IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 348 OF 2012

BETWEEN

PETER MUGENDI MWANIKI…….....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Kenya at Embu (Lesiit & Ongudi, JJ) dated 27th July, 2013

IN

H.C.CR.A. NO. 234 & 235 OF 2009)

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JUDGMENT OF THE COURT

Peter Mugendi, (the appellant) was charged as the second accused alongside one Benson Mwaura Njiru (Benson) with three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** The offences all occurred on 10th April 2008 at Ena Market, Kawanjara Sub-location, in Embu District of the then Eastern Province. The robbers were said to have been armed with dangerous weapons namely; pangas, metal bars and axes and they stole cellphones and cash from Nahashon Gitonga Mwaniki (Nahashon), Elias Nyaga Njagi (Elias) and Phelister Muthoni Nyaga (Phelister). In the course of those robberies, the robbers beat the named complainants.

At the conclusion of the trial in which the learned trial Magistrate heard six prosecution witnesses as well as the appellants in their sworn defences, the two were found guilty, convicted and sentenced to suffer death as by law provided. They both appealed to the High Court (Lesiit & Ongudi JJ) which, by a judgment dated 27th July 2013, allowed Benson's appeal, quashed his conviction, set aside his sentence and set him at liberty.

The appellant was not so lucky. His appeal was dismissed hence this second and final appeal to this Court in which he raises two points of grievance vide the 'Supplementary Grounds of Appeal' filed by advocates Kimunya & Co, namely;

"1. The learned Judges of the 1st appellate court erred in law and facts in finding that the evidence of identification parade was admissible in this case.

2. The learned Judges of the 1st appellate court erred in law and facts in failing to thoroughly evaluate the evidence and thus arrived at a wrong decision."

On a second appeal such as the one before us, our jurisdiction is limited to a consideration of matters of law only by dint of **Section 361** of the **Criminal Procedure Act.** There is therefore no occasion for an appellant to plead in his memorandum of appeal that the High Court erred in law "**and in fact."** Those last words are surplusage of no utility and which could easily invite questions as to the competency of the grounds. The words of this court in **STEPHEN MURIUNGI & ANOTHER** [1982-88] 1KLR 360 speak to the need to clearly differentiate between matters of law and matters of fact. We adopt them both on the point, and as reflective of our deference, in the first instance, to concurrent findings of fact made by the courts below which we can disturb only very sparingly;

> **"We would agree with the views expressed in the English case of Martin Glywed Distributors Ltd (t/a MBS Fastenings) [1983] ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of law, and, it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."**

See, also **CHEMAGONG –VS- REPUBLIC** [1984]KLR 213.

The facts the courts below found as established were that on the 9th and 10th April 2006, thugs invaded a residential plot belonging to one Gachori in which the complainants were tenants. They first used some heavy object to smash in Nahashon's door. The sudden bang woke him. He jumped out of bed and hid under a sofa. Two men walked into his house and in the electric lights from the house and security bulbs he clearly saw and recognized the appellant, whom he knew by the nickname as "**Kariamira",** as the first one in. Kariamira demanded

money and a phone or else he would kill Nahashon. As if to make good the threat, he used a sharp bladed object, to cut him twice on the head and once on the shoulder. When he threatened to decapitate him, Nahashon told him there was money in a bag which he took together with a Motorolla mobile phone.

The thugs then left Nahashon on the floor and proceeded to the next house belonging to Elias where they unleashed some terror after breaking and pulling out the door. Elias recognized both men as the appellant and Benson. The appellant is a person he had seen selling boiled eggs at the Ena bus stage and it is he that assaulted Elias' wife with a panga and a metal rod while demanding money and phones with menaces and threats to kill the wife. Elias used to hear people calling the appellant by the name Kariamira. Elias' wife was Phelister and she corroborated his account. She was injured on the hand and back and she pleaded with the thugs not to kill her. She was unable to identify or recognize any of the thugs, some of whom were standing outside by the window, as she was new in the area.

Nahashon, Elias and Phelister were taken for medical treatment and P3 forms were duly filled on their injuries. They were produced before the trial court. Elias told the police who responded to the robbery that very night, including Corporal Joel Maranya (PW5) that during the attack electric lights were on and he was able to recognize one of the attackers whom he knew by the nickname Kiriamira. He was arrested on 16th April 2008 with the help of the local Assistant Chief.

After the arrest of the appellant, an identification parade was mounted by

Inspector Dominic Muoki (PW5) in which, Nahashon and Elias picked out the appellant. Both courts

below considered the evidence of the identification parade as constituting a test that strengthened the identification of the appellant at the scene, with the High Court stating;

> ***"We accept the identification of PW2 as having been tested and found to be free of error or mistake"***

With respect, this as was submitted by Mr. Kimunya and conceded by Mr Kaigai, the learned Assistant Director of Public Prosecutions, was a misdirection. An identification parade in which the identifying witness already knew and says he had recognized the suspect is of no probative value. It is not a test of the identification evidence or, if a test it be, it is an already rigged test, its answers already known and predetermined. It is superfluous and adds no value or, as was stated by Mwendwa CJ and Simpson J in **GITHINJI & ANOTHER –VS- REPUBLIC** [1970] EA 231 at P.232;

> ***"Once a witness knows who the suspect is an identification parade is valueless. The police might as well bring the suspect alone before the identifying witness and say 'This is the man we suspect, can you identify him'?"***

The evidence of the identification parade was not, however, the only evidence of identification that was tendered by the prosecution. Indeed, as is contended and conceded, Nahashon and Elias did recognize the appellant as one of the robbers. There was electric light all along and the encounter took a long enough time for them to see and confirm that one of the robbers was Kariamira, as the appellant was popularly known. He had a conversation with Nahashon. They both knew him as a person who sold eggs at the Ena Stage and were very particular about what he said and did during the robbery. Moreover, they gave his name and occupation or trade to the police that very night.

This was not a case of identification of a stranger in difficult circumstances but rather of multiple recognition of a person well-known to the witnesses during a prolonged encounter in electric lighted houses while he made no effort to conceal his identity. His case therefore, though attracting the same caution and care as mistakes do occur in recognition or identification and witnesses may be honest yet mistaken, is on a more sure footing, and was free from any possibility of error. See **ANJONONI –VS- REPUBLIC** [1980] KLR 59.

We are satisfied that the learned Judges approached the evidence of visual recognition with the necessary circumspection and that they did, contrary to the appellant's complaint, subject all the evidence to a fresh and exhaustive analysis and re-evaluation before arriving at their own independent conclusions as laid out in many cases including **OKENO –VS- REPUBLIC** [1972] EA 32. Indeed, their approach was that before a court can base a conviction on the evidence of identification at night, such evidence should be absolutely watertight in line with **REPUBLIC –VS- ERIA SEBWATO**[1960] EA 174 and **KIARIE – VS- REPUBLIC** [1984] KLR 739. They also properly placed weight on the first report made in which the two witnesses mentioned the appellant, a person they knew, as one of the robbers. They were right in relying on **TEREKALI & ANOTHER –VS- REPUBLIC** [1952] EA 259 where the court stated;

> ***"Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishments or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others…."***

As we have stated, the appellant was mentioned to the police in the course of the very night of the robbery. We note also that even with all those circumstances that gave the recognition of the appellant at the scene a great measure of confidence, certainty and assurance, the learned Judges were careful to still go ahead to caution themselves although, in the circumstances of this case, they need not have since it was not the case of identifying witness. Said the Judges;

> "***We have warned ourselves regarding the evidence against the 2nd appellant [the appellant herein] and the danger of convicting on such evidence. Having done so, we have come***

to the conclusion the evidence of identification against him was safe."

We respectfully agree with the learned Judges' conclusion that the evidence against the appellant, which was in the nature of recognition by two witnesses in favorable circumstances, was definitely safe and his conviction was proper. We shall not disturb it.

In the result, this appeal lacks merit and is accordingly dismissed.

Dated and delivered at Nyeri this 15th day of July 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