IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: GITHINJI, KARANJA & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 132 OF 2014

BETWEEN

JAPHETH GITUMA JOSEPH

DAVID BUNDI MIKWA

ALFANO MWONGERA.……..……..APPELLANTS

AND

REPUBLIC ….....RESPONDENT

*(An appeal against the Judgment/Conviction of the High Court of Kenya at Meru (**Muga Apondi & J. Makau, JJ**.) dated 27th July, 2013*

in

H.C. Cr. A. NO. 276 OF 2009)

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JUDGMENT OF THE COURT

[**1**] The three appellants were convicted by the **Principal Magistrate, Meru** after re-trial, on two counts of robbery with violence contrary to **section 296(2)** of the Penal Code and each sentenced to death in each of the two counts.

The judgment of the Principal Magistrate shows that the appellants were first tried on the same two counts of robbery with violence in **Criminal Case No. 1564 of 2002** and were convicted and sentenced to death on 14th October, 2005.

Each of the appellants appealed to the High Court against the conviction and sentence and their appeals were consolidated in **Criminal Appeal No. 189 of 2005**. The record of trial magistrate further shows that the consolidated appeals were allowed for non compliance by the trial magistrate with section 200 of the Criminal Procedure Code and a re-trial ordered. Each appellant appealed to High Court for the second time and their respective appeals were consolidated in **Criminal Appeal No. 279 of 2009**.

The appeals were ultimately dismissed by the High Court, save that the sentence of death in the second count was put in abeyance.

[**2**] In the first count, the three appellants were jointly charged with the others and were alleged to have robbed **Elijah Imathiu** of a coat, a revolver pistol – Serial No.BBU 2133 with five rounds of ammunition, cash- Kshs. 30,000 and 250 US Dollars on 19th June 2002 at Mugene Trading Centre, Kithoka while armed with a rifle and axes.

In the second count, they were alleged to have robbed **Joseph Mudambi** of Kshs. 4,500 on the same day and place.

[**3**] The prosecution case was briefly as follows:

On 19th June 2002 at about 10.00 p.m. **Elijah Imathiu (PW1**) (1st complainant) was drinking beer at a bar in Mugene Trading Centre in the company of his brother **Isaac M'Arimi M'cheke (PW3) (Isaac)**. They were seated at a table which was about 10 feet from the bar door which was open. The 1st complainant was facing the door. The only other person in the bar was Joseph **Mudambi (PW2),** 2nd complainant - the barman who was at the counter. The bar was lit by pressure lamp. As the 1st complaint and Isaac were taking beer, six robbers who were armed with a rifle, axes and pangas entered into the bar. The person armed with a rifle stood at the door of the bar and ordered the patrons to lie down and shot at 1st complainant but missed. Four of the robbers held the 1st complainant and pinned him down. The 1st appellant (**Japheth Gituma**) hit the 1st complainant's left ankle with an axe and broke it. Another robber named **Murage** removed the 1st complainant's pistol from the left side of the waist while **Bundi** (2nd appellant) removed the 1st complainant's wallet which contained Kshs. 30,000 and USD 250. His coat was also removed by **Alphonce Mwongera** (3rd Appellant). Meanwhile two robbers lifted the 2nd complainant who was lying outside the counter and demanded money from him. The 1st appellant (Japheth Gituma) threatened to cut him with a panga and the 2nd complainant removed Kshs 45,000 from the counter and gave it to him. The lamp was put off as the robbers left the counter. The robbers fled after completion of their mission which took 5 – 10 minutes.

[**4**] The robbery was reported at Meru Police Station shortly afterwords and on the following day, the three witnesses recorded their statements at the police station. In his statement, the 1st complainant named one Murage, David Bundi (2nd appellant) and Alfano Mwongera as the three people he recognized at the time of robbery and led police in search of them. Murage was found at his home and arrested. He later died and was not jointly charged with appellants. The 1st appellant was arrested by a police officer from Nchiru Police Post on 20th June 2002, and taken to Meru police station. **Cpl James Ndebera (CPL Ndereba**) (PW8) of Meru who was investigating the robbery got information about his arrest. He went to the police station, interrogated him and arrested him in connection with the robbery. Cpl Ndereba also got information that the 2nd appellant was within the Meru Police Station. He proceeded here and arrested him.

[**5**] On 30th July 2002, **PC Francis Kateria (PW10**) and two other police officers were on duty at Makutano, Meru when they got information that three people were seen near a bakery and were suspected of preparing to rob the bakery. They proceeded there and saw three people moving towards the door of the bakery. They challenged them to stop and one of them whipped a gun but he was shot dead and a gun – a pistol was recovered. After investigations, the pistol was identified by the 1st complainant as the one he was robbed of on 19th June 2002 in a bar at Mugene. The deceased suspect was identified as one

Muriuki, a brother of the 1st appellant. On 13th August 2002 at 9.00p.m., the 3rd appellant was arrested at Makutano area, Meru, while armed with a panga by **PC Michael Koros** (PW9) and taken to Meru police station. He was re-arrested by CPL Ndereba from the police cells in connection with the robbery at Mugene Trading Centre on 19th June 2002.

[**6**] The 1st appellant denied committing the offence and testified at the trial that he was at his house on the day of the robbery and that he was arrested on the following day by police officers form Nchiru police station in connection with drinking illicit brew and taken to Nchiru police station. He was later taken to Meru police station where he was kept in custody for about two weeks and later charged with the robbery.

The 2nd appellant also denied committing the offence and testified that he was arrested at Meru police station on 21st June 2002 when he went to follow the report of robbery he had made on 13th June 2002. He further testified that the complainants are his neighbours and that the 1st complainant had a grudge against him after he stopped his father from selling more land to the 1st complainant.

The 3rd appellant denied the offence and stated that he was arrested on 12th August 2002 at about 10.00 p.m. at Makutano while on the way home after closing his business.

[**7**] The trial magistrate made findings of fact that the scene of the robbery was a single room which was brightly lit by a pressure lamp placed at the counter; that the 1st complainant knew all the appellants before; that the 2nd complainant knew the 1st and 2nd appellants before; that PW3 did not know any of the appellants by name but recognized them at the scene; although the police Occurrence Book (OB) entry did not contain the names of the appellants, the 1st complainant at least gave the names of the attackers at the first opportunity in his statement on the day following the robbery.

[**8**] The High Court summed up its findings partly thus:

> ***"This court has carefully considered the evidence which was tendered in the lower court. There is no doubt whatsoever the appellants were arrested after the complainants and their witnesses had reported to police station, and recorded their statements stating that they had identified and recognized the robbers. The complainant's evidence on record clearly shows that the complainants and their witness PW3 were able to identify and recognize the robbers who were known to the complainants and PW3. According to the evidence on record by PW1, PW2 and PW3 there was sufficient light from pressure lamp. The robbery took about 10 minutes. The robbers were known to PW1 and PW2 by their names as well being their neighbours. PW1, PW2 and PW3 in fact were able to describe what each of the robbers did. PW1 in his evidence testified that 1st appellant hit him on left ankle fracturing the same. 2nd appellant took PW1's wallet while the 3rd appellant took his overcoat.***
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> ***PW2 testified he had seen and recognized the 1st appellant and that he is the one who took money from PW2's counter. PW2 testified there was optimum pressure lamp. PW3 testified that when the robbers entered he was able to recognize 2 young men he had seen earlier at the shopping centre. PW3 stated he had known 2nd appellant for more than 10 years. He testified that he had also seen 1st appellant and 3rd appellant at the scene of robbery. PW3 was able to identify the 1st appellant at the identification parade. PW3 testified that he had recognized the 3rd appellant immediately he saw him. The evidence on record show that the complainants and their witnesses knew the robbers, and were able to identify and recognize them through the bright light of pressure lamp that was on during the time of robbery for about 10 minutes. This concurs with the learned State Counsel submissions that the circumstances during the robbery were favourable to positive identification."***

[**9**] Mr. Ken Muriuki the learned counsel for the appellant relied on two grounds in the supplementary memorandum of appeal which state;

"1. The learned judges in the superior court erred in law by failing to appreciate that no initial report and description had been made in respect of the appellants which event was fatal to the prosecution's case.

2. The learned judges in the superior court erred in law by failing to make a finding that the prevailing circumstances during the alleged commission of the offence were not favourable for visual recognition and identification."

In support of the first ground, the counsel submitted that although the robbery was reported to the police the same night, the witnesses did not give the names of the appellants or their description and only gave the names of the appellants in their respective statements the following day. It was his further submission that giving the names subsequently is either an afterthought or renders the evidence unreliable. He relied on several authorities including **Simiyu & Another v. Republic [2005] 1KLR 192** and **Morris Gikundi Kamunde v Republic – Court of Appeal at Nyeri – Civil Appeal No. 332 of 2012**.

On the second ground, counsel submitted that the High Court failed to consider the sufficiency of the lighting and the prevailing circumstances leading to positive recognition of the appellants.

[**10**] **Mr. Evans Ondari**, the learned prosecution counsel supported the conviction and sentence and submitted that the witnesses gave the names of the appellants the following day and that circumstances were favourable for positive identification of the appellants,.

[**11**] The first appellate court is under a duty to reconsider the evidence, evaluate it and draw its own conclusions and it is not enough to merely scrutinize the evidence to see if there is some evidence to support the trial court's findings and submissions. [**Okeno vs. Republic ([1972] EA 32)**]**.** Nevertheless, the mere failure by the first appellate court to perform its duty at all or adequately does not necessarily vitiate the decision of the first appellate court. Rather, the failure by the first appellate court to perform its task becomes an issue of law on second appeal as to whether there was any evidence to support the conviction.

The decision in **Okeno (Supra**) itself shows that in such cases this Court as the second appellate court is required to consider the point of law and reach a decision whether or not, notwithstanding the failure by the first appellate court to perform its duty, the judgment can be supported on the facts as found by the two courts below.

This Court in Okeno's case said at page 36 para 1 and page 37 para A:

"We are satisfied that the irregularities undoubtedly contained in the first appellate judgment did not in fact occasion a failure of justice, and that had the judges discharged their duties in accordance with the law as laid down in a long line of authority, they might have inevitably come to the same conclusion, and dismissed the appeal against conviction as they did do."

[**12**] The High Court was required to test the quality of the evidence of recognition by examining closely the circumstances in which the recognition by each witness came to be made and reach a conclusion whether or not the evidence was free from any error of mistaken identity.

[**13**] In respect of the first ground of appeal, the trial magistrate made a finding that although the Occurrence Book (OB) entry did not contain the names of the appellant, the 1st complainant at least gave the names of the attackers at the first opportunity in his statement on the day following the robbery. The appellant requested for the production of the relevant police Occurrence Book entry at the trial which was produced by **Cpl. Asirigwa** and which did not contain the names of the appellants. However, the statement made by the 1st complainant to the police on the following day contained the names of the 2nd and 3rd appellants. It is submitted that failure by witnesses to mention the names of the appellants at the earliest opportunity in the initial report to police was fatal to the prosecution case.

[**14**] The question of omission of names of suspects in relevant OB entries has frequently featured in

many trials and even during the first and second appeals. The accused persons and appellant have frequently applied for production of the bulky Occurrence Books to verify whether or not the names of the suspects appear. This raises the question of the evidentiary value of OB entries in relation to visual identification.

Section 18(1) of the **Police Act** provides that every police officer in charge of a police station shall keep a record in such form as the Commissioner may direct and shall record therein all complaints and charges preferred, the names of all persons arrested and the offence with which they are charged.

Section 18(2) provides that a copy of the entry in such record certified to be a true copy shall be admissible in evidence of its contents in all legal proceedings.

The records that an officer-in-charge of a police station is required to keep are specified in **Appendix 41A** of **The Kenya Police Standing Orders** and **paragraph XIII(2)** of the appendix which deals with Occurrence Books provides:-

> ***"Section 18(1) of the Police Ordinance 1960 requires "all complaints and charges preferred, the names of all persons arrested and the offences with which they are charged" shall be entered in the occurrence book. These are legal requirements. In addition entries will show clearly the entire days work performed by all ranks attached to police stations."***
>
> ***"(3) Entries to be concise – ALL entries should be as concise as possible."***

[**15**] Thus the only statutory requirement is that the OB should contain a record of **all complaints and charges preferred; the names of all persons arrested and the offence with which they are charged**."

[**16**] There is no statutory requirement that the names of persons suspected to have committed an offence should be recorded in the OB.

The appellants cross-examined Cpl. James Ndereba at the trial who stated:

> ***"Details are usually given in the statement rather than in the "1st report" and statement is always more detailed than the 1st report."***

Reports of commission of alleged crimes are normally made to a duty officer at a police station and may be made by a person who is not the complainant as in cases where the complainant is admitted in hospital. The report is merely a report of occurrence – a bare report of a crime and not evidence of commission of an offence against any person. The official signed statements of witnesses are the basis of investigations and future charges and at the trial can be used as one way of impeaching the credibility of a witness, that is, by proof of former statements whether written or oral inconsistent with any part of his evidence which is liable to be contradicted (see **section 163(1)(c)** of the **Evidence Act**.

[**17**] In conclusion, we venture to say that the recording of names of suspects of crime in the OB is not a statutory requirement and that the OB entries by their nature cannot be considered as a first report against a suspect for purposes of impeaching the credibility of a witness in connection with visual identification of a suspect. Rather, the official statement to a police officer or other oral reports made to police or to other persons immediately after the commission of the crime is normally the proper basis for impeaching the credibility of the witnesses.

Where the issue of first report and first opportunity is raised to impeach the credibility of the evidence of visual identification, it is sufficient that the name or description of a suspect is given by the witness in their official statement to police. This first ground of appeal has no merit.

[**18**] In reference to the second ground of appeal, factors such as the length of the observation of the appellants by the witnesses, familiarity with the appellants, quality of the light and the degree of fear instilled on the witnesses by the robbers. It is trite law that a second appellate court would not interfere

with the concurrent findings of fact by the two courts below unless there was no evidence to support such findings or were based on misdirection, non direction error of law (**Mwita v Republic [2004] 2 KLR 60, Kaingo v Republic [1982] KLR 213**).

Moreover, a first appellate court could not interfere with findings of the lower court which were based on the credibility of witnesses unless no reasonable tribunal could make such a finding or if the finding was based on an error of law (**Republic v Oyier [1985] KLR 353**.

[**19**] The conviction of the appellants was solely based on the evidence of identification or recognition. The High Court appreciated the law that the evidence of identification has to be tested with the greatest care especially when conditions favouring positive identification were difficult and was guided by the principles stated in **Abdalla bin Wendo & Anor v Republic [1953] 20 EACA 166** and other cases.

The High Court considered and exhaustively re-evaluated the evidence and made findings as shown in the excerpt of the judgment quoted above. This was a case of recognition of the appellant by three witnesses who knew them before although not all by their names. The 2nd appellant indeed admitted that the two complainants were his neighbours.

[**20**] The evidence of the 1st complainant that he recognized the 2nd and 3rd appellants was supported by his statement to police on the following day which contained the names of the 2nd and 3rd appellants. The two courts below made a concurrent finding of fact that the bar was brightly lit by the pressure lamp. There was evidence that the bar was lit throughout the robbery and that the pressure lamp was put off only after the robbery. It is also evident that the two complainants vividly described the role of each appellant in the robbery.

[**21**] The defence of each appellant was considered and rejected. On full consideration of the appeal, we are satisfied that the evidence of recognition was ample and of good quality and free from any possibility of error.

It follows that the appeals have no merit and are hereby dismissed.

Dated and delivered at Meru this 21st day of December, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

….....

JUDGE OF APPEAL

P. O. KIAGE

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR