IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KARANJA & MWERA, JJ.A)

CRIMINAL APPEAL NO.363 OF 2012

BETWEEN

JOHN KAMANGA KIMANI...1ST APPELLANT

GEORGE MUNIU WACHU…………………………………………2ND APPELLANT

AND

REPUBLIC ....RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi (Ochieng & Achode, JJ.), dated 14th February, 2012

in

H.C.CR.A.147 & 150 OF 2008)

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JUDGMENT OF THE COURT

The two appellants herein, ***John Kamanga Kimani*** and ***George Muniu Wachu*** were charged jointly with ***Clement Muchai Njeri*** in the Senior Resident Magistrate's Court at *Githunguri* with the offence of robbery with violence contrary to ***section 296(2) of the Penal Code,*** in that on 6th February, 2007 at *Gitiha* Village, *Kiambu* District while armed with dangerous weapons, namely *rungus* they robbed ***Ann Mumbi Kingara*** of one *Eveready* torch loaded with dry cells and cash, all valued at Sh.10,150/=. The three used violence by breaking the door of the said complainant whom they threatened to beat.

In count 2, all the three aforesaid persons were charged with attempted robbery with violence contrary to ***section 297(2) of the Penal Code*** against ***Magdalene Wanjiru Muchiri*** at the same place and time and in the same

manner.

The 3rd accused, ***Clement Muchai Njeri*** alone faced the alternative charge of handling stolen goods contrary to ***section 322(1) of the Penal Code*** by retaining the said *Eveready* torch knowing or having reason to believe it to be stolen.

After trial, the learned trial magistrate found the present appellants guilty of the offence of robbery with violence. He convicted and ordered them to suffer death as by law established. Apparently, none of the accused persons was convicted on count two of attempted robbery. There was no finding made on it.

The 3rd accused ***Clement Muchai Njeri*** was not found guilty of count 1 but he was found guilty of the alternative charge and ordered to serve 12 months in prison. ***John Kamanga Kimani*** (the 1st appellant) and ***George Muniu Wachu*** (the 2nd appellant) being dissatisfied with the lower court decision, appealed to the High Court (***Ochieng, Achode, JJ.***) but their consolidated appeal was dismissed. Being further aggrieved, they have come before us. They were represented by learned counsel ***Mr. O. Onalo*** for the 1st appellant and ***Mr. N. Kamau*** for the

2nd appellant. ***Mr. O. J. Omondi*** Senior Assistant Director of Public Prosecutions, represented the State. While ***Mr. Onalo*** adopted his client's home-made nine grounds of appeal of which he argued ground 1 (identification and ground 5 (re-evaluation of evidence), ***Mr. Kamau*** filed a 3-ground amended memorandum of appeal from which he pressed ground 1 only (identification).

Mr. Onalo attacked the evidence of the complainant, ***Hannah Mumbi King'ara*** (PW1) on identification by arguing that she gave evidence that three people appeared at night by her bedroom window, knocked on it and when she woke up, she saw them through the security light there. The raiders broke the light and when they got into the house, the light there was put on *shortly*.

Counsel urged us to take that to mean that the sitting room light was not on for long. So it was in error for the trial court to find that light was on all the time, an error which the High Court replicated. ***Mr. Onalo*** exhorted us, therefore, to find that there was not a favourable condition conducive to proper identification, let alone recognition. Counsel added that ***M W*** (PW2), PW1's daughter, who was also in the house, appeared to support her mother's testimony that there was security light outside and in the house by which the attackers were well identified or recognized. We were told that she, too, was in error and that the conclusive position was that the conditions to identify the appellants were not conducive to proper identification.

Mr. Onalo moved to the next ground of re-evaluation of the evidence by the first appellate court. Counsel told us that the 1st appellant was arrested from his mother's house, several kilometers away from the scene of the incident and nothing was recovered from him to link him to the offence. Besides, counsel continued, the issue of being at his mother's house constituted an *alibi* that was not displaced, yet the appellant's mother, ***Virginia Wanjiru*** (DW5) had confirmed the son's story. We were further told that the 1st appellant's defence was not (consolidated) in the light of inconsistencies in the prosecution evidence and at some point the learned judges had, in their decision, appeared to shift to this appellant, the burden of proving his innocence.

On ***Mr. Kamau's*** part, he, too, maintained that positive identification of the 2nd appellant was not proved. His position was that PW1 did not tell the police that she had recognized the attackers, including his client, whom the police had arrested and came back with to the scene. We were urged to question why the husband of PW1 was not called as a witness if, indeed, he was the one who disclosed the names of the attackers to the police.

When it was ***Mr. Omondi's*** turn to reply, he opposed the appeal on the basis that the appellants were recognized at the scene by PW1 and PW2, first through the security light, which was not easily broken because of its hard housing and also in the house where electricity light was on. There the raiders (appellants) demanded money, talked with PW1 and PW2 for a while and even counted the cash they were given in there. Their faces were not covered. And because PW1 and PW2 knew the attackers before, and ***CPL Jackson Wanjohi*** (PW4) testified that their names were given to him, there was no error in identifying or recognizing the appellants. And with that, it was unnecessary to call PW1's husband to testify. Counsel concluded that the High Court judges re-evaluated the evidence on record as they were bound to and made note to that effect. There being no responses from either ***Mr. Onalo*** or ***Mr. Kamau***, we rose to consider our decision.

This being the second appeal, our duty is spelt out in ***section 361(1) of the Criminal Procedure Code.*** Besides, by virtue of many past decisions of this

Court, we are enjoined to focus on points of law only, being bound by concurrent findings of fact arrived at by the two courts below, of course unless those findings were not supported by evidence. In ***Njoroge vs Republic*** ***[1982] KLR 322*** this Court said:

"On a second appeal, the Court of Appeal is concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence."

In this appeal, the two points placed before us are:

i. *Identification/recognition*

ii. *Re-evaluation of the evidence by the first appellate court.*

Beginning with identification, the learned trial magistrate, after reviewing the evidence and particularly that of PW1 and PW2, said this:

"I in the foregoing appreciated that the scene of crime was well lit with electricity lighting (sic). ***That in all instances, when complainant remained with the accused the rooms were well-lit with electricity --- a fact not disputed. She spent sufficient time with the 2 accused persons. She knew them very well from before*** (sic). ***Their faces remained uncovered all through. --- I was satisfied that the prevailing circumstances, the situation as it was, was indeed very favourable for a positive identification of 1st and 2 nd accused by PW1 herein --- at the scene of crime --- and also before the court. Her evidence was conclusive and which*** (sic) ***was well corroborated by that of*** Mercy ***PWII who adduced evidence. --- She too, told the court that she knew the two accused persons well from before*** (sic) ***that she even used to give 2nd accused work to do for her."***

The learned magistrate further adverted to the fact that there were no grudges between the two witnesses and the appellants. Accordingly, they were found guilty and sentenced.

On the part of the High Court, it reviewed the evidence of PW1 and PW2 inside the house with electricity lights on. The learned judges noted that although the appellants wore *marvin* hats on their heads, their faces were not covered and further found that:

"In the circumstances, there was nothing to stand in the way of the witnesses' positive identification of the appellants. PW1 and PW2 gave the appellants' names to the police --- The length of time which appellants spent with PW1 and PW2 was considerable. As PW1 said, she did talk to the 1st appellant for a while. Thereafter PW1 handed over Kshs.10,000/= to the 1st appellant. Thereafter, the 2nd appellant had the money counted by PW2. During that whole exercise, there was strong electricity lighting inside the bedroom. The circumstances were thus ideal for positive identification."

Identification of a person who is alleged to have committed a crime is crucial. First, the correct suspect must be apprehended and then charged in court. There the prosecution must adduce credible and strong evidence leaving no reasonable doubt that the accused person is indeed the culprit. That he committed the offence and so should be found guilty. Whether from the prosecution evidence or from the defence, a reasonable doubt is created as to the identity of the suspect, then the trial court or the subsequent appellate courts are bound to allow his appeal. For it would be unjust and contrary to public policy to penalize a person whose identity and linkage to an alleged crime is in doubt.

In the present appeal, we have gone over the evidence particularly of PW1,

PW2 and PW4 from the scene to the time of arrest. We agree with the trial court that the identification of

the appellants, nay their recognition by PW1 and PW2, was without error. There was electric light at the scene where PW1 and PW2 took considerable time with the appellants, people they knew before. PW1 gave their names to the police (PW4) who arrested the accused persons, not long after the robbery.

The defences of the appellants and their witnesses were at best fabrications or badly sewn-up stories due to inconsistencies. They were properly found to be not worth much in the light of the prosecution evidence.

As regards the claim that an *"independent witness"* in the name of the husband of PW1, ought to have been called, the issue was addressed by the learned judges. They found no legal requirement as to the number of witnesses to testify before a conviction is arrived at. And to us, it did not appear that PW1's husband was a vital witness in the case whereby failure to call him to testify impacted adversely on the prosecution case. He was not an eyewitness to the crime and his evidence would at best be hearsay. The evidence adduced by the witnesses summoned sufficed in the circumstances.

And for the *alibi* raised on behalf of the 1st appellant, we found nothing much in it. He was arrested at his mother's house, yes, but after the robbery at night. He had been seen and recognized at the scene by PW1 and PW2 whose evidence displaced any probability of an *alibi*. In the circumstances, we see no merit in this ground and we dismiss it.

All in all, we dismiss this appeal in its entirety.

Dated and delivered at Nairobi this 20th day of March, 2015

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR