IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 319 OF 2011

BETWEEN

PETERSON GATHERU WACHIRA ……...…… APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Sergon & Wakiaga, JJ.) dated 9th December, 2011

in

H. C. CR. A No. 245 of 2007)

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JUDGMENT OF THE COURT

1. This is a second appeal from the judgment of the High Court (**Sergon & Wakiaga JJ.)** which confirmed the conviction and sentence of the appellant. As this Court has stated many times before, in a second appeal, 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 the evidence, or the courts are shown demonstrably to have acted on wrong principles in making the findings. ***See Mwita –vs-R (2004) 2 KLR 60***.

2. The appellant was charged with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** before the Karatina Senior Resident Magistrate's Court. It was alleged that on 20th August, 2006 at Kiamwangi Village in Nyeri District, jointly with others not before court, while armed with pangas and an axe, he robbed Lawrence Kimuri Kaigua of various household items including three mobile phones and cash Kshs. 10,000/= all valued at Kshs. 67,000/= and at or immediately before or immediately after such robbery threatened to use actual violence to the said Lawrence Kimuri Kaigua.

3. The concurrent findings of fact upon which the conviction rested came from five prosecution witnesses. The key witnesses were **Lawrence Kimuri Kaigua** (PW1) (Lawrence) and his wife **Lillian Warira Kimuri** (PW2) (Lillian) who testified that on 20th August, 2006 at around 2:00a.m. they were awoken by a loud bang on their bedroom window. Lawrence switched on the bedroom lights and dressed

up. A voice from outside ordered them to open the door. At first Lawrence was hesitant to open the door but the assailants broke the bedroom window and threatened to enter if the door was not opened. Lawrence obliged and two assailants entered the house. According to Lawrence, the appellant was the first one to enter and ordered him and his wife to return to their bedroom and lie down.

4. The appellant took both of their mobile phones and Kshs. 10,000/=. They demanded more and Lillian gave them Kshs.100/= which was in her handbag. They then ransacked the house and took household items before demanding the house and car keys from Lawrence which he gave out. After a while the assailants threw back the car and house keys into the house. According to Lawrence, the appellant was armed with a panga while his accomplice was armed with an axe. Lillian gave evidence to similar effect but according to her, there were four robbers, three of whom had pangas.

5. As the robbery was going on, a neighbor heard the commotion and called the police who arrived twenty minutes after the robbers had left. Lawrence and Lillian did not give descriptions of the assailants to the police but maintained that they had good impressions of the assailants and would be able to identify them. Eight days later on 28th August, 2006, Lillian was at the Co-operative Bank in town when she spotted the appellant walking past the bank with four women. She notified a friend who called the police while she followed the appellant into a hotel. Three police officers arrived, among them **Police Constable Christopher Ndegwa**(PW3)(Pc Ndegwa), **Senior Sergeant Peter Kigen** (PW5) (SSgt Kigen) and **Police Constable Odongo**(Pc Odongo) who was not called as a witness. Lillian pointed out the appellant who was arrested and taken to Karatina police station.

6. At the police station, Pc Ndegwa searched the appellant and recovered one mobile phone which Lillian positively identified as one of the phones which had been stolen. Lillian called Lawrence who came to the police station and also identified the appellant and the recovered mobile phone.

7. In his defence, the appellant gave a sworn statement on which he was cross examined. He testified that on 19th August, 2006 he left Karatina and headed to Gikomba Market in Nairobi in the company of **Gerald Kamau** (DW2) (Gerald) to sell vegetables. They arrived in Nairobi at around 7:00 p.m. and stayed there for three days until the 22nd of August, 2006. He returned to Karatina on 23rd August, 2006 and they agreed to make another trip to Nairobi on 28th August, 2006. On 28th August, 2006 they were both at a hotel in Karatina when Lillian in the company of police officers came and arrested him without telling him why. He asked Gerald to follow him and find out what was happening. At the police station, the appellant removed his personal effects and gave them to Gerald to take home. That is the time he saw Pc Odongo hand over a mobile phone to Lawrence and Lillian; he did not know where the mobile phone came from. He was later charged with the offence of robbery with violence. The appellant maintained that he was searched at the hotel and no cellphone was recovered from him. He also asserted that there was a grudge between him and Pc Odongo after the appellant stopped his sister from marrying Pc Odongo.

8. Gerald corroborated the appellant's evidence on his whereabouts on the material day and on the day of his arrest. He testified that after the appellant was arrested he followed him to the police station where one officer asked him to pay Kshs. 20,000/=, failing which he threatened to charge the appellant for whatever crime the officer thought fit.

9. The appeal before us is predicated on four '**Grounds of appeal'** drawn up by the appellant in person. At the hearing of the appeal, however, learned counsel who appeared for him, **Mr. H. K. Ndirangu**, abandoned some of the grounds and only dealt with the issue of identification, recent possession and the defence of *alibi.*

10. Mr. Ndirangu submitted that the appellant's conviction was mainly based on the finding that he was in possession of a stolen mobile phone. In his view, the High Court did not properly re-evaluate the evidence which was tendered in the lower court. It was not clear from the evidence of Pc Ndegwa as read with that of Lawrence and Lillian, whether the search on the appellant was done at the hotel or the police station. The appellant maintained that he was never in possession of the mobile phone and the recovery was a frame up by Pc Odongo who bore a grudge against him. According to counsel, Pc Odongo was a crucial witness whom the prosecution ought to have called to prove the recovery of the stolen mobile phone. In

the alternative, he argued that the doctrine of recent possession could not apply because a mobile phone is something which can change hands very quickly; in this case, eight days after the robbery.

11. Turning to the defence of *alibi*, **Mr. Ndiragu** argued that the two courts below did not consider it but instead shifted the burden of proof to the appellant contrary to the law. He also argued that the evidence on visual identification of the appellant was not safe as it was not tested in an identification parade.

12. The Assistant Director of Public Prosecutions, **Mr. J. Kaigai**, supported the appellant's conviction and sentence. He submitted that the appellant was found in possession of the stolen mobile phone eight days after the recovery; that the search on his person was conducted at the the police station and not the hotel; and that there was no need of calling Pc Odongo as a witness since Ssgt Kigen, who was also at the scene of arrest, testified and was the investigating officer. In his view, the appellant's defence was displaced by the fact that he was unable to give a plausible explanation for his possession of the stolen mobile phone. While conceding that the two lower courts erred in shifting to the appellant the burden of proof of *alibi*, Mr. Kaigai maintained that the evidence against the appellant was nevertheless overwhelming and the findings of the two courts below ought to be upheld.

13. We have considered the grounds of appeal, submissions by counsel and the law. In ***Njoroge –vs- R (1987) KLR 19*** this Court stated:-

> " ***1. It is the duty of the first appellate court to remember that the parties are entitled, as well on the questions of fact as on the questions of law, to demand a decision of the court and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions. The court should however bear in mind that it has neither seen nor heard the witnesses and it should make due allowance in that respect.***
>
> ***2. If the first appellate court fails to carry out that duty, it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Misdirections and non-directions on material points are matters of law."***

14. On the issue of identification, both lower courts made concurrent findings that the appellant was positively identified by the complainants as one of the assailants. As this Court has emphasized times without number, evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In ***Kariuki Njiru & 7 others –vs- R- Criminal Appeal No. 6 of 2001***, this Court stated:-

> ***"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."***

15. Both Lawrence and his wife Lillian testified that they were able to get a good impression of the appellant with the aid of the electricity light in the house. Lawrence testified that he only gave oral general description of the appellant to the police when they arrived at the scene, while Lillian testified that she indicated to the police that she would be able to identify the assailants if she saw them again. In ***Maitanyi -vs- R (1986) KLR 198*** this Court held***:-***

> ***"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. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description."***

16. From the record, no evidence was tendered as to the particulars of the "general description" of the assailants, if any, given by the complainants. All that Pc Ndegwa and Ssgt Kigen could confirm was that

the complainants had indicated in their initial reports that they would be able to identify their assailants if they saw them again. In ***Simiyu & Another –vs- R (2005) 1 KLR 193***, it was held,

> ***"In every case in which there is a question as to the identity of an accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of and by the person or persons to whom the description was given."***

17. It is not in dispute that the appellant was not known to the complainants prior to the robbery. This was therefore a case of identification of a stranger. We cannot help but note that from the record, Lawrence testified that when he opened the door he saw two robbers while Lillian testified that there were four robbers. It was therefore imperative for the identification of the appellant by the complainants to be tested in a properly organized identification parade. As it turned out, when the appellant was arrested and taken to Karatina police station, Lawrence was simply called there to see him. The proper procedure would have been to organize an identification parade for Lawrence to test his original identification of the appellant. This court has expressed itself many times on the correct procedure and it is surprising that some police investigators continue to make a mess of it. In the case of ***James Tinega Omwenga –vs- R-Criminal Appeal No. 143 of 2011***, this Court expressed itself as follows:-

> ***"The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless."***

It is clear to us that the identification evidence was not properly tested to ensure that it was watertight, and the two courts below were in error in their evaluation of the evidence on record. We allow that ground of appeal.

18. On the issue of recent possession of stolen items which was the main reason for the appellant's conviction, we advert to the exposition by this court of the doctrine of recent possession. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- R -Criminal Appeal No. 272 of 2005***, this Court held,

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

19. In this case, Pc Ndegwa testified that:-

> ***"At the police station I carried out a quick search and I recovered a cell phone make Ericson"***.

On the other hand, Ssgt. Kigen, who was present with Pc Ndegwa during the appellant's arrest at the hotel, testified thus:-

> ***"On 28/8/06, the wife of the complainant spotted the suspect and made a call to the police station. Police officer (sic) rushed to the scene and she pointed out the suspect. Pc Ndegwa and Pc Odongo searched him and recovered one of the stolen mobile cellphones."***

In his sworn testimony, the appellant contended that he was searched at the hotel and nothing was recovered from him. He said it was Pc Odongo who handed the alleged stolen mobile phone to the complainants at the police station, suggesting that Pc Odongo had framed him.

20. In our view, it was necessary to reconcile those pieces of evidence which raised considerable uncertainty as to whether the search was conducted at the hotel or the police station and whether the stolen mobile phone was found on the appellant or whether it was planted on him. The two courts below simply accepted the evidence of Pc Ndegwa and ignored the rest. It was a misdirection in law. In the circumstances of this case, it was imperative for the prosecution to call Pc Odongo who appears to have played a central role in the recovery of the stolen cellphone, and was alleged to be known to the appellant, to shed light on the apparent uncertainties.

21. What is the consequence of the prosecution's failure to call Pc Odongo as a witness? In ***Bukenya & Others -vs- Uganda (1972) EA 549,*** the predecessor of this Court held:-

> ***"It is well established that the Director has discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

22. The duty is always on the prosecution to prove its case beyond reasonable doubt and it has the discretion to decide any number of the witnesses necessary to prove any fact. In this case, the evidence on recovery of the stolen item was barely adequate, indeed uncertain, and the failure by the prosecution to call the crucial witness, Pc Odongo, attracts the inference stated in the **Bukenya case**. We so find.

23. Lastly, on the issue of *alibi,* the trial court expressed itself as follows:-

> ***"After careful consideration of the evidence as a whole I do find that although the accused (appellant) did call a witness as is required in law where one adduces alibi defence, neither her nor his witness produced any proof of being in the business of buying and selling vegetables. Neither him nor his witness produced receipts as proof of having hired a lorry to take their vegetables to Nairobi, nor call the owner of the said vehicle in dissence (sic) thereof. Neither of them produced receipts of the lodging they allege they spent their nights. Indeed, there is nothing whatsoever to proof(sic) the business they allege to have been in on their claim that they were in Nairobi."***

24. That was a clear misdirection in law, and Mr. Kaigai was right to concede. There is no burden cast on an accused person to prove his *alibi*. As was stated in ***Saidi –vs- R [1963] EA 6***:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."***

25. The first appellate court ought to have reassessed the evidence and corrected that misdirection but it said totally nothing about it. With respect, that was erroneous. In ***Sekitoleko –vs- Uganda [1967] EA 531***, which has been followed by this Court before, the Chief Justice, Sir Udo Udoma had this to say in relation to *alibi* evidence:

> ***"(i) as a general rule of law the burden on the prosecution of proving the guilt of a***

prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R.v. Johnson, [1961] 3 All E.R. 969 applied; Leonard Aniseth v. Republic [1963] E.A 206 followed);

(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself;"

26. The trial court was clearly influenced by its erroneous approach to the evidence on *alibi*. We do not know what the High Court, which supported the conviction, would have concluded if it had considered the *alibi* evidence in accordance with the law as that is in the realm of speculation. Suffice it to say, in our view, the *alibi* pleaded by the appellant, who had no burden to prove it, was not displaced by the prosecution and it raised reasonable doubts as to his involvement in the crime charged. We allow that ground of appeal also.

27. The upshot is that the appeal herein has merit and is hereby allowed. We quash the appellant's conviction and set aside the sentence imposed on him. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 17th day of June, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. 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