IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 114 OF 2012

BETWEEN

CHARLES MURIITHI NYAGA …….. 1ST APPELLANT

PHARIS MUNYI MUNGAI ……...……. 2ND APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Ong'udi &Apondi, JJ.) dated 9th March, 2012

in

H.C.CR.A No. 230 of 2009)

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JUDGMENT OF THE COURT

[1] This is a second appeal from the judgment of the High Court at Embu dated 9th March, 2012. The High Court upheld the conviction and confirmed the sentence meted to the appellants by the trial court. The two appellants, Charles Muriithi Nyaga and Pharis Munyi Mungai the 1st and 2nd appellants respectively and one Jacob Njuki Njue (Jacob) were jointly charged with two counts of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** in the Senior Magistrate's Court at Runyenjes.

[2] The Information placed before the court in regard to the first count was that on 6th December, 2007, at around 8:20 p.m. at Don Bosco Village in Embu District within the then Eastern Province, the appellants jointly with Jacob and another not before the court while armed with dangerous weapons namely a pistol and sticks robbed Elias Njeru Kariuki of a Nokia mobile phone make 6020 S/No. 354840018128919 valued at Kshs. 6,800/=, a Motorolla mobile phone make C350 valued at Kshs. 6,500/=, a black jacket valued at Kshs. 900/= all valued at Kshs. 15,200/= and at or immediately before such robbery used actual violence to the said Elias Njeru Kariuki.

[3] The Information in regard to the second count was that at the afore mentioned date and place, the appellants jointly with Jacob and another not before the court while armed with the above mentioned dangerous weapons robbed Mary Wambeti Njeru of Nokia mobile phone make 1600 valued at Kshs.

3,900/=, a torch valued at Kshs. 100/= and cash Kshs. 1,500/= all valued at Kshs. 4,500/= and immediately after such robbery injured the said Mary Wambeti Njeru on her forehead.

[4] The appellants and Jacob pleaded not guilty. The prosecution called a total of eight witnesses who gave evidence in support of the charge. It was the prosecution's case that on 6th December, 2007, at around 8:20 p.m PW1, Elias Njeru Kariuki (Elias), PW2, Mary Wambeti Njeru (Mary), and their children PW3, Pimrose Wanjiru Njeru (Pimrose) and PW5, Purity Murugi Njeru (Purity) were at home. Elias was asleep in the bedroom while the rest were doing various chores around the house. Purity was seated in the sitting room; when suddenly a man entered the house through the main door which was at the time open. The man ordered Purity to keep quiet. Purity was able to identify the intruder as the 1st appellant. Meanwhile, as Primrose and her sister were busy in the kitchen preparing supper, two men entered the kitchen and greeted them. Primrose noticed one of the intruders was armed with a pistol while the other was armed with a stick. She was able to identify the 2nd appellant as the intruder who was armed with a stick. One of the intruders switched off the kitchen lights and ordered Primrose and her sister to go to the sitting room. At the sitting room Primrose noticed two more intruders guarding their sister. One of the intruders tried to switch off the main lights in the sitting room but he accidently switched on the decorative lights in the sitting room instead.

[5] Mary was outside the house picking clothes from the clothe line. As she was heading back to the house she noticed the lights had been switched off. While at the front entrance of the house, Mary called out to her daughters and inquired why the lights had been switched off. All of a sudden a man who she identified as the 1st appellant appeared at the main door and dragged her into the house. Mary noticed that the man who had pushed her was short and was carrying a black bag. When she got to the sitting room she switched on the lights and noticed that there were two more intruders, one hiding behind the door and another standing near the cupboard. She identified the 2nd appellant was the intruder who was standing near the cupboard. They were ordered to sit down and the lights were switched off.

[6] All this time Elias was in bedroom, he was awoken by movements of people around his bedroom. After a short while the bedroom door was opened and a man carrying a torch came in. The man pointed the torch at Elias, that is when he noticed that the physical features of the intruder who had first entered the room was short and he was armed with a stick; he also saw another intruder armed with a pistol behind the short man. The intruders demanded money. Elias told them he did not have any money with him. The intruders asked Elias to explain why he did not have money yet there were two motor vehicles parked in the compound. Elias got out of bed and requested the intruders to allow him to switch on the bedroom lights to enable them search the room for money. The intruders allowed Elias to switch on the light. With the aid of the electricity light, Elias told the trial court that he was able to identify the 1st appellant as the short man who had a torch.

[7] The intruders took two mobile phones and money from Mary's handbag. Thereafter, the 1st appellant left the bedroom and another intruder who Elias identified as the 2nd appellant went into the bedroom. The 2nd appellant and the intruder who was armed with a gun ordered Elias to get out of the bedroom and go to the sitting room. At the sitting room, Elias saw two assailants guarding his family. According to Elias and Mary, there was enough light in the sitting room that enabled them to identify the intruders. Elias testified that the electricity lights in the corridor and in his son's bedroom which were both next to the sitting room were on and illuminated the sitting room. Elias gave evidence that he also identified Jacob as one of the intruders. Elias was ordered to lie down and his hands were tied up. One of Elias's daughters, Nancy Wanjiru dashed out of the house and banged the door. The noise from the door alarmed the intruders who ran away towards the gate. They injured Mary on her forehead as they were fleeing from the scene. Mary and the children raised alarm and Elias managed to untie himself. Armed with a stool, Elias ran after the intruders. He followed the 1st appellant and hit him with the stool. The 1st appellant fell down but managed to escape before Elias could apprehend him.

[8] Elias testified that the robbers stole two mobile phones and a black jacket from him. Mary noticed that Kshs. 1,500/=, a torch and mobile phone were missing. SGT. Francis Wahome PW4 (Francis) received information from the Embu Police Station control room that a robbery had occurred at Elias's

home. He rushed to the scene in the company of other police officers but by that time, the robbers had escaped. He testified that Elias and his family stated that there were four robbers and they could identify them. On 13th December, 2007, SGT. Francis received information that the 1st appellant had been spotted in the area. Later that night the 1st appellant was arrested while he was in his house. During interrogation, the 1st appellant informed SGT. Francis that he could assist in the arrest of the 2nd appellant and Jacob who were his accomplices. PC Peter Moses Mbevi PW8 (PC Peter), gave evidence that on 19th December, 2008, the 1st appellant assisted the police to arrest the 2nd appellant and Jacob. Identification parades were conducted in respect of each suspect; the appellants and Jacob were positively identified as the assailants by the complainants.

[9] In his defence, the 1st appellant opted for unsworn statement of defence. He testified that he had been arrested on several occasions for selling traditional liquor. On 9th December, 2007 police men went to his home but did not find him. They recovered 20 liters of traditional liquor. The police took the liquor and the 1st appellant's identification card. On 12th December, 2007, while the 1st appellant was sleeping in his house, he was woken up by police. According to the 1st appellant, he was drunk, the police insulted him and arrested him, while at the police station he insulted the OCS and that is why he was put in custody. On 14th December, 2007, he was taken to the OCS's office where he found Elias, Mary, Purity and Primrose. On 16th December, 2007, he participated in identification parade where he was identified by the complainants he had met at the OCS's office. After the parade, PW6, IP Justus Siango (IP Justus), tricked him into signing the identification parade forms on the grounds that he would be released. He denied committing the offence he was charged with.

[10] The 2nd appellant also gave unsworn statement and called one witness. He testified that on 19th December, 2007, while on his way to see one Kinyua a motor vehicle stopped next to him. Four men got out of the vehicle and inquired where he was going. Thereafter, they demanded for his Identification Card which he produced. One of the men accused him of being a thief and he was arrested. He led the men to his home. The men searched his house and took five caps and his mobile phone. On 23rd December, 2007, he was taken to Embu CID office to participate in an identification parade. He testified that the complainants identified him from the parade. He stated that he knew Elias and his family prior to the parade because he had worked for Elias in the year 1996. DW4, Erick Maina Mutahi (Erick), testified that on 6th December, 2007, he went to the 2nd appellant's home at around 5:00 a.m. Both he and the 2nd appellant left to harvest miraa until 7:00 a.m. Erick purchased miraa and went to sell the same at Nyeri. He went back to the 2nd appellant's home at around 7:30 p.m. He stayed with the 2nd appellant up to 10:00 p.m. when he went home.

[11] Jacob gave a sworn statement and called three witnesses in support of his evidence. He testified that on the material day he was in hospital receiving treatment for injuries he had sustained after being attacked. His witnesses confirmed his account.

[12] After considering the evidence on record, the trial court convicted the appellants on both counts and sentenced them to death. The trial court acquitted Jacob on both counts. Aggrieved by the decision, the appellants preferred an appeal in the High Court. The High Court (Ong'udi & Apondi, JJ.) by a judgment dated 9th March, 2012 dismissed the appeal. The appellants filed this second appeal based on the following grounds:-

- ***The learned Judges erred in law and in fact in finding that the appellants identification was not without error.***

- ***The learned Judges erred in law and fact by failing to thoroughly re-evaluate the evidence therefore failing to note that the identification parade was faulty.***

[13] Mr. Kimunya, learned counsel for the appellant, submitted that the appellants' conviction was based on the evidence of identification. According to Mr. Kimunya PW1, Elias, was not in a proper position to identify his assailants. This is because Elias testified that when the robbery happened he was asleep. He

argued that the trial court failed to interrogate the intensity of the light which the complainants' used to identify the appellants. Mr. Kimunya stated that PW2, Mary testified that when she got to the house the lights were off; when she put on the lights, the robbers switched them off. He argued that the issue of how long the lights were on was not interrogated by the trial court. He submitted that the complainants testified that the intruders had caps on but the court did not interrogate whether the caps covered their faces.

[14] Mr. Kimunya argued that the identification parades were not properly conducted. He submitted that Mary in her evidence stated that in the identification parades, there were people of the same height but different complexion. Therefore, the appellants were prejudiced during the identification parades. He stated that the appellants co-accused, Jacob, was identified in the parade but was subsequently acquitted by the trial court. He maintained that Elias had admitted in his evidence that he gave the description of his assailants as young men to the police yet the appellants were not young. He admitted that he could have been mistaken. He urged the Court to allow the appeal.

[15] Mr. Isaboke, Senior Prosecuting Counsel supported the conviction and sentence of the appellants. He submitted that the appellants' conviction was proper and supported by the evidence on record. The robbery took a short time of between 10-15 minutes which was sufficient for the complainants to identify their attackers. He argued that there was proper lighting at the scene for positive identification. Mr. Isaboke argued that the trial court considered the appellants' evidence and found the same not credible. He urged us to dismiss the appeal.

[16] This is a second appeal, that being so by dint of ***Section 361*** of the ***Criminal Procedure Code*** we are restricted to only consider matters of law**.** In ***Chemagong -vs- Republic, (1984) KLR 213 at page 219*** this Court held**,**

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)".***

Based on the foregoing the only issue that falls for consideration is whether the evidence on identification was safe to warrant the conviction of the appellants.

[17] It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. See this Court's decision in ***John Njoroge Mwangi -vs- Republic, - Criminal Appeal No. 55 of 2007.*** In ***Wamunga -vs- Republic, (1989) KLR 424***, this Court held,

> ***"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction".***

Both courts below were concurrent in their findings of fact that the complainants were able to identify their attackers. The two courts found that the appellants were positively identified as some of the robbers who attacked the complainants. In this case the robbery took place at night and therefore the prevailing circumstances can be said to have been somewhat difficult. It was therefore imperative for both courts below to satisfy themselves that the evidence of identification was safe to sustain a conviction.

[18] Both courts below properly tested the evidence of identification. Firstly, they considered the intensity of the light which was available at the material time. Elias testified that he tricked the robbers to switch on his bedroom lights and that is when he managed to identify the 1st and 2nd appellants. Mary was able to identify the 1st and 2nd appellants when she entered the sitting room and switched on the lights. Purity was able to identify the 2nd appellant using the sitting room lights before they were switched

off. Primrose was able to identify the 1st appellant when he entered the kitchen and greeted her because the kitchen lights were on. We find the two courts were correct in finding that the intensity of the light at the material time enabled proper identification of the robbers. In ***Maitanyi -vs- Republic, (1986) KLR 198,*** this Court in, holding that an inquiry as to the intensity of light is essential in testing the accuracy of evidence of identification held;-

> ***"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 position relative to the suspect, 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....' See Wanjohi & Others -vs- Republic (1989) KLR 415."***

[19] On the issue of the caps, it is clear from the record that the complainants testified that despite the robbers having caps they did not hide or conceal their faces. The complainants were able to get good impression of the robbers' physical attributes. Secondly, it was not disputed that after the robbery the complainants gave a detailed description of the assailants to the police. They described the clothes the robbers were wearing as well as their physical attributes. In ***Maitanyi -vs- Republic, (supra)***, this Court held,

> ***"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 came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained".***

[20] On the issue of the description of the ages of the assailants, the trial court correctly held as follows:-

> ***"I also do not agree with the 1st accused (1st appellant) and the other accused persons that because the complainant described her attackers as young men below 25 years then that automatically rules them out because of their ages. I have looked at the 1st and 2nd accused. Though they may agree from their looks and particularly in circumstances where the robbery occurred, it is understandable that one may have thought they are young. (sic) the two do not entirely look old".***

Thirdly, the accuracy of the description and identification of the appellants was tested in the identification parades that were conducted. From the record, it is clear that each parade comprised of people of the same height. The appellants never raised any objection as to the manner in which the identification parades were conducted. In ***James Tinega Omwenga –vs- Republic, - Criminal Appeal No. 143 of 2011***, this Court expressed itself as follows:-

> ***"The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded is worthless".***

In the case of ***Njoroge -vs- Republic, (1987) KLR 19***, this Court stated:-

> ***"Dock identification is worthless the court should not rely on dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade".***

[20] Lastly, on the issue of the alibi evidence given by DW4, Erick, in respect of the 2nd appellant, the trial court disregarded the same on the grounds that the witness was not credible. This opinion was formed by the trial court which had the opportunity to see the witness's demeanour. There are no reasons or grounds for interfering with the trial court's finding as to the demeanour and credibility of the said witness. For the foregoing reasons, we think we have said enough to demonstrate this appeal lacks merit; it is dismissed with the result that the conviction and sentence imposed on the appellants stand.

Dated and delivered at Nyeri this 3rd day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR