officers on the instructions of PW5 and PW6. They carried out a search in it and flushed out the first appellant in the same attire of a white T-shirt and brown trousers. He was sweating heavily as described by members of the public who saw him emerge from the bush where KAW 871P had been abandoned. The 1st appellant was interrogated about the robberies and information gathered from him led to the arrest of the 2nd appellant in Nairobi. Identification parades were conducted in the course of which PW1, PW2 and PW3 identified the appellants as the robbers.

The first appellant gave sworn evidence denying involvement in the robberies but conceded that he is the one who drove motor vehicle KAW P 871 P into Narok area on an innocent mission to deliver curios on behalf of his employer Joseph Ngugi at Sekanani but he was carjacked, dumped and the vehicle robbed from him on his way back to Nairobi. He admitted being arrested in motor vehicle KAS 146G en route to Nairobi on the instructions of his employer. The witnesses picked him out on the identification parade because he had been paraded prior to the parades. He was a stranger to the 2nd appellant whom he met for the first time in the cells and he was surprised when they were jointly charged with offences he knew nothing about.

The second appellant also gave sworn evidence denying the offence stating that he was in Nairobi throughout on the material day driving his brother's pick up. It was on the morning of 25th June, 2007 when he was arrested together with his wife and brothers, driven to Narok CID office where he was paraded before two men one of whom purported to pick him out on an identification parade in connection with robberies he knew nothing about. He was surprised when he was jointly charged with the first appellant whom he did not know before and only met in the police cells at Narok.

The learned trial magistrate W.N. Njage (SPM) found the appellants guilty, convicted them and sentenced them to suffer death in the manner provided by law on both count 1 and 2. The appellants were aggrieved and appealed to the High Court raising various grounds. In a judgment delivered on the 12th day of October, W. Ouko, J (as he then was) and H.A Omondi, J confirmed the appellants' convictions and sentence.

The appellants are now before us on a second appeal. The first appellant Robert Kariuki Wachiuri relies on four (4) grounds of appeal raised in a supplementary grounds of appeal dated and filed on his behalf by the firm of Ochweri Ngamate & Co. Advocates on the 15th day of June, 2016 abandoning those he had filed earlier on. His complaints are that the learned first appellate court judges erred in law:-

- in relying on irregularly conducted identification parades;
- by failing to reevaluate evidence tendered in court which was inconsistent;

- by relying on identification evidence tendered through PW2;
- in finding that the appellants had committed the offence of robbery with violence yet the identification parade was prejudiced and unprocedural.

The second appellant Timothy Gachichio Thiga on the other hand relies on ground three (3) of the three grounds he had raised in a memorandum of appeal dated and filed on his behalf by the firm of Mindo & Co. Advocates on the 20th day of August, 2015 namely that the learned judges of the Superior Court erred in law when they failed to find that evidence on the proof of robbery with violence was wanting in the absence his identification in the identification parades

Learned counsel Mr. James Ngamate Kireru reiterated his grounds of appeal and submitted that the evidence on identification was valueless as it was dock identification. He doubted whether PW2 indeed pretended to have shut his eyes during the robbery as he was unable to describe the robbers to police and even failed to pick out the 1st appellant on the identification parade.

To buttress his submission, he cited the case of **James Karani M'Ikombo versus Republic [2014] eKLR** for the proposition that dock identification evidence is almost worthless and, that failure of the witness to give a description of the assailant to the police raises a doubt as to whether the identification of the appellant was free from error and could form a basis for a conviction. He relied on **Martin Oduor Lango & 2 Others versus Republic [2014] eKLR** for the proposition inter alia that an honest witness may none the less be mistaken.

Learned counsel Mr. D. Mindo submitted that the discounting of the evidence on the identification parades made the evidence of visual identification of the 2nd appellant at the scene of the robbery unreliable and it should not have been used by the learned judges to affirm the 2nd appellants' conviction and sentence.

The learned Assistant Director of Public Prosecution Mr. Chigiti Amos submitted that the learned judges were in order when they affirmed the first appellant's conviction and sentence as the prosecution witnesses were consistent in their testimonies. The incident was not sudden; it took a while and in broad daylight. The witnesses had ample time to see and register the appellant's appearance. The appellant's identification was free from error and was therefore properly relied upon by the two courts below as a basis for sustaining his conviction.

Turning to the appeal of the 2nd appellant, Mr. Chigiti submitted that it raised no point of law. He reiterated his earlier stand that visual identification was reliable as it was free from error and that there is therefore no basis for this court to interfere with the concurrent findings of the two courts below.

As was stated in **Karingo versus Republic [1982] KLR 214** a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in **Chamagong versus Republic [1984] KLR 213 at page 219** where in the Court held *inter alia* that:-

> **"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."**

We have examined the record before us and the judgment of the High Court as well as the grounds of appeal raised by each appellant and considered these in the light of the rival arguments set out above. In our view two issues of law arise for our determination namely:-

- whether the learned judges of the first appellate court discharged their mandate judicially; and
- whether the appellants' visual identification at the scene of the robberies was free from error.

With regard to the straight forward issue number one (1), our perusal of the record reveals that the learned judges took a correct approach in the discharge of their mandate, consistent with the duty of a fresh and exhaustive re-analysis and re-evaluation of the entire evidence. See **Okeno vs. Republic [1972] EA 32.**

Turning to second issue there is no doubt that the learned judges were alive to the fact that the determination of the issue of identification of the appellants at the scene of the robberies was key in the success or otherwise of the appeal before them. This is borne out by the following observations on the record:-

> **"It is common ground that the appellants in these appeals were not known to their accusers before. Their trial therefore turned on the question of identification. Two identification parades were conducted after police arrested people they suspected to have been involved in the offences. The eye witnesses also insisted that they had sufficient time and opportunity to identify their attackers. Whenever the case against a suspect depends wholly or substantially on the correctness of one or more identifications of the suspect, special need for caution before convicting in reliance on the correctness of the identification parade is conducted to remove any doubt as to the identification of a suspect. In this case the parade officer was not called."**

The Court of Appeal in **Achieng v Republic [1981] KLR 175** held that:

> **"where an identification parade was held, the officer who conducted it must be questioned about it. Where such officer is not questioned the evidence of identification can still be accepted as reliable if there is other evidence such as finding of goods in the possession of the appellant."**

The learned judges faulted the evidence tendered on the identification parades for the reason that the parade officer was never tendered to court for purposes of both the production of such evidence and his cross-examination by the appellants on the conduct of the said identification parades. The discounting of the identification parades evidence left the learned judges with no option but to rely on the untested evidence of visual identification whose reliability was to form the basis of the determination in one way or the other of the appeals before them**.** They made the following observations;

> **"The failure to call the parade officer, in our view rendered those identifications valueless. However, in the circumstances of this case, we are of the considered view that the witnesses were able to identify their attackers. For instance both PW2 and PW3 had considerable time with their attackers. Their description of the events and their attackers.**
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> **We are satisfied that the trial court directed itself properly in considering the witness' evidence of visual identification. It for instance, considered the circumstances in which the offence was committed and the time the witnesses had to identify their assailants see Mwaura v. Republic [1987] KLR, where the Court of Appeal held:-**
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> **'In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of the time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light'.**
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> **The two robberies occurred at about 3.00 p.m. in broad day light. The victims had ample time with their assailants. The complaint in count one, for instance, defied the orders of the robbers and instead walked through the shop to pick stones to attack them. His salesman, PW2 saw them from the time they stormed the shop until they fled in a green car that was waiting outside. He was able to consistently describe the events of the day.**
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> **In respect of count two of the offence of robbery, the complainant, PW3 gave a detailed account of his treatment by the robbers. He sat with his customer (the first appellant) on the**

driver's seat before he was ordered to move to the back. He also had ample time with the person he sat with at the back (the second appellant). We are therefore, not surprised that he was able to give to the police in his statement the description of the appellant."

There is no dispute that the two robberies were committed and the only issue for determination by the learned judges was whether the appellants were sufficiently linked to the commission of said robberies. It is also undisputed that the witnesses had never seen the robbers before that day; the robberies were not anticipated as they occurred suddenly; the robberies occurred at about 3.00 p.m. and therefore in broad day light; the robbers were not hooded but guns were used to frighten though they were never fired.

PW1 identified the 1st appellant as the robber who confronted him at gun point and ordered him to lie down. PW1 defied this and instead went to the back of the shop and picked up stones to attack the robbers but on coming back immediately he found the robbers gone; PW2 on the other hand obeyed the command of the robber he identified in the dock as 1st appellant to lie down but kept on peeping and looking at the robbers and it was in the process of such peeping that he managed to register the appearance of the 1st appellant as the robber who stood on guard brandishing a gun and the 2nd appellant as the robber who was stashing money from the cash safes into a carton which they carted away with them. PW3 on the other hand pointed out the 1st appellant in the dock as the customer who was as stranger to him and who hired him in broad day light to drive him to the college and on the way instructed him to stop and pick up three other people one of whom pointed out a pistol to him before ordering him into the back seat and another identified on the parade as the 2nd appellant pointed out to him a gun in a bag before they hijacked his taxi, tied him with a sweater and covered him with a blanket and drove off with him for a while before the car stopped and shortly thereafter he was rescued by the police.

From the above set of facts PW1, PW2 and PW3 were the identification witnesses for the prosecution case.

Some of the factors that a court of law should bear in mind when determining whether circumstances prevailing at the time and place of the incident favoured positive identification or otherwise of the assailant were set out by the court in the **Maitanyi versus Republic [1986] KLR 198.** A court of law ought to be conscious of the fact that many witnesses do not properly identify another person even in day light and it is therefore prudent for such a court to ascertain the nature of the light available, the type of light, its size and its position in relation to the suspect when dealing with the issue of identification.

The learned judges upheld the trial magistrate's findings as to the correctness of the identification of the appellants at the scene of the robberies because PW2 and PW3 had spent a considerable time with their attackers. Their description with clarity of the events and their attention to those events left no doubt that they were indeed able to identify their attackers in the two robberies which occurred broad day light. It was strongly submitted by learned counsel that the identification was worthless because it was merely dock identification. This court has indeed, in several decisions in the past, generally downgraded the probative value of dock identification. See, for example, **Ajode versus Republic [2004] 2KLR 81**.

However, an important qualification to that generality was made in the case of **Muiruri & 2 Others versus Republic [2002] KLR 274** where this Court stated:

"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 v. Rep (1953) 20 EACA 166, Roria v. Republic [1967] EA 583, and Charles Maitanyi v. Republic (1986) 2 KAR 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 courts have emphasized the need to test with the 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 evidence will be rejected merely because it is dock identification evidence. The court might 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."

The High Court was keenly aware that it was assuming a higher burden of re-evaluating the evidence on identification after discounting the evidence on identification parades. In the end, the court had no doubt that the witnesses on identification were truthful in the circumstances of the case and upheld their evidence. In our view, it was not a worthless exercise.

The 1st appellant admitted to have driven motor vehicle KAW 871P Toyota Corolla used as the escape car by the robbers into Narok area. The explanation he gave on how he lost possession of the said motor vehicle was alleged carjacking by abductors who never harmed him but just dumped him, and instead of him making his way to the nearest police station to report the carjacking as would have been expected of a prudent innocent carjacked victim, he simply reported to his employer on phone and then boarded KAS 146G and headed to Nairobi. He would have disappeared into oblivion had the said matatu not been intercepted by police manning a road block on the way to Nairobi at the request of PW5 and PW6 who were acting on a tip off from members of the public that one of those who had disembarked from the abandoned motor vehicle KAW 871P and run into the bush had in fact emerged from the said bush moments later wearing a white T-shirt and a brown trouser, descriptions of clothing PW5 and PW6 said were similar to those of one of the robbers who had disembarked from the hijacked taxi KAR 166K. When flushed out of KAS 146 G he was wearing the described clothing and heavy sweating described to PW5 and PW6 by members of the public. He also promised to co-operate with PW5 and PW6. He was indeed not harmed and that is how his cooperation is what led to the arrest of the 2nd appellant. The 1st Appellant's *alibi* that he was a victim of carjacking was not plausible and it was, in any event, displaced by the prosecution evidence.

On the totality of the evidence on record, we find no error in principle in the concurrent findings of fact made by the two courts below. The appeal is without merit and we order that it be and is hereby dismissed.

Judgment delivered under **Rule 32(2)** of the Court of Appeal Rules.

Dated and delivered at Nakuru, this 17th day of November, 2016.

P. N. WAKI

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR