IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO.137 OF 2014

BETWEEN

NAFTALI MWENDA MUTUA ……..…..... APPELLANT

AND

REPUBLIC.....…..…….... RESPONDENT

(Appeal against the Judgment of the High Court of Kenya at Meru (Lesiit & Gikonyo, JJ.), dated 11th December, 2013 in **HC.CR.A.NO.48 OF 2012***)*

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JUDGMENT OF THE COURT

The appellant **NAFTALI MWENDA MUTUA** was charged with the offence of robbery with violence contrary to section 296(2) of the Penal code. The particulars of the offence were that on the 16th day of February 2011 at around 8.00 p.m. at Mwiganda Village of Tigania East District within Meru County, jointly with another not before court, while armed with dangerous weapons namely knife and *rungu*, robbed **MARY KAIMENYI KAUMBUTHU** of a handbag containing two Nokia Mobile Phones, wallet, necklace, two ATM cards, ID card, Interim Driving license among other personal documents and cash Kshs.5,700/=, all valued Kshs.40,500/=, and during the time of the robbery used actual violence to the said **MARY KAIMENYI KAUMBUTHU** by beating her severally on her back and both shoulders using the said *rungu*.

On 8th February, 2011 the appellant pleaded not guilty to the charge levelled against him thus paving way to the trial before B. Ochieng, the then Principal Magistrate, Tigania. The learned Principal Magistrate recorded the evidence of the prosecution witnesses and found that the appellant had a case to answer. Thereafter, the appellant gave a sworn statement of defence and called his mother (DW2) as his witness. Upon conclusion of the trial, the appellant was found guilty of the offence of robbery with violence and was sentenced to death as by law prescribed. He was dissatisfied with the conviction and sentence and filed an appeal in the High Court.

In an undated judgment (but signed), Lesiit and Gikonyo, JJ. dismissed the appellant's appeal thus precipitating the appeal before us.

When the matter came before us for plenary hearing on 5th November, 2015, Mr. Mutegi Mugambi, learned counsel for the appellant abandoned all other grounds of appeal as set out in the memorandum of appeal filed by the appellant save grounds 2, 6 and 7. These were:

> ***"2. That the identification and recognition was not free from error.***
>
> ***6. That the trial was conducted partially and irregularly.***
>
> ***7. That my sworn defense was rejected without cogent reasons."***

It was the appellant's counsel's submissions that the identification and recognition of the appellant was not free from error and that PW1 did not disclose the source of light at the canteen where she allegedly saw the appellant before the attack, and neither did she describe the intensity of the light or clothing of the appellant. Regarding the light from the motor-cycle that PW1 told the trial court that it's illumination enabled her to see the appellant, counsel contended that the trial court was not told whether the lights were bright or dim, neither was the court told of the speed of the motor-cycle, size of the road, the duration of the illumination, whether the road was smooth or bumpy as all these factors would affect the illumination. He relied on the case of **ERIC OTIENO OROM REPUBLIC** and **KARIUKI VS REPUBLIC** wherein it was held that:

> ***"The strange fact is that many witnesses do not properly identify another person even in daylight…It is at least essential to ascertain the nature of light available. What sort of light, its size and it*** (sic) ***position relative to the subject, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into…"***

Counsel further contended that the trial court wrongly rejected the appellant's defence of *alibi*; that the appellant had called his mother, DW1 in support of his *alibi* defence. In conclusion, counsel submitted that the trial court failed to ascertain on which part of the appellant's body the items allegedly found in his possession were retrieved from.

In opposing the appeal, Mr. Mungai the learned prosecuting counsel urged us to find that this was a case of recognition as PW1 knew the appellant and had seen him at the canteen and further that the appellant and another walked behind PW1 for sometime, overtook her before they pounced on her. Further, that when PW1 made her first report she named the appellant. In conclusion, he urged us to find that the appellant was found in possession of some of the items stolen from PW1 during the robbery incident.

The appeal before us is a second appeal. The law is that on a second appeal this Court is restricted to consider only points of law. (See ***section* 361 of the Criminal Procedure Code).** *See also* ***Njoroge -vs- Republic*** (1982) KLR 388, where this court at page 389 held;

> ***"..On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence..' See M'Riungu -vs- Republic (1983) KLR 455."***

This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by the two courts below unless they were based on no evidence or a misapprehension of the evidence or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision. (See ***Chemagong v. Republic*** [1984] KLR 61 and ***Kiarie v. Republic*** [1964] KLR 739).

In ***M'Riungu v. Republic*** [1983] KLR 455 the court held:-

> ***"Where a right of appeal is confined to questions of law, the 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 fact and law and it should not interfere with the decisions 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 that the decision is bad in law (Martin v. Glyneed Distributors Limited (T/A MBS Fastenings – The Times of March 30, 1983)".

Most recently, this Court in ***George Kamau Gatogo v Republic***- Civil Appeal No. 21 of 2011 cited with approval the holding in ***Kaingo Vs. R*** [1982] KLR 213 at P 219 where the Court held that;

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was evidence on which the trial court could find as it did (REUBEN KARARI C/o KARANJA VS. R [1956] 17 EACA 146)."

We are, as a second appellate court, bound to apply the law as enunciated by the above principles in re-evaluation of the facts and the evidence presented in both the trial court and the first appellate court.

It is against this backdrop that we proceed to consider the grounds of appeal, the record of appeal, the rival submissions of counsel and the law.

The evidence of PW1 was that on 16th February at about 8.00 p.m. she was on her way home. The appellant and another were behind her, but after some time, the duo overtook her and she followed them for some time. It was whilst ahead of her that the two went into a home by the road side and upon their return, they pounced on her and hit her. She fell down. She lay on her handbag which had several contents. At the time of the attack the appellant was armed with a knife and he threatened to slit her. She reported the incident to the Assistant Chief (PW3) and she gave the name of the appellant as one of the assailants. In cross-examination she reiterated that she had known the appellant for 6 years and that in their local village they referred to him as "Madu." On 17th February, 2011 at about 8.00 a.m., she made a report to PC **JAMES OKOTH (PW4)** of Mukinduri Police Station. She was later examined by **MARTHA NJERI, (PW5),** a Clinical Officer from Mathari Mental Hospital who found that PW1 had suffered "harm."

On receiving the report on 16th February, 2011, PW3 informed PW2, the village elder and the latter on not finding the appellant, decided to lay an ambush at the appellant's home. He was able to arrest the appellant at about 2.00 a.m. on 17th February, 2011. According to PW2 the appellant was found with PW1's prayer book, payslip and a necklace.

We have anxiously considered the above evidence which was tendered in the trial court and re-evaluated by the first appellate court. PW1 told the trial court that she knew the appellant as they are from the same village and that at the village they referred to him as "Madu." However, it is not clear whether she also knew the appellant as **NAFTALI MWENDA**? Did she get to know the appellant as **NAFTALI MWENDA** after the appellant was arrested and arraigned in court? What name did she give PW3, the Assistant Chief? Did the Assistant chief (PW3) also know that the appellant's alias was "Madu?" Was the appellant one of PW1's assailants? We say this because **JAMES OKOTH (PW4)** who received the report a day after the incident stated the following in answer to the appellant's question in cross-examination:

"She knows your home and knew you by appearance and not by name." (emphasis added).

If this is true, then what name did PW1 give to PW3 on 16th February, 2011 if in the report she made to PW4 on the following day, she did not know the appellant's name?

The appellant's counsel's further submission was that it was not indicated where the items allegedly recovered from the appellant were retrieved from. It is was the evidence of PW2 that the appellant and another,

"… appeared after 2.00 a.m. and when we (emphasis added) ***ordered them to stop they did not***

head (sic) and took to their heels. <u>We</u> (emphasis added) ***pursued them and managed to arrest NAFTALI while his accomplices escaped. <u>We</u>*** (emphasis added) ***recovered complainant's payslip, prayer book, necklace from him."***

On the other hand PW3's evidence was that:

> ***"On 16th February, 2011 at 8.00 p.m. I received a report from MARY KAIMENYI, that she had been robbered*** (sic) ***by the roadside by villagers some of whom she knew and others not known to her. She furnished me with the name NAFTALLY MWENDA. … At 2.00 a.m. villagers appeared. We*** (emphasis added) ***challenged them to stop but they took to their heels. <u>We</u>*** (emphasis added) ***gave close*** (sic) ***and arrested one of them - NAFTALLY. <u>We</u>*** (emphasis added) ***recovered payslips, prayer book, necklace from him."***

It is evident from the above that PW2 and PW3 were not alone but were with 'others' as they pursued the persons fleeing. It was also PW4's evidence that the items recovered from the appellant were ***"… recovered by a mob during accused arrest."***

From the above it would appear that the appellant was arrested by a mob who allegedly retrieved some of PW1's items from him. As none of members of the mob was called as a witness, this explains why it was not stated where the items were retrieved from. It's also interesting to note that whereas PW1 was accosted and robbed at about 8.00 p.m., it was the prosecution case that the appellant retained PW1's payslips up to about 2.00 a.m. of the following day, when he was arrested. Why would the appellant (or any other robber for that matter), have retained the payslips from about 8.00 p.m. to 2.00 a.m? Of what value were they?

Again from the evidence, it would appear that the mob chased a group of "villagers" and managed to arrest the appellant. Who are these villagers who were fleeing and what were their 'sins' to cause them to flee, bearing in mind that PW1 was robbed by two persons and not a group of "villagers?"

It is apparent that the evidence against the appellant turned on the issue of identification and /or recognition and PW1 was the only single identifying witness. As pointed out by Mr. Mugambi for the appellant, the intensity of the motor-cycle light that PW1 used to see the appellant and his accomplice was not stated. Neither were details given of the lighting at the canteen where PW1 said she had seen the appellant before the walk home. In ***<u>Roria vs Republic, 1967 EA 584, Sir Clement De Lestang, V.P.,</u>*** delivering the judgment of the predecessor of this Court, stated as follows regarding a conviction resting entirely on identification:

> ***"That danger is, of course, greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this Court to satisfy itself that in all circumstances it is safe to act on such identification. In <u>Abdala bin Wendo and Another v. R. (1)</u> this Court reversed the finding of the trial Judge on a question of identification and said this (20 E.A.CA. at p. 169:***
>
> ***'Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.'"***

In ***<u>Maitanyi v R.</u> [1986] KLR 198,*** this Court revisited the issue of identification by a single witness and held as follows:

i. ***Although it is trite law that a fact may be proved by the testimony of a single witness, this does***

not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

ii. ***When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.***

iii. ***The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decisions, it must do so when the evidence is being considered and before the decision is made.***

iv. ***Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.***

It is our considered view that the trial court and the first appellate court erred in not ***"testing with the greatest care"*** the evidence of PW1 in respect of the alleged identification and/or recognition. Suffice to state that failure to do so, left glaring omissions, which raise doubt as to the culpability of the appellant and his conviction may not be safe.

Apart from the two courts failing to test with the greatest care the evidence of PW1, we also find that the contradictions, discrepancies and inconsistencies were not reconciled.

The role of a court of law when confronted with allegations of existence of contradictions, discrepancies and inconsistencies in the prosecutions case has long been settled. In ***Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993,*** the court ruled that:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the warding of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."***
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> In ***Njuki & 4 Others versus Republic [2002] 1KLR 771*** the court went further to state that:
>
> ***"Where discrepancies in the evidence do not affect an otherwise proved case against an accused a court is entitled to ignore those discrepancies."***

In ***Vincent Kasyla Kingo versus Republic Nairobi Criminal Appeal No. 98 of 2014*** this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. See ***Josiah Afuna Angulu versus Republic CRA. No. 277 of 2006(UR)*** where in, this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellants commission of the offence charged and proceeded to substitute conviction for the disclosed offence. Also the case of ***Charles Kiplang'at Ng'eno versus Republic CRA. NO. 77 OF 2009 (UR)*** in which this Court also sitting as a first appellate court reconciled contradictions, discrepancies and inconsistencies in the prosecutions' case and found that these went to discredit the prosecution's evidence as they created doubts as to the appellant's commission of the alleged offence and allowed the appellant's appeal in its entirety.

In the appeal before us, there were contradictions as to whether PW1 knew the appellant by name. Did she know him as 'Madu' or Naftali Mwenda. What name did she give PW3? And what name did PW3 give to PW2? And if indeed PW1 knew the appellant by name, why did PW4 who received PW1's report on the following day, tell the trial court that PW1 told him that she did not know the name of the person who had robbed her.

Besides and as alluded above, no one told the court where they retrieved the necklace, payslip and prayer

book from the person of the appellant. If indeed a mob caused the appellant with a group of persons, the person who retrieved the alleged person was not called as a witness. Suffice to state that none of the prosecution witnesses told the court that they searched the appellant and recovered the necklace, payslip and prayer book from him. In ***Morris Muthiani Sammy v Republic Criminal Appeal No. 14 of 2006***, this Court whilst dealing with a similar situation stated:

> ***"In the case before us, none of the prosecution witnesses testified to having searched and recovered the tube of "Fair and Lovely", ointment, the balaclava, or the handbag from the appellant. In fact the evidence on record was that the handbag was recovered from the road. This aspect o the evidence was not considered by either the trial Magistrate or the first appellate court. The first appellate court misdirected himself by finding that the appellant was found in possession of the "complainant's identity card, the body lotion and probably the handbag …",when there was no evidence to support such a finding."***

It is in view of the above that we have come to the conclusion that the trial court and the 1st appellate court failed to carefully test the evidence, as if it had done so, it would have come to the conclusion that the evidence did not safely support a conviction and this being an error of law, brings the appeal within our mandate.

Accordingly, the appeal is allowed, the conviction of the appellant quashed and the sentence set aside. The appellant is to be set free forthwith, unless he is otherwise lawfully held.

This judgment is given under the provisions of Rule 32(2) of this Court's Rules, Kiage J.A. having declined to sign it.

Dated and Delivered at Nyeri this 17th day of December, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

I certify that this a

True copy of the original

DEPUTY REGISTRAR