IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 414 OF 2009

BETWEEN

SAMUEL MWANGI MACHARIA …….…….. 1ST APPELLANT

JEREMIAH WAMBUGU WANYIRI …….……. 2ND APPELLANT

DAVID MWANGI KAGURU …….....….…3RD APPELLANT

VERSUS

REPUBLIC …….....…… RESPONDENT

(Appeal against the conviction/sentence of the High Court at Nakuru (Ouko & Emukule, JJ.) dated 28th October, 2010

in

HCR. No. 3143 of 2006 & HCCR. 414 of 2009)

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JUDGMENT OF THE COURT

This is a second appeal. The appellants' first appeal to the High Court on a charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** was rejected and the death sentence that had been imposed on each of them confirmed.

The brief facts of the case before the trial court were that on 18th July, 2006 at Captain Trading Centre in Nyandarua District, Central Province, the appellants, jointly with others not before court, and while armed with crude weapons namely, iron bars, robbed **Bernard Nderitu Muringe** of cash Kshs.1,800/= and a mobile phone make Motorolla C113A valued at Kshs.2,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Bernard Nderitu Muringe**. On the same day and in similar circumstances the appellants were also alleged to have robbed **Antony Mwangi Kariuki** of Kshs.150/=.

Bernard Nderitu Muringe, PW1, was the driver of a lorry registration

number KZE 804 and his turn boy was **Antony Mwangi Kariuki, PW2**. On the material day, PW1 and

PW2 loaded sand onto the lorry sand which they were to transport from Gilgil to Nyahururu. At about 11.00 p.m. the lorry broke down at a place known as Captain Trading Centre and the two decided to sleep in the lorry. PW1 was sleeping on a bed which was above the lorry's cabin while PW2 was sleeping on the passenger's seat. At around midnight, PW1 was awoken by the sound of a slap. He quickly put on the cabin lights and realized that it was PW2 who had been slapped by a person who was dressed in what appeared like police uniform. The person was also wearing a beret and blue raincoat. PW1 and PW2 were ordered to alight from the lorry and they obeyed. PW1 realized that the person he had seen was not a policeman and he attempted to run away but the intruder chased and caught up with him.

PW1 was taken back to the lorry where he found four other men, one wore a jacket and the others were in suits. The person who was dressed like a police officer also carried something that appeared to be a gun. PW1 and PW2 were forced to lie down and were tied separately with ropes. PW1 was robbed of Kshs.1,800/= and a Motorola cell phone C113A. PW2 was robbed of Kshs.150/=.

After the robbers left PW1 managed to untie himself and rush to a nearby road block which was manned by Administration Police officers and reported the incident. The Administration Police telephoned Ol Kalau Police Station and reported the robbery. When PW1 was contacted by the police he gave them his cell phone number.

At around 5.00 a.m. the Officer Commanding Ol Kalou Police Station asked PW1 and PW2 to go to the station and see if they could identify some suspects who had been arrested. When they went there they were shown four suspects and PW1 said he could identify three of them as being among the people who had robbed them in the night. He alleged that he was able to identify them because there was light in the lorry cabin and moonlight outside the lorry. The three who were identified are the appellants herein. PW1 was shown a jacket which he was told had been worn by the 3rd appellant at the time of his arrest and it looked like the one which was worn by one of the people who had robbed them. He also identified the beret which the said person was wearing. PW1 was also shown a mobile phone which looked like the one which had been stolen from him. Although PW1 said that the recovered mobile phone was the one he had been robbed of, he had no document to prove its ownership. When the trial court asked him whether he had any documentary evidence to prove ownership of the mobile phone he said that the purchase receipt was at home. He was also not able to tell the serial number of the mobile phone.

Despite the fact that the appellants had been shown to PW1 and PW2, on 19th July, 2006 the police decided to mount an identification parade and called PW1 and PW2 to see whether they could identify the assailants. Obviously, PW1 and PW2 picked the same persons they had earlier identified, the appellants.

The evidence of PW1 was corroborated in all material aspects by PW2, who added that he was able to identify the appellants because there were electric lights illuminating the scene of the robbery, particularly around the place where they were being tied at. There was also light on the driver's cabin, PW1 further stated.

Regarding the arrest of the appellants, **Corporal Michael Wachira, PW11,** testified that on the night of 18th and 19th July, 2006 at around 3.00 a.m. he was at Ol Kalau Police Station when he received a report regarding the robbery and police proceeded to Captain Trading Centre and interrogated PW1 and PW2, among others. He was informed that the robbers had driven off towards Nyahururu Town in a motor vehicle registration number **KAY 359T**. PW11 alerted matatu drivers and other motorists who were driving towards Nyahururu Town to be on the look out for the said motor vehicle. After a short while the police received a report that the motor vehicle had been seen fueling at a petrol station within Ol-Kalau Town. In the course of further investigations the police traced the vehicle on the road and when they flagged it down the driver refused to stop and the police gave chase. They fired at the motor vehicle and it stopped. Four occupants were found in the motor vehicle and upon searching them the police recovered a Motorola phone C113, a police beret, a torch and other items which were suspected to have been stolen. PW11 further told the trial court that PW1 and PW2 identified the appellants clearly as some of the people who had robbed them. PW1 also identified his cell phone which had been stolen.

In his unsworn statement of defence, the 1st appellant, **Samuel Mwangi Macharia**, testified that he

resided at Huruma in Nairobi and travelled to different markets to sell various items. On 18th August he travelled to Ol Kalau to sell some items. In the evening he went to a local bar where he met a certain lady and began to take some drinks with her in his room. He was however warned by a waiter that the lady was a girlfriend of a local police officer and that the police officer would assault him if he discovered that he was with the lady. On the morning of the following day at about 5.00 a.m., while at the bus stage preparing to travel back to Nairobi, the 1st appellant was approached by two people who identified themselves as police officers. One of the police officers told the 1st appellant that he had taken away his girlfriend and as a result he would deal with him accordingly. The 1st appellant was arrested and taken to Ol Kalau Police Station and locked up until 27th

July, 2006 when he was arraigned in court on a charge of robbery with violence which he said he knew nothing about.

The 2nd appellant, **Jeremiah Wambugu Wanyiri**, stated that on the evening of 18th July, 2006 he was at Karuga Shopping Centre and went to a local bar where he took some drinks. While there, a scuffle between him and another man arose and as a result he was arrested and taken to an Administration Police camp. In the morning of the following day he was taken to Ol Kalau Police Station where he was locked up until 27th July, 2006 when he was charged with the aforesaid robbery. The 2nd appellant denied any knowledge of the said charges.

On his part, the 3rd appellant stated that he is a businessman and owns a shop for mobile accessories. He is also a taxi driver. On 18th July, 2006 he hired a motor vehicle registration number KAT 359T (and not KAY 359T) from one

Joseph Maina Gitahi, PW10. The 3rd appellant said that his taxi had broken down and he wanted to use the hired vehicle together with his nephew to go to Nakuru where his nephew was doing some business. After dropping his nephew at Nakuru he decided to go to Nyahururu and got there at 6.45 p.m. He spent the night at a lodge in Nyahururu and on the morning of the following day at about 6.30 a.m. he fuelled the vehicle at a local petrol station ready to start his journey back to Nairobi. In support of that contention he produced a receipt for purchase of petrol in the sum of Kshs.2,900/=. When the 1st appellant reached an area known as Karuga he was stopped by a police officer who enquired as to why the vehicle was muddy. The policeman also asked for proof of ownership of the motor vehicle and the appellant said that he had hired the same. He was then ordered to accompany the police to a local police station. The police alleged that the motor vehicle was a stolen one which the appellant denied. He tendered to the police a receipt for the lodge where he had spent the night and even took the police there.

He also took the police to the petrol station where he had fuelled the vehilce but they did not believe him. The 1st appellant was held in the police cells until 27th

July, 2007 when he was taken to court and charged with the said robbery which he says he knew nothing about.

The learned trial magistrate held that the appellants had been properly identified by PW1 and PW2 and further, the appellants had also been in possession of a mobile phone that had been recently stolen from PW1. The defences advanced by each of the appellants were rejected. The appellants were duly convicted and sentenced to death.

Although each of the appellants had filed a home grown memorandum of appeal, **Miss Njeru**, learned counsel for the appellants, filed supplementary grounds of appeal consisting of three (3) grounds as follows:

> ***"1. THAT the learned judges of the Superior court erred in law in failing to appreciate the law on identification parades result of which the same furthered a grave miscarriage of justice.***

2. ***THAT the learned judges of the Superior court erred in law in upholding the findings of the lower court regarding the doctrine of recent possession in the absence of credible evidence contrary to the law on Burden of Proof in ownership of property.***
3. ***THAT the learned judges of the Superior court erred in law in upholding the decision of the trial court which failed to appreciate the law on proper identification of the appellants result of which led to a miscarriage of justice."***

Arguing ground 1 and 2 above, Miss Njeru submitted that there were no favourable circumstances for a positive identification of the appellants by both PW1 and PW2. She stated that the two identifying witnesses did not tell the trial court how bright the light in the lorry cabin and the moonlight were and suggested that the witnesses, being in a state of shock and having seen the robbers for just a few minutes, were not able to positively identify them on the following day.

Regarding the identification parade, counsel submitted that the same was useless because the police and had earlier showed to PW1 and PW2 four suspects, who included the appellants herein, and therefore at the time of carrying out the identification parade PW1 and PW2 were already aware of the persons they were going to pick.

Lastly, counsel submitted that the learned judges of the first appellate court erred in law in upholding the conviction of the appellants by the trial court on the basis of recovery of the cell phone. It was not sufficiently proved that the recovered cell phone was the one that had been stolen from PW1. PW1 had merely alleged that the recovered cell phone was his but was unable to prove that because he did not tender any evidence to that effect by either producing its purchase documents or stating its serial number. She urged this Court to allow the appeal and set aside the sentence handed down by the trial court.

Miss Idagwa, learned prosecution counsel for the respondent, did not oppose this appeal, and in our view rightly so. She stated that the person who conducted the identification parade was not called as a witness before the trial court. She further conceded that the evidence relating to recent possession of a stolen item was insufficient to warrant conviction. This is because PW1 did not prove that the recovered cell phone was his.

We agree with the submission by both counsel that the evidence regarding identification of the appellants was insufficient to warrant their conviction. In the

case of **CLEOPHAS OTIENO WAMUNGA vs. REPUBLIC [1989] KLR 424**, this 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 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 in reliance on the correctness of the identification."

The complainants claimed that they were robbed at around midnight and that they were able to identify the appellants because there was light in the cabin of the lorry and also because of moonlight. The intensity of that light was not stated to the trial court. The complainants were asleep when they were suddenly attacked and were obviously in a state of panic. They did not have much time to observe the robbers and be able to note any peculiar features regarding their appearance.

But even more disturbing is the manner in which the identification parade was conducted. In our view, the same was of no value because the police had shown the appellants to PW1 and PW2. The identification which was done thereafter was just a mere formality.

Thirdly, when an item that is alleged to have been stolen is recovered the person from whom it was stolen must be able to satisfy the court by production of relevant evidence that the item is the one that was stolen from him and not any other. It is not enough to show that the recovered item resembles the one that was

stolen. In this case, PW1 told the trial court that he had a receipt that was issued to him when he purchased the cell phone but he did not produce the same. PW1 did not also tell the trial court the serial number of his cell phone or adduce any other evidence, like that of inscription of a mark on the recovered cell phone to satisfy the court that it was indeed the one that had been stolen from him. There are many Motorolla C113A cell phones which look alike and it was therefore necessary that PW1 distinguishes his from any other of a similar make. Consequently, the recovery of that cell phone from the vehicle in which the appellants were riding *per se* cannot amount to sufficient evidence to sustain the conclusion that the appellants were the ones who robbed PW1 of the same.

In view of the foregoing, we agree with counsel that the appellants' conviction and sentence to death was unsafe. We set aside the conviction and the sentence that was handed down by the trial court and confirmed by the first appellate court. The appellants are set at liberty unless otherwise lawfully held.

Dated and Delivered at Nakuru this 26th day of March, 2015.

P.M. MWILU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

…….……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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