



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 2 OF 2014

BETWEEN

ABIUD MUCHIRI ALEX1ST APPELLANT

DAVID KARIUKI THAMBARA2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgement of the High Court of Kenya at Embu (Ong'udi.J.) Dated 17th December, 2013

in

H.C. Cr. A. NO. 31 & 32 of 2013)

JUDGMENT OF THE COURT

1. The two appellants **Abiud Muchiri Murioh Alex** alias **Aliud** and **David Kariuki Nthambara** alias **Ndomboro** were jointly charged with another in the Principal Magistrate's Court at **Siakago** with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge read that on the 7th day of October, 2011 at **Kiamutho** Village **Kanyuambora** in **Mbeere** North District of **Embu** County jointly with others not before court while armed with offensive weapons namely *pangas* and slashers robbed **James Mugo Njeru** of one bag of 50 kgs fertilizer, four tins of beans, fourteen tins of cow peas, nine tins of green grams and one *panga* all valued at Ksh.8,070/- and at or immediately before or immediately after the time of such robbery used actual violence on the said **James Mugo Njeru**.
2. The brief facts of the case are that on the night of 7th October, 2011 the complainant **James Mugo Njeru** (PW2) (**James**), was asleep alone in his house. At about 4.00 am he heard movements outside. There was moonlight. He peeped through a gap between the wall and roof of his house and saw the first appellant with a group of three (3) others trying to break into his house. PW2 armed himself with a *panga* and upon the thugs breaking in, he cut one of them, called out the 1st appellant by name and then ran away. He was tripped and fell. One of the thugs cut him on his shoulder. He ran to his father **Stephen Njeru Ileri**, PW3 (**Stephen**)'s home and named 1st appellant as one of the assailants. The incident was reported to **Kanyuambora AP Camp** the

- same night by **James** in the company of his father **Stephen** and neighbours. They went to the home of the 1st appellant where he was arrested. He was wearing a blood stained shirt. Upon interrogation the 1st appellant mentioned the 2nd appellant **David Kariuki** who was also arrested. He had an injury on the right thumb. The suspects revealed where the stolen items were.
3. Meanwhile **Euphrate Igoki Nyaga** (PW5) had travelled leaving her cousin **Patrick Muchangi Mugo (Patrick)** to take care of her house. **Patrick** recalled that on the very night of 7th October, 2011 he was asleep in **Igoki's** house when he heard someone call out the name of **Igoki**. **Patrick** inquired who the caller was and the caller responded, **Abiud**. **Patrick** inquired what they wanted and the latter responded that they wanted to sell some items to **Igoki**. He then advised them to come the next day as **Igoki** was not in where upon **Abiud** requested to leave the items with **Patrick** till the next day. **Patrick** obliged. He opened the door and with the help of moon light he recognized **Abiud** as a person he had been seeing in the locality. He received a bag of fertilizer and cow peas and kept them. On 9th October, 2011 a police officer in the company of the area chief made their way to the home of **Igoki** and inquired about items previously left at her home. She led them to **Patrick** who pointed out the items which they recovered. These together with the blood stained bed sheet, cup and *panga* recovered from **Jame's** house were taken to **Siakago** Police Station and handed to PW1 Cpl. **Thomas Muriuki Koro** who kept them and later produced them in court.
 4. Cpl. **Thomas** also caused a P3 to be filled for the complainant, took blood samples from the complainant and the suspects for analysis. The Government Chemist report tendered in evidence by **Paul Waweru Kagethe** indicated that the bed sheet and cup recovered from **Jame's** house were blood stained with the blood group of the 2nd appellant **David Kariuki**. In their defences the 1st appellant admitted that **James** knew him but said that he had been framed by **James** because of an existing land boundary dispute between him and **Jame's** family while the 2nd appellant stated that he knew nothing about the alleged offence and that the injury on his right thumb was as a result of a fall from a bicycle.
 5. The trial magistrate (**S.M. Mokuu SPM**) believed the prosecution evidence, dismissed the appellants' defences, found them guilty of the offence charged, convicted them and sentenced them to the only sentence known in law for this offence – death. The appellants were aggrieved by that decision and filed an appeal to the High Court which, upon re-assessing and re-evaluating the evidence before it (**H.I. Ongudi, Ngaah JJ**) dismissed the appeal. The appellants are now before us on a second appeal raising four (4) grounds in the supplementary grounds of appeal and in addition adopting ground five (5) in the *home made grounds* of appeal of the 2nd appellant. Those in the supplementary petition of appeal read as follows:-
 - **That the conclusions of the superior court in regard to the 1st appellant was a serious misdirection and devoid of any compatible reasoning by the superior court.**
 - **That the superior court's duty to evaluate the evidence of subordinate court lacked judicial propriety and the superior court failed to do this and the conviction of the 1st appellant was unsafe.**
 - **That the superior court misunderstood the definition of section 296(2) and entered into an area of contest with the state which did not support the conviction.**
 - **That the Superior Court erred in law by holding that DNA analysis was relevant evidence and erred in law by holding that this evidence was admissible in direct contravention of sections 122A (i), 122B, 122D of the Penal Code as amended in Act 5 of 2003 of the Criminal Amendment Act, and conviction of 2nd appellant was unsafe.**
6. The fifth ground adopted from the 2nd appellant's *homemade grounds* of appeal is similar to ground 4 in the supplementary petition of appeal. We find no need to reproduce it.
 7. On behalf of the 1st appellant, learned counsel Mr. **H.K. Mahan** urged us to fault the concurrent findings of the two courts below because identification of the 1st appellant with the help of moon light could not rule out mistake; had the first appellate court properly evaluated evidence before it,

it would have arrived at the conclusion that if any offence was ever committed then it should have been a theft and not a robbery with violence; the facts displayed did not support the ingredients for the offence of robbery with violence as no violence was meted out on the victim; the appellants applied for production of OB entries which the prosecution failed to produce and we should draw an adverse inference that had these been produced they would have been prejudicial to the prosecution's case. Mr. **Mahan** went on to argue that the 1st appellate court should not have ignored the fact that State conceded the appeal. For the second appellant Mr. **Mahan** urged that his conviction does not hold because the only evidence relied upon by the prosecution to place the 2nd appellant at the scene of the crime was the DNA evidence whose samples had not been extracted in accordance with the provisions of **sections 122 A, B, and D** of the Criminal Law (Amendment Act No. 5/2003) and was therefore not admissible in evidence.

8. To buttress his arguments Mr. **Mahan** relied on the decision of **Morris Gikundi Kamunde vs. Republic** [2015] eKLR for the proposition that where a victim alleges to have known the assailant but fails to give the his name to the police at the earliest opportunity, it weakens that testimony; **Lugendo vs. Republic** [2013] 1 EA 174 which held that an accused person has no obligation to prove his alibi; and lastly **Mateso vs. Republic** [2013] I EA 187 it was held:-

“It is settled law that visual identification is of the weakest character and the courts should approach it with great caution. The two courts below did not do so. They never subjected the evidence of the three identifying witnesses to any scrutiny.”

9. Mr. J. **Kaigai** learned Assistant Director of Public Prosecutions on the other hand supports both the conviction and sentence of both appellants on the grounds that all the prerequisite elements for proof of the offence of robbery with violence contrary to section 296(2) of the Penal Code were present; the evidence against the 1st appellant was one of recognition as the complainant knew him before and called out his name; circumstances of identification were favourable as the intensity of the moon light was high; the complainant named the 1st appellant to **Stephen** his father and to the police the same night which information led to the 1st appellant's arrest; the appellants' alibis were sufficiently displaced by the evidence on the record. As for the weight to be attached to the DNA evidence, Mr. **Kaigai** conceded that PW1 the officer who extracted the DNA samples from the appellants was not of the rank of an inspector or above as required by **section 122** of the Criminal Amendments Act No. 5/2003. Nonetheless the said evidence was still admissible in evidence under **section 175** of the Criminal Procedure Code and on that account urged us to dismiss the appellants' appeals.
10. This is a second appeal. By dint of the provisions of section 361(1) of the Criminal Procedure Code, we are in law enjoined to consider matters of law only. See **Ganzi and 2 others vs. Republic** [2005] I KLR 52 which held that the Court of Appeal cannot interfere with the concurrent findings of facts by the trial court and the High Court unless they are based on no evidence or unless they were arrived at as a result of misdirection or non-direction of such a nature as to vitiate the conviction.
11. Ground 1 and 2 of the supplementary petition of appeal touch on the role of the 1st appellate court which the appellants allege was not properly exercised. This has been spelt out in numerous decisions of this Court. See **Kiilu and another vs. Republic** [2005] KLR 174. 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 court's own decision on the evidence with an obligation to the first appellate court to weigh conflicting evidence and draw its own conclusion. It is not to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings but to make its own conclusion before deciding whether the trial court's decision should be supported, while at the same time making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.
12. We find that the learned Judges of the High Court set out the particulars of the charge the appellants faced at their trial; a summary of the testimonies tendered by either side before trial court; the appellant's complaints against the trial court's decision; the particulars of the offence charged; took note of the fact that the prosecution's case in the trial court had revolved around the testimony of the complainant, **James** who was a single identifying witness; they appraised

themselves of the principle in the case of **Ogeto vs. Republic** [2004]KLR 19 that a fact can be proved by evidence of a single witness although there was need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring a correct identification were difficult.

13. Applying the above proposition learned Judges had this to say:-

“In the present case the complainant knew the 1st appellant and the conditions in which he was recognized were favourable and therefore, there would be nothing wrong in relying on the complainants sole evidence on the circumstances under which he recognized the 1st appellant”.

14. Turning to the evidence on the DNA samples, the learned Judges had this to say:-

“In the absence of anything to suggest that the DNA analysis report was controverted it would be safe to conclude that apart from being mentioned by the 1st appellant as one of the gang members that attacked the complainant, the 2nd appellant was related to the robbery in question by blood his own blood. It would have been difficult to convict the 2nd appellant and we would be hesitant to support such conviction if the only evidence against him was the information implicating him by his co-accused. In our view DNA analysis report is not only corroborative evidence but it is also the kind of evidence that can easily stand on its own to prove the participation of the 2nd appellant in the crime in issue.”

15. The learned Judges also took note of the fact that the State had conceded the appeal but declined to be persuaded along that line for three reasons, **one**, the existence of injuries and assaults occasioned during the robbery was not a requirement under section 296(2) of the Penal Code as all that the prosecution needed to prove under that section was either the appellant or either of them was armed with any weapon or instrument that may be deemed to be dangerous or offensive or that the appellant was in the company of one or more persons; or immediately before or immediately after the time of the robbery the accused wounded, beat up struck or used violence to any person; and it mattered not which of the attackers attacked the complainant so long as it was proved that the robbers had a common intention. **Second**, that the inconsistencies noted in the complainant’s evidence which related to the recovery of exhibits did not vitiate the prosecution’s case. They had this to say:

“There is no dispute as to where the cow peas and the fertilizer were recovered and that these goods belonged to the complainant. They were pertinent components in the particulars of the charge against the appellants so that even if the pangas and the slasher were to be out of the picture the evidence that the complainant was robbed of cow peas and fertilizer was not displaced”

Third with regard to the identification of the 1st appellant the learned Judges found that the evidence against the 1st appellant was one of recognition. Furthermore, that he had been sufficiently connected to the fertilizer and the cow peas through the evidence of **Patrick** who recognized the appellant as he deposited the stolen items, that there was nothing on the record to show that **Patrick** was an accomplice. All the above analysis is a clear demonstration that the learned Judges were alive to their mandate and they discharged it to the standard expected of them. We find they identified issues in controversy before them and answered them on the basis of proven evidence on the record. We find no fault in the approach taken by the learned Judges. Ground 1&2 therefore, fail.

16. Ground 3 has been answered by our assessment of the reasons as to why the learned Judges declined to accept the state’s concession of the appeal. We adopt that reasoning fully as the reasoning given by the learned Judges as set out above was supported by the testimonies of two witnesses **James** the complainant and **Patrick** who identified the 1st appellant with the help of

- moonlight. We affirm the 1st appellate court's findings on ground 3 and dismiss it.
17. As for ground 4, the 2nd appellant's complaint is that samples used in the DNA sampling had not been properly extracted in accordance with the provisions of **section 122A (i) 122B, and 122D** of the Penal Code (Amendment Act number 5 of 2003). We find these provisions were not interrogated by the two courts below, notwithstanding that the appellant had raised that issue before the 1st appellate court. Such samples are to be extracted by a police officer of or above the rank of inspector. They are either extracted voluntarily with the written consent of the person from whom they are extracted or by with an order of court compelling such involuntary extraction of the samples. Mr. Kaigai concedes the samples were not extracted in accordance with the said provisions which had come into effect on 25th July, 2003 and were thus operational at the time, but still contends that the evidence was admissible under **section 175** of the Criminal Procedure Code. We have perused **section 175** of the Criminal Procedure Code and find that it has nothing to do with admission of DNA evidence. It deals with jurisdiction of a court to award compensation. These are clear statutory provisions. There is no way they can be ignored. We find the DNA evidence unacceptable. It was the evidence used to provide corroboration to 1st appellant's accomplice evidence against the 2nd appellant. Once removed there is no other evidence placing the second appellant at the scene of the crime.
18. In the result we fault the conviction of the 2nd appellant **David Kariuki Thambara** and allow his appeal. We direct that he shall be and is hereby set at liberty unless otherwise lawfully held. The appeal of the 1st appellant is dismissed in its entirety.

Dated and Delivered at Nyeri this 15th day of July 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 to the original.

DEPUTY REGISTRAR