IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 8 OF 2014

BETWEEN

PETER MUIMI NZANA…….…….....1ST APPELLANT

JOSEPH MUSYOKA IRERI…….....……2ND APPELLANT

AND

REPUBLIC …….....……...RESPONDENT

(*An appeal from the judgement of the High Court of Kenya at Embu (Ong'udi & Ngaah, JJ.) dated 24th December, 2013*

in

H.C.CR.A No. 171 of 2012)

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JUDGEMENT OF THE COURT

1. The appellants, Peter Muimi Nzana and Joseph Musyoka Ireri were jointly charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 24th January, 2012, at Karura Village, Kindaruma Sub-Location, Mbeere South District within Embu County, the appellants robbed Celestino Gichoni Ireri of cash to the sum of Ksh 2,300/= and a Nokia mobile phone worth Ksh 3, 200/= and at immediately after the time of such robbery wounded the said Celestino Gichoni Ireri.
2. The appellants pleaded not guilty to the charge paving way for a trial in which the prosecution called five witnesses. It was the prosecution's case that on the evening of 24th January, 2012 at about 8 p.m. PW1, Celestino Gichoni Ireri (Celestino) left Karura for his home pushing his bicycle. Upon reaching the bank of a river along the route he came across the 2nd appellant standing thereat. The complainant greeted the 2nd appellant whom he recognized with the aid of moonlight. His greetings went unacknowledged making him suspicious. Nonetheless, Celestino proceeded with his journey, only to be stopped a few paces from where he had left both appellants. The complainant instantly recognized the 1st appellant who was also known to him. When

Celestino came to a halt, the 1st appellant held him by the neck and urged him to surrender the money he had. As Celestino struggled with the 1st appellant he felt someone insert his hands into his shirt pocket and remove the sum of Ksh 2,300/= therefrom. It was also Celestino's testimony that the 2nd appellant inserted his hands into his trouser pockets before taking his Nokia mobile phone. Thereafter, the complainant was shoved onto the ground injuring his left hand and back in the process.

3. Upon regaining his footing, Celestino made his way home but chose to leave his bicycle at the scene of the robbery. The complainant reported what had transpired to his wife. The following day Celestino woke up and proceeded to the home of Samuel Nyaki, a village elder whom he also gave an account of what had befallen him. According to Celestino the 1st appellant resided at 'Karura C' and as a result, he had to liaise with another 'sub-area' (PW3, Alphonce Kizia (Alphonce) in a bid to trace the 1st appellant. Alphonce requested Celestino to accompany him to his home from where plans were made on how to apprehend the 1st appellant.
4. The plans came to fruition with the arrest of the 1st appellant followed by that of the 2nd appellant in quick succession. It was Celestino's testimony that upon the arrest of his attackers, the chief suggested that the suspects be handed over to the police, and the appellants were presented at the Kiambere police station, leading to their re-arrest Celestino recorded his statement thereafter before being referred to hospital for treatment. In his testimony Celestino was able to recall that the 1st appellant was wearing a torn shirt while the 2nd appellant was wearing a T-Shirt. The complainant collected his bicycle from the scene of the attack the following day.
5. The testimonies of PW2, Samuel Nzuki Ireri (Samuel), PW3, (Alphonce), PW4, PC Cyrus Kinyua (PC Kinyua) and that of PW5, John Mwangi (John) a clinical officer corroborate the evidence tendered by Celestino. We note that none of the said witnesses saw the attackers and that Celestino was the only person who witnessed the events of the fateful night.
6. Upon consideration of the facts and the evidence adduced by the prosecution, the trial magistrate convicted the appellants and sentenced them to the mandatory sentence. Aggrieved by the decision of the trial magistrate, the appellants lodged separate appeals at the High Court against their respective convictions and sentences. At the hearing of the appeal, the High Court consolidated the appellant's respective appeals. In a judgement dated 24th December, 2013, the High Court (Ong'udi & Ngaah, JJ.) upheld the appellant's convictions and sentences provoking the present appeal. The appellants filed separate grounds of appeal whose main gist was that the evidence of identification was not free from error and the learned Judges erred in their analysis and re-evaluation of the evidence on record.
7. At the hearing of this appeal, Mr. Gikonyo, learned counsel, appeared for the appellants. Counsel chose to rely wholly on the Supplementary Memorandum of Appeal which was filed on 11th March, 2015. Counsel submitted that the appellants acted in person both before the trial court and the superior court. He also drew our attention to the fact that there was moonlight on the night Celestino was attacked. According to counsel, the moon is what enabled the complainant to identify the appellants. However, he faulted the complainant for failing to indicate the nature of the moonlight. Counsel also submitted that there were inconsistencies in the testimony of Celestino with regard to the person who took his money and mobile phone.
8. It was also counsel's submission that in its judgement the superior court stated that the evidence of a single witness was relied upon. Thus it was incumbent upon the trial court to warn itself on the dangers of relying on the testimony of a single identifying witness. Counsel further submitted that the learned judges of the High Court erred in failing to consider whether the learned magistrate warned himself of the dangers of relying on evidence by a sole witness and whether he tested the evidence regarding identification.
9. Another issue raised by the appellant's counsel in his submission was why the complainant delayed to report the robbery to the police on the night it occurred; or to the villagers on the following day yet he knew his assailants. In the same breath, counsel queried the complainant's delay in seeking treatment following the attack submitting that it was not until 26th January, 2012 that Celestino sought and obtained treatment. Counsel submitted that the complainant's wife was not called as a witness yet the complainant had informed her about what had transpired. The case of ***Wamunga Vs Republic, (1989) KLR 424*** was cited in support of this submission.
10. Counsel submitted that the appellant's defence of alibi was not considered; and that this court has

stated severally that an accused person does not assume the responsibility of proving an alibi. The case of ***John Wandati Wamalwa vs Republic, (unreported)*** was cited in support of that argument. According to counsel, the trial court should have tested the alibi. In addition, the police should have inquired and investigated the appellants whereabouts on the material day. The case of ***Kiarie Vs Republic, (1984) KLR 739,*** was cited in support of that preposition. Finally, counsel submitted that the superior court erred by failing to evaluate the entire evidence; and that it should have found doubt which ought to have been resolved in favour of the appellants. Notable in this regard was the time between the date of the attack and the date on which the P3 form was issued with counsel submitting that the complainant could have sustained injuries in any other manner between 24th January, 2012 and 26th January, 2012.

11. Mr. Kaigai, learned Assistant Deputy Public Prosecutor, appeared for the State and opposed the appeal. He supported the conviction and sentence and submitted that the case had been proved to the required standard. The State also submitted that there was moonlight on the night of the attack and that the complainant and his attackers met face to face. It was the State's submission that P.C. Kinyua who took the initial report testified that the complainant stated that he was able to identify his assailants. Mr. Kaigai relied on **Section 143** of the **Evidence Act** which provides that no number of witnesses must be called, and that the trial court was alive to the fact that the complainant was a single identifying witness. Therefore the two courts did not err. It was also the State's submission that the alibi raised by the appellants did not cast doubt on the prosecution's case, that the burden of proof was not shifted and that the court weighed the defence evidence vis-a- vis the prosecution case. Finally, Mr. Kaigai submitted that the two day delay in reporting the robbery and obtaining treatment on the part of the complainant was not prejudicial to the appellants and, no doubt was introduced into the case.

12. We have considered the record of appeal, the grounds of appeal, submissions by counsel and the law. By dint of **Section 361** of the **Criminal Procedure Code**, this Court's jurisdiction is restricted to matters of law only. We also remain alive to what this court has stated severally; that it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of evidence, or the courts below are shown to have demonstrably to have acted on wrong principles in making the findings. See ***Daniel Kabiru Thiong'o-vs R-Nyeri Criminal Appeal No 131 of 2002 (unreported)***, where this court stated that:-

> ***"An invitation to this court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so".***

13. From the record two issues commend themselves to us for determination:-

a. ***Whether the appellants were positively identified as the persons who robbed Celestino.***

b. ***Whether the evidence of a single witness namely Celestino was sufficient to sustain a conviction.***

Identification remains an indispensable element in any criminal trial. In ***Cleophas Otieno Wamunga –vs- R,(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 the 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 on reliance on the correctness of the identification".***

We are also persuaded by the words of Lord Widgery C.J. in ***R-vs-Turnbull, (1976) 3 ALLER 549*** in the following terms:-

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

14. Applied to the present appeal, and having perused the record of the trial court and that of the first appellate court, it becomes manifestly clear that the two courts below were conscious of the principle that evidence of visual identification can cause miscarriage of justice if not carefully tested. We note that the trial court warned itself of the danger of convicting the appellants based on the evidence of Celestino, and in the same vein proceeded to test the veracity of his testimony against that of the other witnesses. Thereafter, the trial court convicted the appellants.
15. We now turn to the hour at which the robbery occurred and whether the conditions which were prevailing at the time were conducive for identification. It is on record that the robbery in question occurred on 24th January, 2012 at about 8p.m. under moonlight. In ***Maitanyi –vs- R, (1986) KLR 198*** this court held:-

> ***"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 are all important matters helping to test the evidence with the greatest care"***.

It also held that:-

> ***"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid or to the police…..If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description"***.

Going by the testimony of Celestino when he was recalled by the trial court to be cross-examined we are satisfied that he received a strong impression of the first appellant at the time he was attacked. The complainant stated as follows under cross-examination:- ***"I know you from your physical appearance"***.

He had earlier stated as follows during examination-in-chief: -

> ***"There was moonlight. I was able to identify those who came thereat. I know the 1st accused (the 1st appellant). I had known him for a while. I at times go to Tarda. He was putting on a torn shirt".***

16. To bring the subject of identification to a close we turn to the case of ***Anjononi & Another –vs-R, (1976-80) KLR 1566***, where it was held that:-

> ***"The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case where no stole property is found in the possession of the accused…… 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"***.

The record reveals that the first and second appellants were known to Celestino prior to the attack. Under cross-examination by the first appellant, the complainant states that: ***"I confirm that I know you. You stay at Tarda and as a community worker I know you"***. The complainant had this to say under cross-examination by the second appellant: ***"I have known you since you were young. I know up to where you put up. I was a member of the school committee of where you went through primary education"***. Indeed this knowledge was instrumental as after relaying the details of his attackers to a village elder, the appellants were promptly arrested. In the same vein we note that the complainant knew where the first and second appellants resided. Celestino testified that: - ***"Accused 1(the first appellant) belongs to Karura C the two don't stay together"***. Accordingly, we find and hold that the trial court and the first

appellate court properly applied their minds to the subject of identification.

17. We can do no more but state the provisions of **Section 143** of the Evidence Act with regard to the subject of a single identifying witness:-

> ***"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"***.

18. We are not convinced by the appellant's contention that the complainant's delay in reporting the robbery had an impact on their subsequent recognition as the persons responsible for the same. Celestino's evidence reveals that on 25th January, 2012 he spent the better part of the day trying to trace the whereabouts of the appellants with the assistance of village elders and the local administration. It is only upon the arrest of the appellants that a formal complaint was lodged with the police. This ground of appeal fails.
19. We are inclined to agree with the superior court's findings on the defence of alibi which was raised by the first and second appellant at the trial court. Our examination of the record confirms that the appellants chose to give unsworn statements as their mode of defence without calling witnesses, an act which effectively prevented them from bringing witnesses who would support their defence.
20. In view of the foregoing analysis, we are satisfied that the prosecution proved its case beyond reasonable doubt. Consequently, we find the present appeal to be devoid of merit and hereby dismiss the same, and we affirm the conviction and sentence of the appellants.

Dated and delivered at Nyeri this 14th day of April, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR