**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJA)**

**CRIMINAL APPEAL NO. 19 & 26 OF 2010**

**BETWEEN**

**JULIANO NJUKI MUGUNA.....….....1ST APPELLANT**

**NASARIO IRERI NJAGI.....2ND APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Embu (Makhandia, Karanja, JJ)*

in

H.C.CR.A.NO. 116 OF 2008)

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**JUDGMENT OF THE COURT**

**Introduction and Background**

1. The appellant ***Nasario Ireri Njagi (Nasario)*** and ***Juliano Njuki Muguna (Juliano)*** were tried and convicted on 3rd June, 2008 by the Principal Magistrate at Siakago (***F.M. Omenta)*** for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. It was alleged that on the 29th day of August, 2006 at Kanyuombora location in Mbeere District within the Eastern Province jointly while armed with dangerous or offensive weapons, namely sword, robbed ***Samuel Njiru Namu*** of cash 6,000/= and a pair of shoes valued Kshs. 150/= and at or immediately before or immediately after the time of such robbery used actual violence to the said ***Samuel Njiru Namu.***

2. The brief facts are that on the material day of 29th August, 2006 at 2.00pm, the complainant, ***Samuel Njiru Namu (PW1)*** a fishmonger in Kanyuombora market was cycling to Ishiara market when, at Wakaithi, he was accosted by the two appellants known to him as local residents. It was ***Juliano who*** held him from the back by his shirt, while ***Nasario*** drew out a knife and ordered him to give out to them all that he had. ***Juliano*** rummaged through PW1's trouser pockets and removed Kshs. 6,000/= and Mutumba shoes worth 150/=. PW1 raised an alarm attracting the attention of PW2 ***Salesio Njeru Njuki (Salesio)*** who was headed towards Kanyuombora market from Ishiara market.

*3.* ***Salesio*** responded to the distress call. He saw people struggling on the road. He rushed there and when the duo saw ***Salesio*** approach they disappeared into a maize plantation nearby. PW1 promptly reported to ***Salesio*** that the assailants were known to him as local residents and he had seen them disappear into a nearby maize plantation.

*4.* ***Samuel and Salesio*** reported the matter to the chief at Kanyuombora who after receiving the report gave them a note to take to Ishiara police post. PW4 ***P.C. Cyrus Githinji (P.C.Cyrus) received them*** **and after** booking the report, referred the pair back to the APs at Kanyuombora chief's camp to effect the arrest.

5. On 21st September, 2006, PW3, ***P.C Wycliffe Nalianya Mafutu (P. C. Wycliffe)*** was on duty in the report office at Ishiara police post when he received the first appellant ***Nasario*** from two APs, ***APC Benson Kipknows*** (sic) and ***APC Mohamed Haji*** both of Kanyuombora chief's camp. A month later PW4 went to Siakago police post and collected ***Juliano.***

**The appellants' appeals.**

6. 6. The two appellants (***Nasario, Juliano***) were then jointly charged prosecuted, found guilty, convicted and sentenced to the only sentence known to law for this offence- death. They were aggrieved by that decision and they appealed against it to the High Court and (M***.S.A. Makhandia*** and ***W. Karanja, JJ***) (as they were) which dismissed both appeals and upheld the trial court's conviction and sentence. The appellants are now before us on a second appeal first in two sets of home made grounds of appeal separately lodged. These have subsequently been supplemented by grounds of Appeal filed separately by the Appellants' respective learned counsel. The supplementary memorandum of appeal filed by **Mr. C.M. Kingori** on behalf of ***Nasario*** 1four (4) grounds namely:-

***(1) That the learned trial magistrate and the first Appellate court erred in law and facts in failing to resolve the inconsistencies, gaps and doubts apparent in the prosecution evidence.***

***(2) The first appellate court erred in law and facts in failing to re-evaluate the evidence and making it (sic) own decision.***

***(3) The learned trial magistrate erred in law and facts in failing to appreciate that the complainant's evidence and that of PW1 was unreliable.***

***(4) The learned trial magistrate and the first appellate court erred in law and facts in peremprorily dismissing the 1st appellants defence whereas the same was sound and unchallenged.***

8. The second Appellant's (***Juliano)*** supplementary grounds of appeal filed by M/S ***Kimunya & Company advocates*** raises two (2) grounds of appeal namely:-

***(1) The learned Judges of the High Court erred in law and facts in finding that all the ingredients of robbery with violence were proved.***

***(2) The learned Judges of the High Court erred in law and facts in finding that there was proper identification of the appellants.***

**The 1st appellant's submissions`.**

9. The two appeals were heard together. In his oral submissions, learned counsel ***Mr. Kingori*** urged us to allow the 1st Appellant's appeal because the two courts below failed to reconcile a glaring inconsistence, in the testimonies of ***Samuel*** and ***Salesio*** when ***Samuel*** stated that there were people from Embu side headed to the Wakaithi market and who witnessed the robbery but chose not to intervene and assist him,

while ***Salesio*** who was then supposedly on the same road from the same Embu side and headed towards same Wakaithi market stated that there were no other people at the scene of the alleged robbery except the Appellants and PW1. No explanation was given as to why no efforts were made by *Samuel* to trace Appellants for their arrest, why it took a month to effect the arrest why no explanation was given as to how the Appellants were arrested. On the basis of the above, ***Mr. Kingori*** urged us to find that the two courts below should have found the prosecution evidence unreliable as there is no way ***Samuel*** and ***Salesio*** who were walking on a straight road in broad day light could have seen things differently.

10. Turning to the defence evidence, ***Mr. Kingori*** urged us to find that the 1st Appellant gave a plausible defence which should not have been rejected; the chief who had been adversely mentioned by the 1st Appellant and who had played a key role in the apprehension of the Appellants was for unknown reasons not called to tender evidence in court. We should therefore draw an inference that had he testified his testimony would have been adverse to the prosecution case.

**The second appellant's submissions.**

11.On his part, learned Counsel ***Mr. Kimunya*** for the 2nd Appellant also urged us to allow the 2nd Appellant's appeal on the grounds that the prosecution evidence did not meet the required threshhold because PW1 did not identify the Appellants by their names as he only gave one nick name "***Kamau"*** allegedly for the 1st Appellant which was not included in the charge sheet as an "alias". Neither was PW1 asked to explain how he was able to tell that the knife the appellant was allegedly arrested with, almost a month later, was the very knife PW1 had been threatened with in the course of the robbery. Lastly, he submitted that PW1 suffered no injuries which was a necessary element for the offence of robbery with violence.

**The respondents submissions.**

*12.* ***Mr. Kaigai,*** Assistant Director of Public Prosecutions on the other hand supported both the conviction and sentence of both Appellants. According to ***Mr. Kaigai,*** the prosecution case met the required threshold because this was a case of recognition; the incident occurred in broad day light; the assailants had not covered their faces; there is no dispute that assailants were local residents known to PW1 and 2, and therefore there was no possibility of any mistaken identity. Furthermore all the ingredients for the offence of robbery with violence were present; the complainant cannot be blamed for delayed arrest of the Appellants as that was the work of the arresting authorities i.e the chief and the APs; there are no serious discrepancies in the prosecution evidence and, even if any were noted, these are trivial and therefore curable. The witnesses were found truthful by the two courts below which finding should not be upset as there is no basis for upsetting it; as for the defences, he submitted that the Appellants have no reason to complain as they were considered before rejection. As for the alleged failure to avail the testimony of the area assistant chief, ***Mr. Kaigai*** urged that the issue of grudge allegedly involving the area chief only arose in the Appellants' defences, had no bearing on the prosecution case, and were rightly ignored by the two courts below.

**Analysis and Determination.**

13. This being a second appeal, this court is restricted to address itself on matters of law only. Any in roads into the factual findings is only permissible where these are based on no evidence or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making their findings. This was the position taken by the predecessor of this court in the case of ***Rex versus Hassan Bin Said [1942] EACA62*** wherein, it was held *inter alia* that:-

> ***"(1) A second appeal lies only upon questions of law. In such a case, this Court is precluded from questioning the findings of facts of the trial court, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the findings of fact, this being a question of law."***

14. We have considered the record of appeal, both sets of the supplementary grounds of appeal together with the attendant rival submissions.

15.This Court in its decision in the case of ***Njuki & 4 others versus Republic [2002] 1KLR771*** at page 782 pr. 15-25 had this to say:-

> ***"....But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to over look those discrepancies and proceed to convict the accused."***

In the case of ***Josiah Afuna Angulu versus Republic CR. Appeal No. 277 of 2006 (UR),*** this Court as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile thereby creating a doubt in the appellant's commission of the offence charged resulting in the substitution of the appellant's conviction on the main charge with a conviction for a lesser offence. See also the decision in the case of ***Charles Kiplang'at Ng'eno versus Republic; CR. Appeal No. 77 of 2009 (UR)*** wherein, this Court upon reconciling contradictions and inconsistencies in the prosecutions' case rendered the entire prosecution's evidence on the record unbelievable resulting in the reversal of the appellant's conviction to an acquittal.

*16.* ***Mr. Kingori's*** complaints in grounds 1&2 of the appeal on in consistencies, gaps and discrepancies in the prosecutions evidence centered on ***Samuel's*** allegation that there were many people on the road heading from Embu side to the ***Wakaithi*** market who did not respond to PW1's distress call, while ***Salesio*** allegedly only saw three people struggling on the road and when ***Samuel*** raised an alarm and ***Salesio*** responded, two of the three disappeared into a maize plantation nearby. Second that ***Salesio*** never mentioned that he witnessed ***Samuel*** being robbed as he stated in his testimony that it is ***Samuel*** who told him (***Salesio)*** that he had been robbed. ***Mr. Kingori*** wondered why two people allegedly witnessing events unfolding before them on a straight road in clear broad day light could give different accounts of those events.

17. In the light of the above principles, it is our response to ***Nasario's*** grounds 1&2 that the crucial issue here was whether ***Samuel*** had been robbed and if so who robbed him and not who failed to respond to ***Samuel's*** distress call. As for ***Salesio's*** failure to witness ***Samuel*** being robbed, it is evident from the evidence on the record that ***Samuel*** raised an alarm after the act of the robbery had been completed. It is also evidently clear that ***Salesio's*** attention was drawn to the scene after ***Samuel*** raised the alarm. It therefore follows that, when ***Samuel*** raised the alarm after the act of robbery was complete, there is no way ***Salesio*** could have witnessed that which had already happened by the time his attention was drawn to it. Therefore the failure by the two courts below, first of all to take note of these, and then, **second,** to reconcile them, did not cause any miscarriage of justice to the Appellants. Neither did it affect the weight to be attached to the prosecutions case before founding a conviction.

18. In response to ***Nasario's*** ground 2, we note the following observation from the first appellate court's judgment:-

> ***"This being a first appeal, it is incumbent upon us to re-analyze and re-evaluate the evidence adduced before the trial court and come up with our own conclusion while at the same time bearing in mind that we did not have the advantage of seeing the witnesses testify..."***

Then followed a summary of the prosecution evidence, the trial courts findings on the same, 1st appellate courts own observations made on the said evidence, identification of the crucial issues for determination namely identification of the assailants by the two crucial witnesses namely ***Samuel*** and ***Salesio***, whether the their evidence was one of identification or recognition, application of well known principles of law on both identification and recognition as set out, in the case of ***Abdalla Bin. Wendo V. Republic [1953] 20EACA 166*** and then drawing out own conclusions that court. We find nothing wrong with the above approach. This was in line with the well known principle in a long line of case law on the subject on the

role of a first appellate court. See the decision in the case of ***Kiilu & another versus Republic [2005] KLR 174*** where in this Court held *inter alia* that:-

> ***"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate curts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***(ii) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the law or court's findings and conclusions; it must make its own conclusions only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"***

19. In response to **Nasario's** ground 3 we find it is an invitation for us to revisit the factual findings of the two courts below which we decline to do as this is a forbidden area under **section 361** of the Criminal Procedure Code.

20. As for ground 4, the learned trial magistrate had this to say of the Appellants' defences:-

> ***"The accused have denied committing the offence saying that the area chief is framing them up because of some malice. Accused has claimed he has a shamba dispute with the chief hence the witch hunting by the chief. Accused 2 has said he had lent his bicycle to the chief and when he went for (sic) the chief was not amused. The defence talk of a chief who was not even a witness and who did not play any role in this matter. Their defence is a mere fabrication intended to dissuade the court from the truth and I shall dismiss it as such."***

21. The first appellate court on the other hand had this to say:-

> ***"We find the appellants' alibis were properly dismissed."***

22. It is now trite that in all criminal prosecutions, the burden of proof rests with the prosecution. This burden never shifts to the accused. The moment ***Nasario*** raised the issue of witch hunt by the area chief as a defence, the duty of the two courts below was to weigh it against the totality of the prosecutions evidence and then determine whether it raised any reasonable doubt. They did so and found it was displaced by the prosecution evidence**.. *Mr. Kingori*** contends they were wrong. In our view the chief first came into the picture when ***Samuel*** and ***Salesio*** reported the attack on ***Samuel. Samuel*** and ***Salesio*** were firm that the assailants were local residents and were very well known although they do not seem to have given their names. The chief referred ***Samuel*** and ***Salesio*** to Ishiara police post for action. Had the chief wanted to fix the Appellants himself, he would not have referred ***Samuel*** and ***Salesio*** to Ishiara police post.

23. When PW4 received the report and the note from the area chief from ***Samuel*** and ***Salesio,*** he is the one who referred ***Samuel*** and ***Salesio*** back to the area chief and the APs for action. We find no conspiracy in this. It was only logical that the area chief and the area APs be tasked to execute the arrest mandate of local residents.

24. PW3 received ***Nasario*** from APs, while PW4 received ***Juliano*** from Siakago police cells. It is evident from the evidence that these two had been arrested in connection with other offences not related to the one under inquiry herein. It did not come out in the Appellants' cross-examination of ***Samuel*** and ***Salesio*** that these two witnesses were in cahoots with the alleged chief, bent on fixing the Appellants for the benefit of the alleged chief and not as away of vindicating ***Samuel*** for an alleged robbery with violence committed against him. The rejection of this allegation by the two courts below was not only meritorious but was also based on sound evidence, noting that the alleged involvement, in this matter by the area chief was introduced at the defence stage. We may also add that the prosecution had no obligation to call for its rebuttal as it had no direct link to the core inquiry by the two courts below, that is, the alleged commission of the offence of robbery in broad day light against ***Samuel***, which the alleged

chief did not witness.

25. In response to ***Juliano's*** ground 1 of appeal, the case of ***Johana Ndung'u versus Republic- Criminal Appeal No. 116 of 2005 (UR***) sets out the ingredients of robbery with violence pursuant to **section 296 (2)** of the Penal Code as follows:-

> ***"(a) If the offender is armed with any dangerous weapon or instrument; or;***
>
> ***(b) If he is in the company with one or more other person or persons, or;***
>
> ***(c) if at or immediately after the time of the robbery, he wounds, beats, strikes or uses another violence to any person." it is also trite that proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under section 296(2) of the penal code. See Oluoch versus Republic [1985] KLR 549.***

26. The undisputed evidence of ***Samuel*** and ***Salesio*** is that the assailants were two and were therefore in the company of each other. ***Juliano*** is said to have held ***Samuel*** from behind by the collar; ***Nasari***o pulled out a knife and threatened him with it; ***Juliano*** felled ***Samuel*** and frisked him and when ***Samuel*** raised an alarm, the duo disappeared into a nearby maize plantation together. Further, a knife had featured. It falls into the category of offensive weapons. See the decision in the case of ***Ganzi & 2 others versus Republic [2005] 1KLR 52*** where this Court held that:

> ***"the words "dangerous or offensive weapon" in section 296(2) of the Penal Code bear the same meaning as defined in section 89(4) of the Penal Code, that is, any article made or adopted for us for causing injury to the person or intended by the person having it in his possession or under his control for such use."***

27. Lastly, lack of actual physical injury is immaterial so long as there is proof of use of violence. Threat of injury from intended use of a knife and the felling down of ***Samuel*** and rouging him up suffices to satisfy the ingredient of violence.

28. An issue was raised by ***Mr. Kingori*** as to how ***Samuel*** was sure that the knife recovered a month later from ***Juliano*** was the very knife he had been threatened with on the material day. It is correct that PW1 gave no explanation as to how he was sure that the knife tendered in court was the very knife he had been threatened with. We find no fault in PW1s failure to give an explanation as he was not asked to give such an explanation. The foregoing not withstanding, whether the knife would have been eventually recovered or not, what was needed to prove the offence was evidence that indeed violence of the type described in the ingredients set out above was in fact used on Samuel. This was established by the evidence on the record.

29. In response to ***Juliano's*** ground 2, we agree with the submissions of ***Mr. Kimunya*** that identification of the assailants was crucial to the prosecution case. The trial court had this to say on the issue of identification:-

> ***"Considering evidence as adduced, the incident was during day time; complainant saw his assailants who he knew very well. His witness, PW2 came to the scene and saw both accused running away from the scene. The two were well known to him hence he identified them....They made a report at Kanyuombora AP Camp and this led to the arrest of the two. I find the evidence very systematic and point at the two accused.***

The first appellate court had this to say:-

> ***"To begin with, we are satisfied that there cannot be a case of mistaken identity in this matter. The incident happened at 2.00pm in broad day light. The 2 appellants were very well known to the complainant before. We also note that PW2 Salesio Njeru saw the 1st appellant run from (sic) the complainant was into the maize plantation. That was definitely not a normal thing to do.***

***He also found the complainant crying and the complainant told him immediately that he had been robbed by the 2 appellants. The complainant did not even have time to fabricate anything against the 2 appellants. He gave their names to PW2 immediately and this corrobated what PW2 had himself seen. When they went to the chief and police post thereafter, they gave the names of the appellants. There was therefore no doubt that the 2 were clearly recognized by the 2 witnesses at the scene. This was not a case of identification but one of recognition....”***

30. There is a long line of authorities on identification and we intend to cite only a few to illustrated our approach. In ***Roria versus Republic [1967] EA 583*** at page 584 there is an observation that:-

***“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the house of Lords in the course of debate on section 4 of the Criminal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts, there may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten, if there are as many as ten it is the question of identity.”***

In **Maitanyi versus Republic [1986] KLR** there is observation at page 201 thus:-

***“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 come to the complainant’s aid, or to the police....” if a witness received a very strong impression of the features of an assailant; the witness will usually be able to give some description.***

31. In ***Kariuki Njiru & 7 others versus Republic Criminal Appeal No. 6 of 2001 (UR***) 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***.”

32. Lastly see the decision in the case of ***Wamunga versus Republic [1989] KLR 424*** for the holding that:-

***“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 a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant. In reliance on the correctness of the identification”***

33. From the record, we find both courts below were alive to the fact that ***Samuel*** knew the two assailants as local residents. ***Salesio*** who saw them running away from the scene of the robbery into the maize plantation nearby also recognized them. When Samuel mentioned their names to ***Salesio, Salesio*** already knew who they were. The duo confirmed this to the area chief and PW3 ***Wycliffe*** to whom the reports were made. It is evident from the record that neither ***Samuel*** nor ***Salesio*** pointed out the appellants to the APs and the police for arrest. Appellants were arrested in connection with other offences but since their names had already been given to the police at Ishiara police post and the APs at Kanyuombora AP camp in connection with the robbery against ***Samuel,*** they were variously collected and then charged with the offence of robbery with violence against ***Samuel.*** In the result, we find the issue of mistaken identity did not arise. The Appellants were positively identified and the two courts below arrived at the correct conclusion on the matter.

34. For the reasons given above, we find no merit in this appeal. The same is dismissed.

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

**P.N. WAKI**

**.....**

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

**.....**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**.....**

**JUDGE OF APPEAL**