



IN THE COURT OF APPEAL

AT NYERI

(CORAM:VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL Nos. 83, 100 & 101 OF 2013

BETWEEN

FRANCIS KINYUA IRERI 1ST APPELLANT

BEN ROGERS MUTUI KIILU 2ND APPELLANT

JOHN MUTUKU NGUMBI 3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Embu

(Ong’udi & Lesiit, JJ.) delivered on 31st May, 2013

in

H.C.CR. Appeal Nos. 193, 195 & 196 of 2008)

JUDGMENT OF THE COURT

1. The three appellants together with a fourth person were charged with various counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The three appellants were charged with nine (9) counts and were convicted by the trial court on count nos. 1, 5, 6, 7, 8 and 9. The fourth person was acquitted by the trial court. The three appellants appeal to the High Court was partially successful; the High Court set aside conviction and sentence on counts 5 and 9 and upheld conviction and sentence on counts 1, 6, 7 and 8. The present appeal is against conviction and sentence on these remaining counts.

2. The Information on each of the four remaining counts is as follows:

“COUNT I: Francis Kinyua Ireri, Bernrogers Mutui Kiilu and John Mutuku Ngumbi that on the 14th day of July 2006 at Kiarimui village in Gikuuri sub location Runyenyes Township location in Embu district within Eastern Province jointly with others not before court while armed with dangerous weapons namely pistols and a sickle robbed Hellen Gichuku Njiru of a skirt, two blouses, wrist watch, spray piston, table clock, hat, a

jacket, axe, dagger, cardigan, school hand bag all valued at Ksh. 19,500/= and at immediately before or immediately after the time of such robbery threatened to shoot and wound the said Hellen Gichuku Njiru.

COUNT 6 : Francis Kinyua Ileri, Benrogers Mutui Kiilu and John Mutuku Ngumbi that on the 14th day of July 2006 at Kangaathire village Runyenyes Township in Embu District within Eastern Provinces jointly with others not before court, while armed with dangerous weapons namely pistols, swords and axe robbed Joseph Nyagi Njeru of a mobile phone make Motorola T-190 and cash money all valued at Ksh. 9,200/= and at or immediately before or immediately after the time of such robbery threatened to shoot and wound the said Joseph Njagi Njeru.

COUNT 7: Francis Kinyua Ileri, Benrogers Mutui Kiilu and John Mutuku Ngumbi that on the 14th days of July 2006 at Kangethire village in Gikuuri sub-location Runyenyes Township location in Embu district within Eastern Province jointly with others not before court while armed with dangerous weapons namely pistols, sickle and axe, robbed Simon Ndwiga Njeru of cash money Ksh. 5,000/= and at immediately before or immediately after the time of such robbery, threatened to shoot and wound the said Simon Ndwiga Njeru.

COUNT 8: Francis Kinyua Ileri, Benrogers Mutui Kiilu and John Mutuku Ngumbi that on the 14th day of July, 2006 at Kangethire village in Gikuuri sub-location Runyenyes Township location in Embu district within Eastern Province jointly with others not before court while armed with dangerous weapons namely pistols, sickle and axe, robbed Jacob Munene of two mobile phones make Nokia 3310 and Motorola T-190, one jacket and cash money all valued at Ksh. 13,000/= and at immediately before or immediately after the time of such robbery, threatened to shoot and wound the said Jacob Munene”.

3. The High Court in upholding conviction and sentence for each of the appellants expressed as follows:

“On our part, we did find that the evidence against the 1st appellant was that of recognition by PW4, 5 and 8. They not only saw him in very close quarters but he even spoke to them. Each of these witnesses was attacked separately. The attacks took some minutes in which the attackers explained who they were and what they wanted from the victim. The two complainants PW4 and PW5 recognized the 1st appellant and reported to the authorities straight away. PW8 also recognized him and joined PW4, 5 and 6 who all had gathered by then due to screams by victims of the robberies, to try and track them down. The fact that their first point of call was the 1st appellant’s home is clear proof that each of these witnesses had recognized the 1st appellant during the attack. Another complainant PW1 identified the appellant in an identification parade....

In regard to the 2nd appellant, he was arrested at 3.00 am on the same night of these incidents. He had in his possession a phone (Exhibit 12) stolen from PW4’s house. The phone was sufficiently identified by PW4 as belonging to his wife. PW4 was able to activate and call the line in it at the scene where PW6, the Assistant Chief had pulled out the 2nd appellant from a “matatu” vehicle. We have no doubt the phone was properly identified as PW4’s phone stolen from his house that same night. The 2nd appellant was found with a table clock and mavin hat (Exhibit 7 and 4) which had been stolen from PW1’s house. She identified them as her property; PW1 also identified the 2nd appellant in an identification parade mounted within a week of the robberies. PW4, 5 and 8 also identified the 2nd appellant at the time of arrest as the one who was armed with an axe (Exhibit 8)....PW5 also saw the 2nd appellant at close quarters inside his house where he had a lantern lamp. PW8 was also able to see the 2nd appellant inside his house under light from a lamp. He noted that he had the toy pistol (Exhibit 11)....

As for the 3rd appellant, the evidence against him was that of identification by the complainants PW1, PW4 and PW8. In regard to PW1, we are satisfied that circumstances of identification were difficult it being at night. However, the fact that PW1 identified him in identification parade conducted within a week of the robbery adds credence and gives an assurance that PW1 had seen and recognized him. We note that PW1 had been both robbed and raped and that the incident took long. PW1 was with the appellants for a long time. The lamp was on and in the bedroom in which each appellant took turns to rape her. Even though the learned magistrate was not satisfied that the rape charges were not proved, and for the wrong reasons in our view, that does not mean that PW1 was never raped. We find that PW1 had sufficient time to see her attackers and due to the nature of the attack against her, we find that their identity must have been imprinted on her mind permanently as to enable her see and recognize each of the attackers subsequently. The 2nd appellant was properly identified, as was 1st and 3rd appellant by PW1.

As for PW4, 5 and 8, they all said they saw the 3rd appellant with help of a lamp inside their houses. They all came out of their houses after the attack and met outside. It transpired that PW4 had called OCS Runyenyes while PW5 had called the area Assistant Chief PW6. Since attack took place within minutes of each other, it would be safe to say that the 3rd appellant was the third man in the gang of three who harassed and robbed residents in the area that night. The identification by PW1 as against him was safe. We find that PW4 and PW8's identification of the 3rd appellant as the third robber in the group in the identification parade mounted later, and identification by PW5 in evidence were all sufficient and positive identification of the 3rd appellant”.

4. Aggrieved by the judgment of the High Court upholding their conviction and sentences on counts 1, 6, 7 and 8, the appellants have lodged a second appeal before this Court. The 1st appellant filed separate grounds of appeal while the 2nd and 3rd appellants filed joint grounds of appeal. To avoid repetition, the appellants grounds of appeal can be summarized and compressed as follows:

- a. *That the learned Judges erred in law in affirming the conviction of Francis Kinyua Ileri in count 1 whilst no identification parade or a properly conducted identification parade was made.*
- b. *That the learned Judges erred in law by failing to find that the charge sheet did not accord with the evidence given in the trial in respect of the identity of the robbers.*
- c. *That the learned Judges erred in law by failing to find that Francis Kinyua Ileri, the 1st appellant is not the “Mnight” referred to by the witnesses as no one was able to give his correct names or full names.*
- d. *The trial magistrate and the learned Judges misapprehended some parts of the evidence which resulted in improper analysis of the evidence.*
- e. *That the learned Judges erred in law and facts in finding that the 2nd and 3rd appellants were positively identified by the complainants in very difficult circumstances.*

5. At the hearing of this appeal, learned counsel S. K. Njuguna appeared for the 1st appellant, while learned counsel R. Kimunya appeared for the 2nd and the 3rd appellants. The State was represented by the Assistant Director of Public Prosecution Mr. Job Kaigai.

6. Counsel for the 1st appellant submitted that the 1st appellant was linked to the crime by PW1 Hellen Gicuku Njiru; that PW1 had never seen the 1st appellant who was a stranger to her; that in so far as the testimony of PW1 was concerned, this was not an issue of recognition but identification; that PW1 stated that she used a lantern to identify the 1st appellant and likewise she identified the 1st appellant at an

identification parade; counsel submitted that the trial court properly rejected the identification of the 1st appellant by PW1 on the premise that the conditions for identification using the lantern lamp were not conducive for an identification that was free from error; counsel submitted that whatever remained of PW1's identification of the 1st appellant was dock identification which was worthless. It was further submitted that the names of the 1st appellant was not properly written in the charge sheet as Francis Kinyua Ileri; that the excerpt of the Occurrence Book does not mention Francis Kinyua Ileri but states the attacker was known as "Mnight"; that the witnesses mentioned "Mnight" but no one gave the full names of "Mnight" to the police or the trial court. Counsel submitted that "Mnight" is still at large but Francis Kinyua Ileri was arrested; if indeed Francis Kinyua Ileri was "Mnight", the police should have used an alias in the charge sheet. It was also submitted that the intensity of the light was not interrogated by the trial court and the position of the light relative to the 1st appellant was not indicated; that the two courts below misapprehended the evidence and erred in not properly evaluating the evidence on identification.

7. Learned counsel Kimunya for the 2nd and 3rd appellants associated himself with submission by counsel for the 1st appellant in relation to the lighting conditions at the scene of crime; he reiterated that the conditions for positive identification of the 2nd and 3rd appellants did not exist and the two courts below erred in not interrogating the lighting conditions; that in relation to the 3rd appellant, nothing was recovered from him and the doctrine of recent possession was inapplicable. As regards the evidence of PW1, her testimony clearly shows that the offence took place at 10.00 pm and it was dark; although she testified she had a lantern lamp; the two courts below erred in not interrogating the intensity of the lamp and its relative position to the 3rd appellant; that neither PW1, PW4, PW5 and PW8 gave any description of the 3rd appellant and all they stated was that they did not know the 3rd appellant prior to the crime; that the learned Judge erred in not properly re-evaluating the evidence in so far as identification of the 3rd appellant was concerned.

8. As for the 2nd appellant, counsel submitted that the circumstances of his identification were not favourable; that the 2nd appellant was arrested in a "matatu" and there was no corroboration from the tout or matatu driver as to how he was arrested and if anything was recovered from the 2nd appellant; that the recovery of mobile phone from the 2nd appellant was not proved to the required standard; that PW4 testified that he called a telephone number but we are not told which number he called and there is no certificate from Safaricom as the mobile phone service provider to corroborate that any number was called by PW4. Counsel urged this Court to allow the appeal by the 2nd and 3rd appellants.

9. The State in opposing the appeal submitted that the prosecution case was proved to the required standard; that the 1st appellant was a person well known to PW1, PW2, PW3 and PW8 as regards his name, place of residence and physical features; that there was no possibility of mistaken identity as this was a case of recognition by different people who were attacked at different times. In relation to the 2nd appellant, it was submitted that he was found in possession of the stolen mobile phone and he did not give any explanation as required by Section 111 of the Evidence Act as to how he came to be in possession of a phone stolen a few hours earlier. As regards PW3, the State submitted that there were ample sources of light and moonlight that enabled the 3rd appellant to be positively identified; that the testimony of the prosecution witnesses were reliable; that the defence evidence was considered, evaluated and analyzed individually; that although the conductor and driver of the matatu were not called to testify; the absence of their testimony did not dent the prosecution case; that the witnesses and evidence tendered by the prosecution was sufficient to prove the case against the appellants; it was submitted that the two courts below made concurrent findings of fact and this Court was urged not to interfere with the findings.

10. We have considered the rival submissions by the State and learned counsel. We have analyzed the record of appeal and the Judgment of the High Court. This is a second appeal which must be confined to points of law. As was stated in *Kavingo – v – R*, (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 it is shown that the findings are not based on evidence. (See *Chemagong vs. Republic*, (1984) KLR 213 at page and *(Reuben*

Karari s/o Karanja vs. Republic 17 EACA146).

11. A common ground of appeal that is the gist of the appeal by each of the appellants pertains to the evidence on identification. Each of the appellants submitted that the High Court erred in re-evaluating the evidence on identification. We have considered this ground of appeal for each appellant and it is our duty to determine if the learned Judges erred in re-evaluating the evidence linking and identifying each of the appellants to the specific counts as charged.

12. The critical evidence identifying the 1st appellant to the crime in Count 6 is the testimony of PW3 Joseph Njagi Njeru. The witness testified that he was able to recognize the 1st appellant as he is resident in the same area; that the 1st appellant is called Njue Ireri alias “Mnight”; he identified the 1st appellant in court as the person known as “Mnight” which is the name they call him at home; that he called the OCS Runyenyes police station and when he met the police who were responding to the report he told them that one of the attackers was Njue alias “Mnight”. That in the company of PW6 Patrick Murithi Njiru, the Assistant Chief, they went to the 1st appellant’s home and when they reached they found he had escaped through a hole that was made through a mud wall; that a knife, a pistol and a school bag with clothes was recovered. PW3 testified he had known the 1st appellant since childhood.

13. The evidence linking the 1st appellant to the offence in Count 8 was given by PW5 Jacob Munene Njeru. In his testimony, he stated that he was able to recognize the 1st appellant whose nick name was “Mnight” but his real name is Kinyua; that it was the 1st appellant who had a pistol; that he has known the 1st appellant since childhood as he comes from the same village and the 1st appellants mother is called Wanja; that the 1st appellant’s home is 2 km from his home; that he did not recognize the other attackers in his house; that it is the 1st appellant who took his mobile phones and a jeans jacket; that when the police came he told them that one of the attackers was “Mnight” and when the Assistant Chief came all members of the search party went to the house of the 1st appellant.

14. The evidence linking the 1st appellant to the offence in Count 1 is the testimony by PW1 Hellen Gicuku Njiru who testified that she heard the door to her sitting room being opened as she had shut the door but not locked it; she went to the sitting room and saw three men and one told her they were thugs and wanted money; that her lantern lamp was on and she was able to see them; that the 1st appellant went to her back and placed a sickle on her neck; that the 1st and 2nd appellants accompanied her to her bedroom where the 1st appellant started removing her underpants and raped her; that the lantern lamp was on the table in the bedroom; that the three members of the gang rape her in turn; that it was the 1st and 2nd appellant who took the items in her house including the school bag, cardigan, blouses and a skirt; that they threatened to shoot her.

15. The evidence linking the 1st appellant to the offence in Count 7 is the testimony of PW8 Simon Ndwiga Njeru. He testified that on 14th July 2006 at 11.00 pm he was in his house having supper in the sitting room when he heard a knock on the door; the person said they were police officers and he opened the door; three people entered and a lantern lamp was on the table; that when they entered they said they were not police officer but thugs and wanted money; that he saw three people and recognized one of them as Francis Njue who they call “Mnight” the 1st appellant herein; that the 1st appellant’s home is across the river and he had known him for over 10 years since he was born and they grew up together; that the 1st appellant is the one who had the pistol; that he had not known the 2nd appellant before and the one who had an axe is the 3rd appellant; that the 1st appellant is the one who told him not to make noise.

16. We have examined the record of appeal to determine if the High Court erred in re-evaluating the evidence on identification in Counts 1, 6, 7 and 8 in relation to the 1st appellant. What is clear from the record is that in count 6, the testimony of PW3 Joseph Njagi Njeru links the 1st appellant to the offence; this is testimony of recognition; in count 8, the testimony of PW5 Jacob Munene Njeru links the 1st appellant through recognition; in his testimony PW5 stated that he was able to recognize the 1st appellant

whose nick name is “Mnight” but his real name is Kinyua; the testimony of PW8 Simon Ndwiga Njeru links the 1st appellant to the offence in count 7, he testified that on 14th July 2006 at 11.00 pm he was in his house having supper in the sitting room and that he saw three people and recognized one of them as Francis Njue who they call “Mnight” who is the 1st appellant; that the 1st appellant’s home is across the river and he had known him for over 10 years since he was born and they grew up together; that the 1st appellant is the one who had the pistol. In so far as Counts 6, 7 and 8 are concerned, we are satisfied that the 1st appellant was identified through recognition by the testimony of PW3, PW4 and PW8. In *Anjoni & Others vs. Republic, (1976-80) 1 KLR 1566* at page 1568 this Court held,

“...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

17. As regards count 1, the evidence linking the 1st appellant to the crime is the testimony of PW1. The offence was committed in the night; the two courts below did not interrogate the intensity of the light and the relative position of the lamp in the house of PW1 to the 1st appellant. We note that the trial court having found that the offence of rape against PW1 was not proved; the finding negates the testimony of PW1 as relates to identification of the appellants; whereas the High Court did find that PW1 was raped, we are faced with two conflicting findings of fact by the two courts below; we give no weight to the testimony of PW1 in so far as identification of the appellants is concerned. We find that the High Court erred in finding that the conditions for positive identification of the 1st appellant existed in relation to count1.

18. Based on the testimony of PW3, PW4 and PW8, we are satisfied that the High Court Judess did not err in finding that the 1st appellant was properly and positively recognized as one of the persons who committed the offence in Counts 6, 7 and 8. PW6 Patrick Murithi Njiru, the Assistant Chief, testified that PW3 and PW4 reported to him and made an initial report that they recognized the 1st appellant “Mnight” as one of the members of the gang that attacked them. Before the trial court, PW3 and PW4 positively identified the 1st appellant as the person they referred to as “Mnight”. We do not agree with submission by counsel for the 1st appellant that “Mnight” is at large; “Mnight is not at large; “Mnight” is the first appellant and PW3 and PW4 positively identified the appellant in the dock as “Mnight”. The 1st appellant’s ground of appeal on identification in relation to count 6, 7 and 8 has no merit.

19. We now turn to consider whether the learned Judess erred in re-evaluating the evidence on identification of the 2nd appellant in relation to Counts 1, 6, 7 and 8. The critical evidence linking the second appellant to the offence in Counts 1, 6, and 8 is the testimony of PW5 Jacob Munene Njeru and PW6 Patrick Murithi Njiru. In his testimony, PW5 testified that after the attackers left his house, together with PW6 Patrick Murithi Njiru, the Assistant Chief and other persons they kept vigil on the road as they thought the attackers would board a vehicle and escape; that it was 3.00 am and a vehicle appeared on the road and it was stopped; the conductor was asked if anyone had boarded the vehicle near the place and he answered one person had boarded; the Assistant Chief asked that the person should come out; the 2nd appellant came out and the Assistant Chief searched him and from his pocket was recovered a maroon hat – MF14, table clock MF17 and a mobile phone MF12; that Joseph Njagi (PW3) recognized the mobile phone as his; that at the house of the 2nd appellant, a school bag was recovered, a checked jacket, sickle knife, axe and pistol; the police took the 2nd appellant with them.

20. PW6 Patrick Murithi Njiru testified that he was the Assistant Chief of Gikuuri sub-location; that on 14th July 2006 at 11.00 pm he received a call from Joseph Njagi PW3 who informed him that he had been robbed and he identified one of the robbers as “Mnight”; that he called together his vigilante group and the people who had been robbed – Joseph Njagi (PW3) and Jacob Munene Njagi (PW5). That PW3 and PW5 informed him that they had recognized “Mnight” and they decided to go to the home of “Mnight”; they surrounded the compound but heard a common in another house which was 80 ft away; the people who were stationed there shouted that people had escaped from that house; that he entered that house and

recovered one pistol, a sickle, knife, axe, pair of skirt, cardigan, jacket, school bag and a small sword; that they suspected the robbers would board a vehicle and go away from the area; that they went to the road to check and he stopped one Nissan Matatu which was coming from Runyenyes toward Embu; that inside the vehicle were about six passengers; that they asked the conductor if there was a person who had boarded the motor vehicle near the place and he said yes; it was the 2nd appellant; that Jacob Munene said the 2nd appellant was one of the robbers and he asked him to come out; that he searched him and recovered from him a mobile phone, table clock and a maroon hat all which were inside his jacket pocket; that Joseph Nyaga identified the mobile phone as his; that this was confirmed since Joseph Nyaga gave him (PW6) the line number and PW6 called from his phone and the recovered mobile phone rung; that he called Runyenyes Police Station and spoke to the OCS who came and took away the 2nd appellant. That Joseph Njagi who had called him told him he recognized one of the attackers as “Mnight” who is the 1st appellant. PW6 testified he has known the “Mnight” since childhood.

21. It is a principle of law as stated in the case of *Andrea Obonyo – v- R, (1962) EA 542, 549* that where an accused person is found in possession of recently stolen property and in the absence of any reasonable explanation for his recent possession, a presumption of fact arises that he is either the thief or the receiver. In *David Langat Kipkoeh & Two Others - v – R, Criminal Appeal No. 169 of 2004*, it was emphasized that it is the duty of a person who is found in possession of recently stolen goods to offer an explanation as to how he came into possession. This statement is supported by the provisions of **Section 111 (1)** of the *Evidence Act, Cap 80 of the Laws of Kenya* which requires an accused person to explain his possession. Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of a recently stolen property is especially within the knowledge of the accused and pursuant to the provisions of **Section 111 (1)**, the accused has to discharge that burden. The provision of **Section 111 (1)** of the *Evidence Act* states:

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him”.

22. We have analysed the judgment of the High Court to determine if they erred in re-evaluating the evidence of identification of the 2nd appellant. We are satisfied that the 2nd appellant was properly identified through the doctrine of recent possession; the testimony of PW3, PW5 and PW6 place the 2nd appellant within the scene of crime; the items recovered in possession of the 2nd appellant shortly after they were stolen not only places the appellant at the scene of crime but leads to an irresistible inference that he was a member of the gang that attacked the complainants in Counts 1, 6 and 8. The 2nd appellant was found in possession of items stolen from the complainants in Counts 1, 6 and 8; the school bag and maroon hat recovered from the 2nd appellant was one of the items stolen at the house of PW1 Hellen Gicuku Njiru, the complainant in count 1. We are satisfied that the doctrine of recent possession is applicable as against the 2nd appellant; it is our considered view that the two courts below did not err in evaluating the evidence on identification linking the 2nd appellant to the offences in counts 1, 6 and 8 as charged. The 2nd appellant’s ground of appeal on identification in relation to counts 1, 6 and 8 is without merit. As regards count 7, it is our considered view that the two courts below erred in not analysing the evidence of PW8 Simon Ndwiga Njeru in relation to identification of the 2nd appellant under difficult conditions.

23. We now analyze the evidence on identification of the 3rd appellant to determine if the High Court erred in law. The 3rd appellant is linked to the crime through the evidence of PW1, PW4 and PW8. PW1 testified that a lantern lamp was on in her house; that she saw the 3rd appellant who was left guarding her child; that the 3rd appellant also raped her. PW4 testified that when three people entered his house, it was the 3rd appellant who took his mobile phone; that there was light from a hurricane lamp and it is the 3rd appellant who was demanding money; PW8 Simon Ndwiga Njeru testified that the person who had an axe was the 3rd appellant and it was the first time to see him; that he was able to see him with the aid of

light in his room; that he observed the 3rd appellant for about 2 minutes; he was able to pick the 3rd appellant from the identification parade.

24. The identification of the 3rd appellant is different from that of the 1st and 2nd appellants. In the 1st and 2nd appellants the issue is one of recognition; but as for the 3rd appellant, the issue revolves around identification under difficult conditions. The trial magistrate court simply stated that the conditions for identification of the 3rd appellant were favourable. We have examined the record of appeal to determine if the High Court erred in law in arriving at the conclusion that the 3rd appellant was positively identified. The evidence identifying the 3rd appellant is by PW1, PW4 and PW8. In all their testimony, they state that they identified the 3rd appellant through the aid of either a lantern lamp or hurricane lamp that was lit in their respective houses. For PW1, it was her contention that the 3rd appellant was one of the persons who raped her. What is glaringly absent in the judgment of the trial court and the High Court is analysis and re-evaluation of the lighting conditions that existed at the time of the offence. The two courts below did not describe the conditions of lighting in their judgment. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where conditions for identification are difficult, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances, it is safe to act on such identification. In **Wamunga vs. Republic, (1989) KLR 424** it was stated that:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

25. From the evidence adduced, we note that no information was given as to the intensity and brightness of the light from the lantern and or hurricane lamp. This information was necessary to enable the court carefully test the identification evidence. The evidence of identification at night must be tested with the greatest care using the guidelines in **Republic - v- Turnbull, (1976) 3 All ER 549** and must be absolutely watertight to justify conviction. (See **Nzaro -v- Republic, 1991 KAR 212 and Kiarie - v- Republic, 1984 KLR 739**). In the case of **Maitanyi -v- Republic 1986 KLR 198**, this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.

26. Our analysis of the evidence on record shows that in the present case, no inquiry was made by the learned Judges as to the nature of the alleged light or its intensity. No inquiry was made to determine its brightness and position in relation to the 3rd appellant. No inquiry was made as to the intensity of light from the lamps or the torch alleged to have been used by the attackers. In the absence of such inquiry, the evidence of identification of the 3rd appellant cannot be held to be free from error (See **Simiyu & another -v- R., [2005] 1KLR 192**). We are convinced that there was no proper testing of the evidence of identification by the two lower courts.

27. The record also shows that neither PW1, PW 4 nor PW8 gave any description of the 3rd appellant to the police or any person in authority prior to the identification parade (See **Charles Gitonga Stephen - v- R, eKLR 2006**). There is no initial report identifying or describing the 3rd appellant. If at all PW 1, PW4 and PW8 properly identified the 3rd appellant as one of the attackers, they should have given a detailed description of the suspect as was stated in the cases of **Moses Munyua Mucheru - v- R, Criminal Appeal No. 63 of 1987** and **Juma Ngondia - v- R, Criminal Appeal No. 13 of 1983** and **Peter Njogu Kihika & Another, - v- R Criminal Appeal No. 141 of 1986**.

28. Due to the difficulty in conditions for visual identification and the failure to give prior description of the 3rd appellant to the police, we find that the learned Judges erred in their re-evaluation of the evidence of identification in respect to the 3rd appellant. The basis upon which the learned Judges were satisfied that PW1 was able to see all the appellants is unclear in view of the fact that no re-evaluation of the lighting conditions was done. The 3rd appellant was identified by PW1 in court; and as has severally been

stated, dock identification without additional evidence is worthless. We observe that the learned Judges erred when they made the statement that “since the attack took place within minutes of each other, it would be safe to say that the 3rd appellant was the third man in the gang of three who harassed and robbed resident in the area that night”. It is our considered view that there is no evidence on record to support such an inference and conclusion by the Judges. There was no analysis to establish if there was any corroborative evidence that would implicate the 3rd appellant with the various counts of offences. We find that the High Court erred in upholding the conviction and sentence of the 3rd appellant; the prosecution had not proved beyond reasonable doubt that the 3rd appellant was a member of the gang that committed the offences charged in counts, 1, 6, 7 and 8. The error by the High Court leads to our finding that the identification of the 3rd appellant was not free from error.

29. As regards the other grounds of appeal raised by the 1st and 2nd appellant, we have considered the same and we find they have no merit; under **Section 143** of the **Evidence Act**, there is no specific number of witnesses necessary to prove an offence; we find no prejudice was caused to the 2nd appellant by failure to call the conductor and driver of the matatu. We find that the evidence of PW5 and PW6 who were both present when stolen items were recovered from the 2nd appellant to be reliable and corroborative of each other; the recovery of the stolen items is further corroboration of the identity of the 2nd appellant as one of the person(s) who committed the offences.

30. In totality, we quash the conviction and set aside the sentence of the 1st appellant in respect to count 1 and uphold his conviction and death sentence in relation to counts 6, 7 and 8. We quash the conviction and set aside the sentence of the 2nd appellant in relation to count 7 and uphold his conviction and death sentence in relation to counts 1, 6 and 8. Except as stated heretofore, we dismiss the appeal by the 1st and 2nd appellants. We find merit in the appeal by the 3rd appellant. We order and direct that the 3rd appellant, John Mutuku Ngumbi, be and is hereby set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 18th day of March, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

J. OTIENO - ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR