IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE, & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 349 OF 2012

BETWEEN

EPHANTUS MUTHEE WANJIKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Embu (Lesiit & Ong'udi, JJ) dated 27th July, 2012

in

H.C.CR.A. NO. 225 OF 2009)

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JUDGMENT OF THE COURT

The appellant **EPHANTUS MUTHEE WANJIKU** was charged, tried and convicted on a charge of robbery with violence contrary to *Section 296(2)* of the Penal Code in consequence of which the Principal Magistrate at Kerugoya sentenced him on 8th December, 2007 to suffer death as by law provided. The offence was found to have been committed on 23rd April, 2009 at Kutus township in Kerugoya District when the appellant jointly with another not before court robbed one John Kariuki Mburia (P.W.1) of some Ksh.10,000/- while armed with offensive weapons namely a knife and a metal bar. Actual violence was used on P.W.1.

Aggrieved by that conviction and sentence, the appellant's first part of call was the High Court. His appeal was, however, dismissed by that Court (Lesiit and Ong'udi, JJ) on 27th July, 2012, hence this second appeal.

The appellant initially preferred some six grounds of appeal in a homegrown document style 'Memorandum Grounds of Appeal' thumb-printed by himself. Those were, however, abandoned by the appellant's learned counsel Mr. Kimunya who argued before us the single ground contained in the "Supplementary Grounds (sic) of Appeal" dated 9th April, 2015, namely;

> ***"That the learned judges of the High Court erred in law and facts (sic) in finding that the evidence on record supports the conviction and thus failed to exercise their duty of thoroughly***

re-examining the same."

Whether or not the first appellate court properly or at all discharged its duty of re-evaluating all the evidence tendered before the trial court, in a fresh and exhaustive manner before drawing its own inferences and making independent conclusions with the rider that it did not see and hear the witnesses as did the trial court, is a legitimate subject of enquiry in a second appeal which is on points of law.

It is counsel's contention that the learned judges did not perform that task in the manner laid down in a long line of authorities including the notorious one of **PANDYA -VS- REPUBLIC [1957] E.A. 336** and **OKENO -VS- REPUBLIC [1972] E.A. 32**. He in particular faulted the learned judges for accepting at face value the evidence that there was electric light at the scene of the robbery without interrogating the nature of the light, and the position of its source *vis a vis* the complainant and his assailants. Counsel contended that the learned judges merely repeated what the trial court had stated but did not examine that aspect of the evidence afresh.

We are not persuaded that the criticism leveled against the learned judges is justified. The judgment of the High Court shows that the learned judges were conscious of their duty as a first appellate court and did themselves restate the legal position. They then declared that they had subjected the evidence to a fresh consideration. Whereas it is true the learned judges did not delve into an examination of issues to do with the source, intensity and angular positioning of the light beyond stating that it was clear that there was sufficient electricity light from nearby homes, the case was not dependent on identification as such or alone. Nor was it seriously contended that the appellant was a victim of mistaken identity.

The case against the appellant, as the learned Assistant Director of Public Prosecutions Mr. Kaigai submitted, centred on the fact that the man he hit with a metal rod in the course of robbing him had the courage and presence of mind to tenaciously hold on to him, never letting go, and all the while screaming for help. Help arrived in the form of P.W.2 Michael Waweru who had been drinking with P.W.1 at Bells Pub before the latter left at about 9.30 p.m. Shortly afterwards he heard screams and answering the distress call, he found P.W.1 struggling with one of the two robbers. The robber had a metal rod while his accomplice, armed with a knife managed to escape. P.W.2 and other members of the public helped P.W.1 to completely subdue and arrest the appellant. He and his metal rod were taken over by the Police who saved him from "mob justice". The learned judges were perfectly entitled to find as they did that the appellant was arrested at the scene of the robbery and had no chance to escape from the scene. He was caught red-handed, in *flagrante delicto*.

Faced with the concurrent findings of fact as to how the robbery in fact occurred with the appellant being apprehended at the scene, and being satisfied that the High Court properly directed itself in the matter, we have no reason to interfere with the findings and conclusions of the learned judges.

The upshot is that this appeal is devoid of merit and is accordingly dismissed.

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

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR