IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 44 OF 2014

BETWEEN

SAMUEL KIMENJU MBUTHI..... 1ST APPELLANT

MERCY MUKAMI GITONGA .... 2ND APPELLANT

PETER MWANGI HURIA .... 3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court at Nyeri

(Ougo & Abuodha, JJ.) delivered on 26th November, 2013

in

***H.C.CR. Appeal No.1177 of 2008*)**

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JUDGMENT OF THE COURT

1. The three appellants were charged with two counts of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code;*** they were tried, convicted and sentenced to death. They faced an alternative count of handling stolen goods contrary to ***Section 322 (2)*** of the ***Penal Code***.

2. The particulars of Count I is that on the 2nd day of July, 2008, at Ngarengiro area in Laikipia District within Rift Valley Province, jointly with others not before court while armed with dangerous or offensive weapons namely pangas and rungus robbed Bernard Ciuri Irimu of a Canter Lorry Registration No. KAU 904G valued at Ksh. 1,400,000/=, a mobile phone Motorola VC113 valued at Ksh. 2,700/=, a driving licence, a pair of brown shoes and cash Ksh. 1,200/= all valued at Ksh. 1,405,600/= and at immediately before or immediately after the time of such robbery used actual violence to the said Bernard Ciuri Irimu.

3. The particulars in Count II were that on the 2nd day of July, 2008, at Ngarengiro area in Laikipia District with others not before court and while armed with dangerous or offensive weapons namely pangas and rungus robbed Evans Irungu Gitonga of mobile phone make Nokia 2626 S/No.

359546010961497 valued at Ksh. 4,700/=, cash Ksh. 500/= and a pair of shoes all valued at Ksh. 6,200/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Evans Irungu Gitonga.

4. The relevant prosecution evidence in support of the charge was given by PW1 Bernard Ciuri Irimu; PW3, Moses Lekare; PW 4, Francis Kiyaiya; PW5, Inspector of Police Kennedy Rucho, and PW 6, Inspector of Police, Aden Kuya.

5. PW1 Benard Ciuri Irimu testified as follows:

> ***"I work as a driver. I can remember 2nd July, 2008, I was doing my work. I had a Mitsubishi HD Lorry. Its number was KAU 904G. I had parked to wait for work at Naromoru. My vehicle is hired. I got work. At around 3.00 p.m., I went to have the battery repaired. When I came back, I found my conductor with customers who said they wanted cows to be carried from NgareNgiro to Wambugu Farm. My conductor is Evans Irungu. I negotiated with them and we agreed a price of Ksh. 8,000/=. They did not pay me but they were to pay after I carry and off-load. We proceeded to Nanyuki. The customer bought bread and milk saying he was to take to the people to load the cows. The customer was with a woman so they were two. The woman is the one who bought bread and milk. The customer telephoned and he told me to turn. We drove on. I was shown where to park. I parked. The man who was telephoned came and he went to bring cows. I was left with the two customers. Two maasai men came and the man who went to get the cows (sic). The three attacked us. They beat us and tied us. They demanded money and mobile phone. They removed money and my mobile phone Motorola. The money they took from me was Ksh. 1,200/=. They took the keys and demanded to know if the vehicle had a cut out. I said no. They drove off. I was left guarded by two men. Later at night they gave us milk and four slices of bread. They led us inside the bush. They told us we were dead bodies. They led us up a hill. They gave us something like beer in a plastic container. We were told to walk. I felt I could not walk. I was ordered to sit down. I slept. I woke up in the morning and found I had no shoes. The driving licence was in my pocket. We got a lift and went to Nanyuki Police Station. I was asked if I knew the people. In November, I was called by police. I was taken to a parade. I saw the woman who hired us at Naromoru. The 2nd parade I saw the man who was with the woman when they hired us. I also identified the man we met in the bush from a 3rd parade. These people are before the court. The 2nd accused in the dock is the one who hired the vehicle from Naromoru with the 3rd accused now in the dock. The 1st accused in the dock is the one who was showing us where we would load the cows and is the one we met in the bush. It was 5.00 pm or thereabout. It was daylight. The vehicle has never been recovered".***

6. PW3 Moses Lekare testified as follows:

> ***"On 18th August, 2008, I brought a passenger from Endana to Nanyuki town as I drove a matatu. I was waiting for other passengers to come. A friend of mine called Kimenyi came and said he had a phone he was selling. That he wanted to sell it as he had a problem. That he was selling it for Ksh. 4,000/= which I did not have. I had a Nokia 1600. It was a black 2626. I told him we could trade in and I gave him Ksh. 1,000/=. He said it was okay. I gave him Ksh. 1,000/= and the phone. I asked for the receipt. He said it was in the house and he went to bring it. I had known him since childhood. I was with a brother who had come to buy goats. I called him and told him there was a phone being sold for Ksh. 500/= and paid. The phone worked. One day while at the stage on 27th, I saw two people come towards me. They are in shuts (sic). They asked for the phone. They said they were police officers. They asked me where I got it. I told them it was Kimenyi. I called Kimenyi on the pretext that he come to assist me drive a car. We were both arrested. Kimenyi is in court. I did not know if my friend was involved. He did not give me a receipt".***

7. PW 4, Francis Kiyaiya, testified that on 18th August, 2008, he came to Nanyuki town to do business and he was at the bus station where Kimenju was selling a phone; that his relative Moses, (PW3), had

seen the phone and had paid Ksh. 500/= at the time and he could only pay Ksh. 1,000/= if he got another Ksh. 500/=. That he gave Moses Ksh. 5000/= and he paid Kimenyu Khs. 1,000/= whereupon he was given the phone. It was a blue Nokia 2626 identified as MFI 1.

8. PW5, Inspector of Police, Kennedy Rucho, testified that he conducted an identification parade on 30th November, 2008. That he got seven (7) persons to be in the parade; that the seven persons were of the same age, height and living standard similar to that of the appellant; that the appellant stood between the 2nd and 3rd parade members; that the appellant was identified by Evans Irungu Githinji through touching. In cross-examination, he stated that the appellant who was identified was Peter Mwangi Huria, (3rd appellant); when asked why there were seven instead of the minimum of eight (8) persons in the parade, PW5 did not respond and he did not agree that he did not stick to the rules. He testified that some parts of the Identification Parade Report were blank and not filled and this was a mistake.

9. PW6, Inspector of Police, Aden Kuya, testified that on 5th December, 2008, he conducted an identification parade for Samuel Kimenju Mbuthia, (1st appellant); that the witnesses were Evans Irungu Gitonga and Benard Ciuri Irimu; that there were eight (8) members of the parade with similar height, age and colour; that the 1st appellant was standing between the 5th and 7th members of the parade; that the 1st appellant was identified. In cross-examination, PW5 testified that he forgot to indicate the mode of identification and the members of the parade were people he looked for outside the police station who looked like the 1st appellant. PW 6, Inspector of Police Aden Kuya, testified that he conducted an identification parade in respect of Mercy Mukami Gitonga, the 2nd appellant; that the parade was conducted on 5th November, 2008, and there were 8 members in the parade; that the 2nd appellant was identified; he admitted that the mode as to how the suspect was identified is not indicated on the Parade Identification Form and the time at which the parade was conducted is not given.

10. In his unsworn testimony, the 1st appellant, Samwel Kimenyu, stated he was a driver and was arrested on 27th October, 2008; that on 2nd July, 2008, he was at his place of work; that on 5th November, 2008, he was at Karatina Police Station when the Investigating Officer removed him from the line at 5.30 pm and said they would parade him; that he was required to sign a form which he did and was taken back; that on 17th November, 2008, he was removed from the police cell and put in a vehicle and taken to court where he was charged with the present offence which he does not know (sic); that he was charged with the 2nd and 3rd appellants whom he does not know. The 2nd appellant in her unsworn statement said she lives in Karatina and on 2nd July, 2008, she had gone for a funeral of her brother in law in Meru and went back to Karatina on 5th July, 2008, at 2.00; that on 29th October, 2008, she was arrested; a parade was conducted on 7th November, 2008. The 3rd appellant in his unsworn statement said he was arrested on 24th November, 2008, and taken to his house which was searched and nothing was recovered therefrom; that he is not aware of the offences as charged.

11. The trial magistrate in convicting the appellants held as follows:

> ***"Against the 1st accused person, there is clear evidence of identification as one of the robbers, his role was clearly spelt out. That he is the one who came in later and showed the driver where to park. He then went and came back with the other two robbers who participated in the robbery. The stolen phone was traced to him as the seller. His defence that he was arrested because of an existing grudge between him and PW4...did not cast any doubt on the prosecution evidence given the strong evidence of identification and recovery.***
>
> ***The 2nd and 3rd accused persons' roles are also clearly spelt out. They hired the said vehicles. The defences that are similar indicating that they were not arrested for any tangible reason is not plausible given the strong prosecution evidence and the same is rejected. It is on the basis of the foregoing that the court finds the three accused persons guilty as charged in Count I and convict them accordingly. The complainant in Count 2 did not testify and the accused are, therefore, acquitted on Count 2; the accused persons are also acquitted on the alternative to***

Count 2".

12. The appellants' first appeal to the High Court was dismissed. In dismissing the appeal, the learned Judges on the issue of identification expressed as follows:

> ***"The interaction between PW1 and the appellants was reasonably long and under circumstances that cannot be disputed as favourable for identification. Even if this court were to come to the conclusion that the identification parade was flawed, which we do not think, that would have only affected its probative value. PW1 was up and straight headed for the three appellants any time since he met them at around 3.00 pm, on the material day at Naromoru; he negotiated the purported transportation business and drove all the way with the two of them to Nanyuki where they met the 3rd attacker whom he said was the one who told them where to park the vehicle. There was, in our view, ample opportunity to observe the appellants and be able to recognize them at a later date. It is, therefore, our considered view that the conviction based solely on PW1's evidence was safe and we uphold it with the consequence that the appeals stand disallowed. It is so ordered".***

13. Aggrieved by the High Court upholding their conviction and sentences, 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 compressed as follows:

i. ***The learned Judges erred in law in holding that the identification parade was not flawed and in the event it was, the same was not fatal.***

ii. ***The learned Judges erred in law in holding that PW1 identified the 3rd appellant irrespective of the contrary evidence of PW5 and PW7.***

iii. ***The learned Judges erred in law and fact in failing to warn themselves of the dangers of relying upon the evidence of identification by a single witness (PW1).***

iv. ***The learned Judges erred in law in failing to detect or note that PW1 lied on oath when he testified that he attended one parade and identified all the 3 appellants whereas the parade forms show the 3rd appellant's parade was on 31st November, 2008, and those of the 1st and 2nd appellants on 5th November, 2008.***

v. ***The learned Judges erred in law in failing to note that there was discrepancy in relation to the description of the suspect before identification as tendered by PW1 and PW7.***

vi. ***The learned Judges erred in failing to note that the provisions of Section 200 of the Criminal Procedure Act were not followed.***

vii. ***The learned Judges erred in failing to note that the charge sheet was defective and that the burden of proof had been shifted to the 3rd appellant.***

viii. ***The learned Judges erred in law and fact in failing to note that the person who would have identified the 3rd appellant was one Evans Irungu and not Bernard Chiuri Irimu.***

ix. ***That the testimony of PW1 in court conflicted in material particular with the 1st report made at the Police Station on 3rd July, 2008.***

x. ***That the extract of the 1st report against the 2nd and 3rd appellants cannot stand for want of credibility.***

14. At the hearing of this appeal, learned counsel Mr. A.M. Ng'ang'a appeared for the 1st appellant while

learned counsel Maragia Ogaro acted for the 2nd and the 3rd appellants; the State was represented by Mr. Job Kaigai, the Assistant Director of Public Prosecution.

15. Counsel for the 1st appellant submitted that that the learned Judges erred in failing to re-evaluate the entire evidence on record and merely repeated the findings of the lower court and simply stated that the 1st appellant was identified; that the learned Judges did not re-evaluate the evidence of PW3 and PW4 to ascertain if the 1st appellant had been positively identified; that in the charge sheet, the stolen phone is stated to be Motorolla while the evidence on record shows a Nokia 2626 mobile phone; that the complainant stated his phone was black yet PW4 testified that the Nokia phone was blue in colour; that due to the difference in colour of the phone, the evidence relating to the phone should not have been used to connect the 1st appellant with the offence. Counsel submitted that the prosecution case was not proved beyond reasonable doubt; that the 1st report at Nanyuki Police Station show that there was a carjacking incident and not robbery with violence; the report does not mention that PW1 was attacked by the 1st appellant with two other persons and later joined by two maasai men; that under the Judges' Rules on identification parade, it is required that the identification parade form should be produced in evidence, that in the instant case, no parade forms were produced and the 1st appellant stated he was not in a parade; that there is no evidence to show that a parade was actually conducted; that the two courts below totally failed to consider the defence testimony and this violated the rules of natural justice; counsel urged us to allow the appeal.

16. Learned counsel, Mr. Maragia, for the 2nd and 3rd appellants, submitted that the key issue in this appeal is identification of the appellants. That from the Occurrence Book (OB) report, there is no description of the persons who attacked the complainant; that PW1 did not give any description of the attackers; the OB does not mention the presence of any woman among the persons who attacked the complainant; that the first time PW1 states he was attacked he refers to two men and the link with the 2nd appellant, who is a female, does not arise; that the person who identified the 3rd appellant in parade is Evans Irungu who did not testify; that PW1 lied on oath when testified that he attended an identification parade in one day where he identified all the three appellants; that the identification parade for the three appellants was not conducted in one day as alleged by PW1; that in any event, the parade that was conducted was flawed in that the 3rd appellant is darker and he was placed in a parade among light skinned people; counsel cited the case of ***Martin Isaiah Awan alias Bishop – v- R, Nairobi Criminal Appeal No. 343 of 2009,*** in support of the submissions. It was further submitted that the learned Judges did not delve into the issues raised in the written submissions of the 2nd and 3rd appellants as filed in court.

17. The State conceded to the appeal by all the three appellants. In conceding to the appeal, it was submitted that the conviction of the appellants was not safe; that the Investigating Officer wrote a total of ten (10) statements which were conflicting and it was hard to know where the truth lies; that the identification parade of the 1st appellant was flawed as it had seven (7) members as opposed to the minimum requirement of eight (8) persons; that the persons in the parade were dissimilar to the suspects; that whereas there was a strong suspicion, suspicion by itself is not enough to convict the appellants; that the prosecution case was not proved to the required standard.

18. We have considered the submissions by the State and learned counsel. Whereas the State conceded to the appeal we are not bound by the same as we are bound to examine the record of appeal to determine if the learned Judges erred in law in upholding conviction and sentence of the appellants. 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 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).***

19. The key issue in this appeal is the identity of the persons who attacked the complainant (PW1). It is PW1's testimony that he found his conductor Evans Irungu with two customers who wanted to hire his lorry; that he spent time negotiating the hire charges; the two courts below were satisfied that PW1 was

able to identify the appellants as the persons who hired the lorry and later robbed him. The State in conceding the appeal emphasized that the Investigating Officer had written about ten (10) reports that were conflicting and that the identification parade was flawed. The question we pose from the facts of this case is whether the testimony and report of an Investigating Officer can carry more weight than the testimony of PW1 who gave an eye witness account identifying the persons who attacked and robbed him. It is our considered view that if the Investigating Officer wrote about ten conflicting reports, this fact goes to the veracity and weight of the report and in our view such a report has no probative value.

20. The evidence on record shows that the 1st appellant allegedly sold a Nokia mobile phone to PW3. From the testimony of PW3 and PW4, the 1st appellant sold a Nokia 2626 to the 3rd appellant for Ksh. 1,000/=. The complainant PW1 testified that his phone that was stolen was a Motorola while that of his conductor Evans Irungu was a Nokia phone. Evans Irungu did not testify and hence the ownership and identity of the Nokia phone was not proved; further, the evidence on record is contradictory as to whether the 1st appellant sold a blue or black Nokia mobile phone to PW3. Because Evans Irungu did not testify, we are satisfied that the doctrine of recent possession is inapplicable in this case as the theft, ownership and make of the recovered Nokia mobile phone was not proved. Having correctly acquitted the appellants on Count II because Evans Irungu did not testify, the two courts below erred in using the evidence relating to the Nokia phone to convict the 1st appellant because the theft and ownership of the Nokia phone was not proved.

21. We now analyze the evidence on identification of each of the appellants to determine if the High Court erred in law. 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".

22. In the instant case, the testimony linking each of the appellants to the crime is that of PW1. The offence was committed in broad day light at 3.00 pm and there is no question that the conditions for positive identification did not exist. In his testimony, PW1 succinctly explained the role of each of the appellants during the attack; he testified that it is the 2nd appellant who bought bread and milk; that it was the 1st appellant who showed him where to park his vehicle and he is the one who tied their hands to the back; that the third appellant is one of the persons who came and started attacking them.

23. The appellants in challenging the evidence of PW1 submitted that it was contradictory as PW1 testified he identified all the three appellants in one identification parade yet there were three different parades conducted. We have examined the record and concur with the submission by counsel for the appellant on this aspect. The testimony of PW5 and PW6 reveals that different parades were conducted on different dates. The appellants contend that the identification parade as conducted was flawed and there is no concrete evidence that any parade was actually conducted. Counsel identified the flaws in the parade to include the date and time of the parade were not indicated on the parade forms; and some parts of the forms were not filled. The State conceded that the identification parade was flawed particularly for the 1st appellant because seven (7) persons instead of the recommended minimum of eight (8) persons were members of the parade. The flaws identified in the conduct of the parade goes to the weight to be given to the outcome of the parade. Taking into account the flaws in the parade, we are of the view that the results of the identification parade in the instant case carry no weight and are of no probative value. If the results of the identification parade are of no probative value, what remains on record are dock identification and the testimony of PW1. This court has on many occasions reiterated that dock identification without an earlier identification parade is almost worthless. (See ***Njoroge – v- R, 1987 KLR 19; John Wachira Wandia & Another – v- R, [2006] eKLR);*** see also ***Ajode – v- R, [2004] 2KLR 81***). We note that Evans Gitonga Irungu, the conductor in the lorry driven by PW1, was not called to testify. We are cognizant of the provisions of ***Section 143*** of the ***Evidence Act*** wherein there is no specific number of witnesses to be called by the prosecution in any particular case.

24. In the instant case, the evidence identifying the appellants is the testimony of PW1 as a single identifying witness. Counsel for the appellant contended that the two courts below erred in evaluating the testimony of PW1 and failed to note material contradictions; that the initial report as captured in the Occurrence Book shows that the complainant was attacked by two persons and there is no mention of a woman; that the person who identified the 3rd appellant in the identification parade was Evans Gitonga Irungu who did not testify and as such the evidence identification of the 3rd appellant was not beyond reasonable doubt. In ***John Njagi Kadogo & 2 Others – v- R, [2006] eKLR,*** it was stated that a court might base conviction on the evidence of dock identification if it is satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto, the court warns itself of possible dangers of mistaken identity.

25. In the instant case, there are disturbing facts on record and contradiction in the testimony of PW1. The fact that PW1 testified he was able to identify all the three appellants in one identification parade yet there were three different parades; the fact that in his initial report he did not mention the presence of a woman as one of the persons who attacked them; the fact that the identification parade was flawed, the absence of corroborative eye witness account particularly the failure to call Evans Irungu to testify; the absence of any description of the appellants in the initial report made to the police; all these facts raise doubt as to the identity of the appellants as the persons who committed the offence. It is our view that had the two courts below considered these disturbing facts, the benefit of doubt on the issue of identity should have been given to the appellants. To this extent, the High Court erred in re-evaluating the evidence relating to identification of the appellants. We find that this appeal has merit and we hereby quash the conviction of each of the appellants and set aside the death sentence meted upon each of them. We order that Samuel Kimenju Mbuthi, Mercy Mukami Gitonga and Peter Mwangi Huria be and are hereby forthwith set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 13th day of April, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR