IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 231 OF 2007

JACKSON GITHUI WANJERI .....APPELLANT

AND

REPUBLIC .....RESPONDENT

AS CONSOLIDATED WITH

CRIMINAL APPEAL NO. 99 OF 2015

BETWEEN

JAMES MAINA WANJIRA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from an appeal judgments of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 3rd October, 2007 and 15th May, 2008

in

H.C.Cr.A. No. 151 of 2004

and H.C.Cr.A No. 152 of 2004)

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JUDGMENT OF THE COURT

The Appellant in Criminal Appeal No. 231 of 2007 **Jackson Githui Wanjeri**, the 1st appellant and appellant in Criminal Appeal No. 99 of 2015 **James Maina Wanjira**, the 2nd Appellant, were arraigned before the Senior Resident Magistrates Court at Karatina jointly with others for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars were that on the 22nd day of March, 2003 at Karogoto village in Nyeri District of the Central Province, jointly with others not before court and while armed with dangerous weapons namely, axes, pangas and rungus. They robbed Faith Wanjiku Maina of cash Kshs.18,000/=, a wrist watch make Swiss Time valued at Kshs.400/= and a

Motorola mobile phone valued at Kshs.6,500/=, all valued at Kshs.24,900/= and at or immediately before or immediately after the time of such robbery used actual violence on Faith Wanjiku Maina.

The Appellants denied the offence prompting a trial in which the prosecution tendered evidence through ten (10) witnesses to prove its case. The brief facts were that Faith Wanjiku Maina, PW1, the wife and John Maina Kogi PW2 the husband, were on the material night of the 22nd/23rd day of March, 2003 asleep in their main house at Karogoto with their children, among them, Victor Juliet Alpha Wangui Maina PW5. In the same compound also variously lived tenants among them Joseph Maina Muiruri, PW3 and Purity Wanjiku PW4. At around 11.00 p.m. the witnesses heard a commotion outside. PW3 and PW4 tried to get out of their rooms but found that they had been locked in their rooms from outside and were thus unable to get out to find out what the commotion was all about save that they heard the voice of one Wanjohi whom they knew very well as a local resident commanding the gang as to how the robbery operation should be executed. PW3 and PW4 heard the gang banging the doors and the windows of the main house. PW1 heard Wanjohi saying *mkipata mama piga risasi* (if you get the woman shoot!). PW2 armed himself with a spear and went to the window, asked the gang what they wanted and they replied, the money PW1 was to buy maize with the next day. PW1 who had Kshs.30,000/= on her for buying maize the next day was frightened. She took Kshs.12,000/= with her, leaving the balance on her bed together with a mobile phone and a wrist watch and then climbed on the roof through a hole PW2 had made for that purpose. PW2 after engaging the gang at the window for about an hour gave up and he too climbed onto the roof through the same hole when he realized that the robbers had broken doors and gained access.

Meanwhile PW5 went to hide under the bed in her parent's bedroom when she realized that the robbers had broken the doors and gained entry into the house. Some came to her parents' bedroom looking for her parents and money. When they missed her parents they flushed her out from underneath the bed and ordered her to give them money. She told the robbers she did not know where her parents keep money. She was ordered to open the drawers in her parents' bedroom, which she did. The robbers searched those drawers but found no money. They however found what her mother had left on the bed which they took together with her mobile phone and wrist watch. It was further PW5's evidence that electric lights were on both on the outside and the inside of their house. These enabled her to recognize the 1st appellant Jackson Githui Wanjeri whom she knew before as a resident of Kiamuhari where she used to see him whenever she paid a visit to a school mate. It was also PW5's evidence that after the first appellant and his group left the house she went to the window and was able to register the appearance of the second appellant James Maina Wanjira alias Cianyama in the same clothes he was in the previous evening when she saw him in the company of Wanjohi. She told police who came to the scene that she had recognized the 1st appellant but did not lead police to his arrest; and also that she could identify the 2nd appellant as one of those standing at the window.

A report of the robbery was made to Karatina police station on the same night and police visited the scene and interrogated members of the public and PW5. Acting on the information received from PW5 Sgt. James Wanyonyi PW10 arrested the 1st appellant on the same night of the robbery, while the 2nd appellant was arrested by PC Joshua Otieno PW9 thereafter. CI Benedict Masee conducted an identification parade in respect of the 2nd appellant in which PW5 was the sole identifying witness. She picked him out on the ID parade as one of those who had participated in the robbery at her parents' home and whom she had seen at the window. PW7 contended both in his examination in chief and cross-examination that the ID parade was procedurally conducted; the 2nd appellant voluntarily participated in it and assisted in selecting the parade members. His only complaint was that he had stayed for too long in the cells before the parade.

The 1st appellant gave sworn evidence denying any involvement in the commission of the robbery alleging fabrication of the charge against him by the arresting officer who had in fact similarly fabricated a charge against him in 2002 but in respect of which he was acquitted. He added that it was not true as claimed by PW5 that she had seen him in her parent's house as she did not give his name to her parents nor lead police to his home to arrest him which she allegedly knew where it was.

The second appellant likewise gave sworn evidence denying any involvement in the robbery also alleging fabrication of the charge against him by PW10 because of a disagreement over a woman. As for his identification by PW5 on the identification parade; he stated that he was picked out by PW5 because he had been in the police cells for over 10 days; he had been seriously assaulted and that the witness saw him being pointed out by a police officer as the robber when being taken to the flying squad's offices.

In a judgment delivered on the 23rd of April, 2004 the trial magistrate J. M. Nyagah SRM found both appellants guilty of the offence, convicted them and sentenced them to death. The appellants were aggrieved and appealed to the High Court. The first appellant Jackson Githui Wanjeri vide Nyeri HC Criminal Appeal No. 151 of 2004 which was dismissed on the 3rd day of October, 2007 by Mary Kasango J and M.S.A. Makhandia J as he then was; while the second appellant James Maina Wanjira appealed vide Nyeri HC Criminal Appeal No. 152 of 2004 also dismissed by the same learned judges on the 15th day of May, 2008. The appellants are now separately before this Court on second appeals as already indicated above which were consolidated and heard together. Learned counsel H.K. Ndirangu appearing for both appellants informed the court that though he had raised separate supplementary grounds of appeal for each appellant with those of the 1st appellant dated and filed on the 15th day of July, 2013, while those of the 2nd appellant dated 16th June, 2016 and filed on the 17th day of June, 2016 they are similar in material particulars and should be reflected as one set. These are that the learned judges of the Superior Court erred in law:

- in failing properly to evaluate the evidence of the first instant court and therefore came to the wrong conclusion in upholding the convictions and sentences of the subordinate court

- in failing to address their mind to circumstances surrounding identification of the appellant by PW5 and failed to make a finding that it was not safe to convict on the said evidence

- Then they failed to evaluate the evidence of PW5 with other evidence and the defences raised by the appellants, and this lack of proper evaluation has worked prejudice to the appellants.

- In failing to come to the inevitable conclusion that the cross-examination of PW5 by the trial court went beyond the courts duty for clarification and that the learned magistrate entered into the arena as a prosecutor, thus prejudicing the appellants' case.

Learned counsel Mr. H.K. Ndirangu submitted that the re-evaluation of the findings of the trial court in connection with the recognition and identification of the appellants at the scene of the robbery was based on the evidence of PW5 who was a single identifying witness. It is his view that the learned judges fell into error as they did not look at the totality of the entire record. It is this error that led to the learned judges' failure to interrogate the circumstances under which the persons who had been jointly charged with the appellants were acquitted. Mr. Ndirangu contended that PW2 had given a detailed account of how he had identified the persons acquitted which account the learned magistrate rejected and ruled that it was not safe to act on it as a basis for convicting the persons acquitted. The learned judges should have revisited this evidence, interrogated it and then given reasons as to why they upheld the trial magistrate's acquittal of those other persons by bringing out the difference in PW2's account of their identification which was disbelieved and that of PW5 which was believed. It is Mr. Ndirangu's contention that there was no such differences demonstrated to exist on the record as the lighting, timing and place was the same. The conviction of the appellants by the trial court ought not to have been upheld by the learned judges. Further that reliance on PW5's evidence as a basis for upholding the appellants' convictions should have also been faulted on the ground that the trial magistrate abdicated his role as an arbiter and assumed the role of a prosecutor when he cross-examined PW5 in order to fill in the gaps then created in the prosecution case which action was highly prejudicial to the appellants. Lastly, he submitted that PW10's evidence lacked corroboration as there was no assertion on the record to support his evidence that PW5 gave a description of the 2nd appellant which assisted in the location and arresting of the 2nd appellant.

In opposition, the learned Assistant Director of Public Prosecutions Mr. J. K. Kaigai submitted that the

convictions and the sentences meted out against the appellants were well founded; PW5 who was the star witness for the appellants' convictions and gave a detailed and descriptive account of how she recognized the first appellant and identified the 2nd appellant; she gave an account of the role played by each appellant; she was not shaken in cross-examination. Mr. Kaigai conceded that PW5 was a single identifying witness but since the two courts below found her to be a credible witness, the prosecution had discharged its mandate on proof of the charge beyond reasonable doubt in terms of the provisions of **section 143** of the **Evidence Act**. Further that no doubts were created with regard to PW5's recognition of the 1st appellant at the scene of the robbery and any doubts that may have existed with regard to the identification of the 2nd appellant at the scene of the robbery were cured by the positive identification of him on the parade conducted by PW7 in which the 2nd appellant voluntarily participated and raised no complaints against it. Lastly that the appellants' defences did not displace the prosecution case. On account of the totality of the above, Mr. Kaigai invited us to affirm the concurrent findings of the two courts below.

In reply to the respondent's submissions, Mr. Ndirangu submitted that the appellants who were undefended at the trial were greatly disadvantaged as their alibi defences were not properly not evaluated.

The appellants are before this Court on a second appeal. Their appeals must therefore be confined to points of law only as expressly provided for by **section 361(1)** of the **Criminal Procedure Code**. This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by the two courts below unless they were based on no evidence or a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching to decision. See **Chemagong versus Republic [1984] KLR 611** and **Kiarie versus Republic [1964] KLR 739.**

The test to be applied is whether there is any evidence on which the trial court could find as it did. See **Reuben Karani s/o Karani versus Republic [1950] 17 EACA 146 and M'R'ungu versus Republic [1983] KLR 455** in which the court held *inter alia* that:-

> ***"where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."***

We have given due consideration to the record before us and considered it in the light of the rival argument set out above. In our view, only one issue falls for our determination namely whether the learned judges fell into error when they affirmed the appellant's convictions and sentences.

The learned judges before affirming the first appellants' conviction and sentence reasoned thus:-

> ***The evidence of PW5 was clear and consistent. PW5 was a secondary school student in Form 3. She spent one hour with the appellant in a well lit room throughout the incident. This is while the appellant and his colleague were looking for money. At one time this appellant wanted to hit her with a panga. She knew the appellant before having met him at the schoolmate's home.***
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> ***We are aware that this being identification by single witness there is of necessity need to warn ourselves on danger of basing a conviction on the evidence of identification by a single witness. It is indeed possible for a witness to believe quite genuinely that the attack was by someone she knew and yet being mistaken. In the case of*** *Abdalla Bin Wendo versus Republic [1953] 20 EACA 166,* ***the Court of East Africa said***
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> ***"--- but on identification issue a witness may be honest yet mistaken and may make our erroneous assumption particularly if he believes that what he thinks is likely to be true..."***

We have accordingly warned ourselves and find that the identification of the appellant by PW5 was without error. This witness displayed clarity in the description of her contact with the appellant. They were together for one hour in a house well lit by fluorescent light. Throughout this time they were in close proximity. Apart from the clarity of the witness we do also find that the conditions of the identification were favourable."

Whereas before affirming the conviction and sentence of the 2nd appellant they reasoned thus:

We are in agreement with that finding of the learned magistrate. PW5 came across as a very forthright, clear and truthful witness. She had seen the appellant earlier in the day. She spent ten minutes with him during the robbery. She observed that he was still dressed the same way that he had been during their encounter in the day. We are aware that on the evidence of identification by a single witness in difficulty circumstances it is important to warn ourselves of the dangers of relying on that evidence. A case in point is the Court of Appeal CLEOPHAS OTIENO WAMUNGA versus REPUBLIC Criminal Case No. 177 of 2004. The court stated as follows:-

"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 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. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of Republic versus Turnbull (1976) 3 ALL ER 549 at page 552 where he said:

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

We have warned ourselves of reliance on that evidence but we find that it is safe to rely on the identification evidence of PW5. That identification on the night of the robbery was corroborated by the identification of the appellant on the identification parade by PW5.

It is not disputed that the convictions of the appellants by the trial court and the affirmation of those convictions by the first appellate court were anchored on the testimony of PW5 as a single identifying witness both on the recognition of the 1st appellant and the identification of the 2nd appellant at the scene of the robbery. As submitted by Mr. Kaigai the learned Assistant Director of Public Prosecutions, a conviction on the basis of evidence of a single identifying witness is sustainable in terms of **section 143** of the **Evidence Act Cap 80 Court of Appeal Rules** so long as it meets the test for its admissibility. **Section 143** of the **Evidence** (supra) simply makes provision that

"no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact"

The test for admissibility of evidence of a single identifying witness is what has been refined by case law some of which were highlighted by the learned judges in the judgments and of which we fully associate ourselves with as stating the correct principles of law governing such admissibility of evidence of a single identifying witness.

The parameters for testing such evidence were set out by the court in **Ndungu Kimani versus Republic [1979] KLR 282** where in the court *inter alia* stated that:-

"the witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness; or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his

evidence."

The court went further in the case of **Benson Mugo Mwangi versus Republic Criminal Appeal no. 238 of 2008** and observed *inter alia* thus:

> ***"thus on the issue of identification provided that the trial court tests the evidence of a single witness with the greatest care, a conviction can be based on the evidence of a single witness. What then is meant by the clause "testing the evidence of a single witness with the greatest care"***
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> ***"In our view the first consideration on testing the evidence of a single witness is to consider as to whether the witness is honest and reliable. The integrity of the witness is of paramount importance before a court directs its mind to his evidence. If the witness gives the impression at the time he is testifying that he is not an honest witness or is a witness of doubtful integrity then without much ado the court cannot rely on his evidence to convict ---"***

In the same **Benson Mugo Mwangi** case (supra) the court went further to add thus:-

> ***"once the court is certain in its mind that the witness is honest, the court must proceed to consider whether the circumstance prevailing at the time and place of the incident favoured proper identification."***

Some of the factors that a court of law should bear in mind when determining whether circumstances prevailing at the scene of the incident favoured positive identification of the perpetrator or not are some of those set out by the court in the **Maitanyi versus Republic [1986] KLR 198,** namely that a court of law should be cautious 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.

The major reasons as to why learned counsel Mr. Ndirangu has sought to fault the concurrent reliance by the two courts below on the evidence of PW5 as a basis for sustaining the appellant's convictions is because no reasons were given by the learned judges as to why they upheld the trial court's discounting of PW2's identification of the persons acquitted under the same identifying circumstances as those of PW5 such as the lighting system, timing and the house. In his view, in the absence of such reasons concurrently given by the two courts below for this preferential treatment of the testimony of PW5 over that of PW2 under similar circumstances, the appellants convictions cannot hold and they should not have been upheld by the 1st appellate court.

The evidence on the record with regard to the testimony of PW2 was that when the robbers struck he took a spear and went to engage them at the window. This was a window other than the bedroom window because had he engaged them at the bedroom window his wife PW1 would have said so. PW2's role was to prevent the gang from gaining access to the house. The gang members were many and had spread out to the doors and various windows. Those are the circumstances the trial court took into consideration when it discounted PW2's identification evidence. Obviously his concentration and focus was divided and distracted as he had to pay attention to the activities going on at the door and the windows.

In contrast PW5 said the 1st appellant was among the four or so robbers who came to her parents' bedroom and took one hour with her searching the drawers in circumstances where the robbers were not hooded and with nothing to distract her focus on what the robbers were doing in the said house. She therefore had ample time to recognize a familiar face. It is true as contended by the appellants that she did not lead police to his arrest. But the two courts below had no reason to disbelieve her testimony that it is her mention of her recognition of the 1st appellant that led to his arrest on the same night.

As for the 2nd appellant, he and his group came to the bedroom window when there was no more banging of doors and windows. There was no distraction as the 1st appellant and his group had already left the bedroom. She therefore had an opportunity to focus her eyes on those at the window and to register the

appearance of the 2nd appellant as the person she had seen earlier the previous evening wearing the same clothes he was in while in the company of Wanjohi, the same Wanjohi who was commanding the robbery operations.

As submitted by Mr. Kaigai, the correctness of that identification was tested in an identification parade and found sound. Indeed the 2nd appellant alleges to have stayed in the cells for 10 days and had also been injured. He however did not dispute PW7's evidence that he participated in selecting parade members. He must have selected those who were in the same condition as him. The two courts below believed PW5's testimony that she never discussed the 2nd appellant with the police before picking him out on the parade. She had attended the identification parade in response to her information to the police given on the same night that she could identify the person she had seen with Wanjohi the previous evening, in circumstances that were conducive to positive registration of a persons' appearance as PW5 was not under any apprehension of danger. That is why she was even able to recall even the type of clothing the appellant had on. Wanjohi was also a frequent visitor in the plot where he was seeing one of the tenants.

As for the cross-examination of PW5 by the court, it is correct that indeed the court did so. There is however nothing in the said cross-examination to suggest that it exceeded the court's obligation to test the correctness of PW5's recognition and identification of the appellants at the scene of the robbery. The particular aspects of the said cross-examination that went to demonstrate that the trial magistrate had abdicated his role as an arbiter and then strayed into the arena of the prosecutor were not pointed out. Lack of such particulars is sufficient proof that there were none. As for the alleged failure to re-evaluate the appellant's alibis properly, we find no error in the two courts below finding them displaced as the circumstances outlined above were conducive to PW5's positive recognition and identification of the appellants at the scene of the robbery.

In the result it is our finding, as did the learned judges, that the appellants' convictions were anchored on sound evidence of both the recognition and identification of the appellants at the scene of the robbery. We find no justification to interfere.

Both appeals are dismissed.

Delivered and Dated at Nyeri this 9th day of November 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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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