IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G. B. M. KARIUKI & MURGOR, JJ.A.)

CRIMINAL APPEAL NO.358 OF 2007

BETWEEN

GEOFREY WAINAINA KARIUKI

SIMON MWORIA NYANJUI

JAMES OTIENO OWANGA

FRANCIS NDABI MWORIA.……..……..…….....APPELLANTS

AND

REPUBLIC.....…….... RESPONDENT

(An appeal from a Ruling of the High Court of Kenya at Nairobi (Onyancha & Kubo, JJ.) dated 7th May, 2004

in

HC.CR.A.1210-1214 OF 2001)

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JUDGMENT OF THE COURT

The four appellants herein ***Geofrey Wainaina Kariuki*** alias Corporal and ***Simon Mworia Nyanjui*** were accused number 2 and 5 respectively while ***James Otieno Owanga*** and ***Francis Ndabi Mworia*** were accused numbers 4 and 1 respectively in the Chief Magistrate's Court at Kiambu in Criminal Case No.8 of 2000 which they were jointly charged with four counts of robbery with violence contrary to Section 296(2) of the Penal Code. Their co-accused ***Peter Chege Mwangi*** alias ***Seei*** (accused 3) was acquitted by the High Court when the State conceded his appeal on the ground that there was insufficient evidence against him. ***Francis Ndabi Njogu*** (Accused 1) faced the alternative charge in the Chief Magistrate's Court of handling suspected property contrary to Section 322(2) of the Penal Code.

The robberies were said to have taken place on 20th December 1999 at Gitombo Village Kiambu. It was alleged that the robbers, with others not before court while armed with dangerous weapons namely

axes, rungus and pangas robbed the complainants at their residences of household goods and other personal property including cash, curtains and blankets, electronic equipment (radios) and clothe items. The charges named the victims as ***M W N*** (PW8 count 1), ***Monicah Wanjiru Njoroge*** (PW1 Count 2), ***Evans Njoroge Waithera*** (PW2 Count 3) and ***C N M*** (PW4 Count 4), alongside the specific items of property stolen from each. In each case it was alleged that the robbers used actual violence on each complainant. The robberies took place at night. The complainants together with other witnesses testified.

The record shows that the appellants were heard in their defences, based on their arrest on 28th December, 1999 – not on the alleged day of the robberies – 20th December, 1999. On the other hand the prosecution evidence on identification centered round the claim that the victims, who did not know their attackers before, had been able to identify them during the robberies through the light from the torches that the robbers had. There were other witnesses who did not identify some of the accused persons as the robbers and the learned trial magistrate acquitted such accused. For instance ***Francis*** (accused 1, not an appellant here) was found guilty on Count 1 because the complainant, ***M W*** (PW8) had testified that she clearly saw him during the robbery. From the evidence, the learned trial magistrate found that 3 counts had not been proved against ***Geofrey*** (accused 2, first appellant), ***Peter*** (accused 3, not an appellant), ***James*** (accused 4, not an appellant) and ***Simon*** (accused 5, an appellant). They were all acquitted of counts 1, 2 and 3 under Section 215 of the Criminal Procedure Code. Francis (accused 1) was found guilty of count 2 also and convicted.

As to count 4 where ***C M*** (Pw4) was the victim, the learned trial magistrate was satisfied on evidence that PW3, PW4, PW5 identified all the accused persons convicted them of the offence. There was also evidence from the identification parades which the learned trial magistrate took into account. The accused persons were duly convicted and were all sentenced to suffer death.

Each of the 5 accused persons appealed to the High Court (***Onyancha, Kubo*** JJ.) by filing separate appeals. It was not readily apparent from the record but it seems that all those appeals were consolidated, heard and determined together. The grounds of appeal to the High Court were more or less similar in substance, attacking the evidence on identification, lack of proof beyond a reasonable doubt and failure to consider the defences. One of the appellants in the High Court, ***Francis Njogu,*** contended that the provisions of section 85(2), 88 of the Criminal Procedure Code were disregarded. Each appellant filed written submissions which they highlighted at the hearing of their appeals. The appellants mostly attacked evidence on identification either at the scene or on the identification parades that were conducted. ***Mr. Okello***, State Counsel on behalf of the State conceded all the five grounds of appeal on account of inadequate evidence of identification. The learned judges agreed with ***Mr. Okello*** only as regards the appeal of ***Peter Mwangi*** which they allowed. The appeals of the other four were dismissed and they consequently preferred the present appeal in which, ***Geofrey Wainaina*** is appellant no.2, ***Simon Mworia*** is appellant no.5, ***James Otieno*** is appellant no.4, and ***Francis Ndabi*** is appellant no.1. The appeal centres around count 4 only, the appeals on the other counts having been allowed.

In the course of time ***James Otieno*** and ***Francis Ndabi*** passed on and on 2nd October, 2013 their appeal was marked as having abated under Rule 69(1) of the Rules of this Court. Accordingly, the only two appellants before us are ***Geofrey Wainaina Kariuki*** and ***Simon Mworia Nyanjui*** (accused 2, accused 5 respectively in the subordinate court).

Mr. Nyachoti, learned counsel for the appellants filed a supplementary memorandum of appeal with 3 grounds which he argued together. The grounds were on:-

i. Identification;
ii. re-evaluation of evidence; and
iii. Standard of proof ; beyond a reasonable doubt

Mr. Nyachoti submitted that the conviction on count 4 was based on evidence of 3 family members who were in one room when the robbery took place. These were; ***B M*** (PW3), a minor who was living with his father, C ***N M*** (PW4, complainant) and mother, ***M M*** (Pw5). We heard that these witnesses claimed to have positively identified the appellants, who were strangers in a small room with

whitewashed walls when the robbers flashed about their torches with the light falling on their faces; that the incident took place at night; the witnesses had been harassed and even assaulted and therefore could and in fact did make a mistake in claiming to have identified the appellants; that it was not stated in evidence as to the distance between the walls of the room and the appellants or even the intensity of the torch light in use; and that in their reports to the police, these witnesses did not indicate that they could identify their attackers if they saw them again. It was added that in any event the identification parade reports touching on these proceedings were discounted by the High Court as of no value and besides, the learned State Counsel conceded the appeals. What remained was dock identification which was the weakest type of identification if not worthless.

Mr. Kivihya, the Assistant Director of Public Prosecutions, opposed the appeal on the basis that no law bars members of the same family from testifying in a matter, so long as their evidence was relevant. He added that ***Mr. Okello's*** conceding of the appeals in the High Court did not tie the hands of the learned judges who were entitled to reevaluate the evidence before the trial court and draw their own conclusions. And that is what they did here. Further, despite the fact that evidence from the identification parades was found to be flawed, still the evidence of eyewitness PW3, PW4 and PW5 was strong and cogent enough for the learned judges to rely upon in confirming the conviction and sentence of the appellants. Counsel then went on to refer to specific parts of their evidence to demonstrate that the witnesses were not mistaken in identifying the appellants in the small room where they were with the robbers who flashed about their torches looking for money.

While conceding that there was no law barring members of the same family from testifying in a given case and that the High Court could as well disregard the concession by the State, ***Mr. Nyachoti*** urged us to allow the appeal herein on account of mistaken identification in the circumstances, citing the case of ***Charles Maitanyi vs Republic Nairobi Cr. A. 6/1986***.

In determining this appeal we are alive to the principle of law under Section 36(1), of the Criminal Procedure Code and the case of ***Njoroge vs Republic [1982] KLR 38,*** among many others decided by this Court that: -

> ***"On second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence."***

In this appeal ***Mr. Nyachoti's*** main plank of argument was that the identification of the appellants, who were strangers to the three witnesses, at night, using torch light only, could not be positive. We accept that identification of a thing or a person is essentially a matter of fact. The identifying person applies the sense of sight and claims that he/or is certain that the thing or person identified is the one in question. But it is possible that the identifying witness could be honest but mistaken in the identification. And when it comes to visual identification, aspects of intensity of light, distance from the object, visibility, the state a mind of the witness and so on and so forth come into play. And that is why this issue of identification is usually examined with much care and anxiety.

In the case of ***Charles O. Maitanyi vs Republic Nairobi Cr. Appeal No.Cr.A.6 of 1986*** this Court, while considering the aspect of identification of the appellant in a robbery with violence, which took place at night and the complainant's evidence on the identification which was the basis of conviction and sentence, the learned judges commented that there was some light in the premises where the incident took place which could be turned low or high. The complainant did not know the appellant before. But on seeing him some days after the robbery, he had him arrested and charged. The lower court relying mostly on the evidence of identification convicted the appellant and sentenced him to death. He unsuccessfully appealed to the High Court. So he brought his appeal to this Court and again the central ground of appeal was identification. This Court stated that its decision could turn on testing with the greatest care the evidence of the single identifying witness. And so the learned judges delved into what the two lower courts did in that regard: -

> ***"It must be emphasized that what is being tested is primarily the impression received by the***

single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve.That may sound too obvious to be said, but 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 the light available. What sort of light, its size, and its position relative to the suspect, and all important maters helping to test the evidence with the greatest care."

The learned judges added that the other line of inquiry to ascertain the reliability of a single identifying witness of a stranger is whether the witness/complainant was able to give some description or identification of the assailants to those who came to the scene or to the police. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description, otherwise a later identification or recognition must be suspect unless explained. The learned judges then concluded that there had been no careful testing of the evidence by the two lower courts. Accordingly, they had erred in law and the appeal was allowed.

In the appeal before us, it was not a question of a single identifying witness. There were three witnesses (PW3, PW4, PW5) as stated above. They were all in what was described as a small room with whitewashed walls. The source of light was said to be from the torches the robbers carried, which they flashed about and even on themselves as they looked for money. It is thus our duty to examine the level of scrutiny of that evidence as done by the two courts below so as to determine and conclude whether the correct standard of proof was attained or not.

Beginning with the finding of the learned trial magistrate on the issue of identification, the recorded evidence of PW3, PW4 and PW5 was appreciated thus:

"The same night the same gang descended on PW3's (PW4?) house. He was called out from outside but he refused to open the door. He was inside the house with his 12 year old son, PW3, and his wife M N M – PW5. They told the Court that one of the robbers climbed on the roof and removed an iron sheet and dropped inside the house. He then opened the door for the others to get in. They demanded to (be) given money and beat up PW4. He told the Court that the room they were sleeping in… was behind his shop… a small one white wall. He said that from the reflection of the light from the robbers' torches she (sic) was able to see them. He told the court that Accused 5 was armed with a small axe and that he attacked him with the same while jumping on the bed. He gave them Sh.1600/= which was in the room."

Touching on the evidence of PW5, the learned trial magistrate recorded:

"They are then said to have taken PW5 to her shop next to the room. They took her round the shop while looking for money. She said that they were lighting up the whole place while looking for money. She explained widely (vividly?) in her evidence the role played by each on every one of them."

As for the evidence of PW3 the learned magistrate said:

"PW3, their son also said he saw clearly and was able to identify A1, A2, A4 & 5. He said that Accused 2 is the one who had taken their radio while accused 4 is the one who had taken the keys to the gate."

In conclusion the learned trial magistrate said:

"On Count 4 (iv), I note that the fact of the robbery against Christopher PW4 is not disputed. Indeed he was even beaten up and injured …

PW3, PW4 and PW5 narrated to the court how they saw the robbers. PW3 saw and identified all of them except Accused 3."

And on all the evidence tendered by PW3, PW4 and PW5 the trial magistrate observed:

> ***"I have no cause whatsoever to doubt the evidence of PW3, 4, 5. The same was consistent and corroborative. The circumstances pertaining at the scene were conducive to a proper identification of the suspects. The room was small. It is said to have been coloured white. The light from the robbers' torches lit the small room significantly to enable these 3 witnesses to identify the suspects.***
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> ***They stayed with the robbers for long as they looked around for money from the shop. She (PW5) said she saw all the accused persons and was able to pick them out in the respective parades later."***

The appellants were accordingly found guilty, and as has been pointed out earlier the evidence from the identification parades was found unreliable and so disregarded.

The High Court on its part considered this issue of identification of the appellants in the light of all the evidence tendered in the lower court. The Judges concluded that charges in respect of all the counts had not been proved against the appellants and their appeals were allowed. There was no omission on the part of the judges to reevaluate the recorded evidence from both sides and the record bears them out. Of count 4 they delivered themselves:

> ***"As to Count iv, we have already observed that visual identification of the 1st and 5th appellants was very positive and credible. The trial magistrate reached a conclusion that the evidence of the three witnesses PW3, PW4 and PW5 corroborated each other. He noted that the conditions of positive visual identification were good. That there was enough light reflecting from the wall after torch flashed thereon from the attackers torches. That the room was small and therefore concentrated the reflected light. That the robbers spent adequately long time to give witnesses opportunity to observe their faces."***

That there was thus sufficient evidence to prove the offence and justify a conviction.

On the finding of fact on identification by the two lower courts, we are not intent on disturbing the same. We are satisfied that the circumstances though difficult the witnesses positively identified the appellants as the robbers and corroborated one another. We are equally unable to find fault with the way the two lower courts went about analyzing the evidence on identification of strangers in torch light. One of the witnesses was even assaulted (PW4). But still the two courts below found that the evidence of PW3, PW4 and PW5 was sufficient and reliable. The witnesses were able to note and tell the lower court what act each appellant did during the robbery like hitting PW4, looking for money or taking gate keys. They were firm in cross-examination. The two courts had in mind the danger of one being mistaken in a matter of identification. They had in mind the size of the room where the offence took place and that the source of light was torches which PW3 described as bright. Indeed PW4 described the torch that ***Simon Mworia*** (2nd appellant) as one of 5 cells.

The ***Maitanyi*** case remarked on the need in the circumstances as these, when a witness identifying a stranger, forms a strong impression of identification of an assailant and usually gives some description of that to people who may arrive at the scene or the police. Such a victim would vow that if he saw that assailant again, he could identify him/her otherwise a later identification for example from the dock may be suspect.

We have considered this point which ***Mr. Nyachoti*** raised before us. The issue was not raised in the two lower courts for inquiry. However, we have noted that in cross-examination ***PC Benjamin Muthia*** (PW6) told the lower court that: -

"The complainants said they would identify those people if they saw them."

And ***C M*** (PW4) is one such complainant who claimed that he told the police that if he saw his assailants

again he could identify them. He does not appear to have said by what description. However, with the vivid way in which this witness together with PW3 and PW5 described the acts done by the appellants like climbing on the bed and assaulting PW4, leading PW5 from the house to look for money in the shop, we are satisfied that the two courts below well and properly appreciated the subject evidence in the subject case and arrived at a proper conclusion.

In sum we dismiss this appeal in its entirety.

Dated and Delivered at Nairobi this 21st day of March, 2014

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

….....

JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR