IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CRIMINAL APPEAL NO. 300 OF 2010

BETWEEN

KENNEDY ORENGE WAMUREMBA …….. 1ST APPELLANT

TEKETI OLE KIU ……...…… 2ND APPELLANT

STEPHEN MAINA WANJA ……...…… 3RD APPELLANT

AND

REPUBLIC ……..….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Maraga & Emukule, JJ.) dated 12th March, 2010

in

H.C.CR.A No. 142 of 2008)

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JUDGMENT OF THE COURT

1. The appellants jointly with Isaac Sitonic Massay and Lesemoi Kiok were charged with three counts of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** at the Senior Resident Magistrate's Court at Narok. The particulars of the first count were that on 12th August, 2006 at Olmusakwa trading centre Nkareta in Narok District within the then Rift Valley Province, the appellants and their co-accused, jointly with others not before the court robbed Robert Maleya Letoluo of cash Kshs. 1,300/=, a home theater/DVD/radio player, 2 wrist watches, Motorola C115 & C117 cellphones, a dozen of Eveready batteries, a Sanyo radio cassette, a maasai simi, a Sagem and Nokia 3310 cellphones all valued at Kshs. 57,565/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Robert Maleya Letoluo. The particulars of the second count were that on the above mentioned date and place the appellants and their co-accused, jointly with others not before the court robbed Stephen Nadunguenkop of cash Kshs. 47,000/=, 18 x 300 ml bottle of soda, 6 x 250 g packets of milk,

Nokia 1600 cell phone, a pair of safari boots, four pairs of Eveready batteries, a black jacket, a Sony radio cassette player and a maasai simi all valued at Kshs. 57,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Stephen Nadunguenkop. On the third count, the particulars were that on the aforementioned date and place, the appellants and their co-accused jointly with others not before the court robbed James Kiok of cash Kshs. 5,000/= and a Motorola C117 cell phone all valued at Kshs. 7,700/= and at or immediately before or immediately after the time of such robbery used actual violence to the said James Kiok.

2. The appellants and their co-accused pleaded not guilty to all charges. The prosecution called a total of 11 witnesses. It was the prosecution's case that on 12th August, 2006 at around 1:00 a.m. PW2, Stephen Nadunguenkop (Stephen) and PW3, James Rakita Kiok (James) were asleep in Stephen's shop. The shop had been subdivided into two parts; one part was serving as the shop while the other served as the bedroom. James got up to answer a call of nature. He opened the door and saw a man standing near the door; the man was holding a huge stone ready to hit the door. James directed the torch he was carrying at the said man and identified him as the 3rd appellant, a customer who frequented his hotel. James testified that the 3rd appellant retreated while screaming and four men emerged. James ran back into the shop and hid under the bed. Immediately thereafter, Stephen saw about five people enter into the shop; the assailants pointed their torches directly at Stephen's face and as a result he was not able to identify any of them; they tied up his hands. The assailants asked Stephen where James had gone to; one of the assailants bent down and peeped under the bed; James came out from under the bed and was able to identify the said assailant as the 3rd appellant using the light from torch he was still holding. The 3rd appellant kicked James on his right knee, took away the torch he had and ordered him to lie down. According to James, the 3rd appellant took Kshs. 5,000/= from his pocket. Stephen testified that the robbers took Kshs. 47,000/= from his jacket that was hanging on the wall. They also took a Nokia 1600, a Sony radio cassette, one pair of safari boots, one black jacket, six packets of milk, four pairs of torch batteries and 18 bottles of soda. Both James and Stephen testified that the assailants were speaking in Kiswahili. After the robbery the robbers locked James and Stephen in the shop.
3. In the same neighbourhood and on the same day at around 2:00 a.m. PW1, Robert Maleya Letoluo (Robert), was asleep in his room with his wife, PW4, Janet Naserian Letuluo (Janet) and daughter PW6, Naanyu Letoluo (Naanyu). Robert woke up and saw some light at a gap near the roof, above and below the door of the room and through the window; he also heard people speaking outside the room. He got out of bed to check who was outside. Suddenly, the door was hit by a large stone and broke into pieces; five men entered the room and ordered Robert to go back to bed. The noise woke up Janet who remained in bed. Janet testified that the room was filled with bright beams of light from torches; the robbers were armed with a gun, swords and clubs. The assailants demanded for Kshs. 100,000/= from Robert. Robert did not have the said money and instead gave them Kshs. 600/= that was in his jacket. The assailants continued demanding for more money; one of the assailants pointed the gun he was armed with at Robert while another assailant hit him twice. Janet testified that one of the assailants asked her in Maasai language to show them where the money was. Fearing for his life, Robert called his son, PW5, Daniel Letuluo (Daniel), who was in the adjacent room to open the shop for the assailants to take anything they wished. After opening the shop, three of the robbers went into the shop, meanwhile Daniel tried to get help from their neighbours. As he was running, Daniel almost collided with the 2nd appellant near the shop; the 2nd appellant ran away from Daniel screaming while another assailant got hold of Daniel and led him back to his room. It was Daniel's evidence that he was able to recognize the 2nd appellant who was well known to him. The 2nd appellant used to be the watchman at Daniel's school, Olmusakwa Primary School.
4. While the robbery was ongoing, Naanyu woke up and ran out screaming. One of the assailants ran after her and brought her back to Janet; another assailant threatened Naanyu to keep quiet or he would kill her. Janet testified that she was able to identify the assailant who threatened Naanyu as the 3rd appellant using the light of the torches the assailants had; the said assailant was tall, well built, brown in complexion and had one dark tooth. Janet testified that she was able to identify the assailant who ran after Naanyu as Isaac Sitonic Massay. She was also able to identify the 1st

appellant as one of the assailants; she noticed that the 1st appellant had a missing tooth. It was the prosecution's case that the assailants took a Nokia 3310, Motorola C115, Sagem mobile phone, two wrist watches and a DVD/home theatre and Kshs. 1,300/= . The assailants asked Daniel for a bag to carry the stolen items; Daniel gave them yellow paper bags and a travel bag. After the robbery, the assailants locked Robert, Janet and Naanyu in one room and Daniel in another room.

5. Thereafter, on the same night Daniel informed his parents that he had recognized the 2nd appellant as one of the assailants but they did not believe him. The following morning the complainants informed their neighbours what had transpired. PW9, Sempoi Ole Kiewua (Sempoi), testified that Daniel showed the neighbours who had gathered at the scene where he had seen the 2nd appellant. They followed the footprints heading to Olmusakwa Primary School, where the 2nd appellant worked. The 2nd appellant was arrested by members of the public and taken to the police station. Sempoi also testified that following the description given by Janet, the 3rd appellant was arrested by members of the public at the Centre. On 15th August, 2006 while PW8, Kuteret Ole Pere (Kuteret), was outside his business he noticed the 1st appellant who matched the description given by Janet of one of the assailants; Janet had described the assailant as having brown teeth, a missing upper tooth and big eyes; the 1st appellant was arrested by members of the public. Thereafter, he was put amongst other people and Janet identified him; he tried to run away but was restrained by members of the public. The 1st appellant was handed over to the police.
6. On 30th August, 2006 while Naanyu was at the saloon she recognized a man who had peeped into the salon as one of the assailants. She informed Janet who also recognized the assailant as Isaac Sitonic Massay; he was later arrested. The appellants and their co-accused were arraigned in court and charged accordingly.
7. The appellants and their co-accused gave unsworn testimonies in their defence. The 1st appellant testified that on 15th August, 2006 he fenced his land up to around 2:00 p.m. when he went to purchase some items at Stephen's (PW2) shop. On his way home the 1st appellant met PW7, Joel Ole Keiwua (Joel), who requested him to go back with him to Stephen's shop. The 1st appellant agreed to go back thinking that Joel wanted to hire his services. When they arrived at the shop, Joel and Stephen started talking in Maasai language which the 1st appellant did not understand. Stephen asked the 1st appellant if he was involved in the robbery at his shop; the 1st appellant told him he was not aware of the said robbery. He was then taken to a hotel room and ordered to sit down. Later on James (PW3) and Janet (PW4) came to the room and stated that they did not see the 1st appellant during the robbery. After a while, Janet changed her mind and stated that the 1st appellant was one of the assailants. The 1st appellant stated that he was tied up and beaten up. On 16th August, 2006 the police came to the room at around 11:00 a.m. and arrested the 1st appellant. The 1st appellant denied committing the offences he was charged with.
8. The 2nd appellant gave evidence that he was a watchman at Olmusakwa Primary School; on 11th August, 2006 he was ill and went for treatment at Narok District Hospital; thereafter, he went home and did not report to work that day. On 13th August, 2006 at around 10:00 a.m. some people went to his house and arrested him; he was later taken to Narok Police Station and charged. He maintained that he was not involved in any robbery. The 3rd appellant testified that on 1st August, 2006 he went to his mother's house at Ngoben Centre to take care of her shop and to harvest maize because she had traveled to Nyeri. After three days he inquired from his mother why she had taken long to return; his mother informed him that his grandmother was unwell and requested him to be patient. Eventually the 3rd appellant's mother came back on 12th August, 2006. On the same day at around 8:00 p.m. men came to the house and James's (PW3) brother who was his neighbour told the rest that the 3rd appellant was one of the assailants. Suddenly, the men pounced on the 3rd appellant and started beating him up; they tied him up with a rope and continued beating him up; when the 3rd appellant's mother came to his rescue she was also beaten up and directed to go into the house. The men led the 3rd appellant out of the house to a hotel at Musakwa and tied him up. He stayed in the hotel until 13th August, 2006 when the police came and arrested him. He maintained that he never committed any of the offences. Isaac Sitonic Massay and Lesemoi Kiok

also denied committing the offences.

9. Convinced that the prosecution had proved its case, the trial court convicted the appellants and Isaac Sitonic Massay with the three counts of robbery with violence and sentenced them to death. The trial court acquitted Lesemoi Kiok for lack of evidence. The appellants and their co-accused preferred an appeal to the High Court. Unfortunately, Isaac Sitonic Massay died while the appeal was still pending in the High Court, hence his appeal abated. By a judgment dated 12th March, 2010, the High Court (Maraga & Emukule, JJ.) dismissed the appellants appeal hence this second appeal based on the following grounds:-

- ***The learned Judges erred in both law and fact in convicting the appellants while relying on the evidence of identification by single witness and yet failed to observe that the circumstances could not favour positive identification unless tested in an identification parade.***

- ***The learned Judges erred in both law and fact in convicting the appellants yet failed to scrutinize and observe that the evidence on record was meager and flimsy and could not sustain a safe conviction.***

- ***The learned Judges erred in both law and fact by convicting the appellants relying on the evidence based on mere suspicion which lacked proof to incriminate the appellants to the commission of the offence.***

- ***The learned Judges erred both in law and in fact by rejecting the defences given by the appellants when it was the duty of the prosecution to disprove the defence of alibi by evidence.***

- ***The learned Judges erred both in law and in fact by failing to consider the question of coruscation (sic) in the evidence of minors in the suit.***

- ***The learned Judges erred in both law and fact by convicting the appellants on insufficient evidence which did not meet the standards (sic) of proof which is beyond any reasonable doubt.***

10. Mr. Bichanga, learned counsel for the appellants, submitted that the state had conceded before the High Court that the identification of the 1st and 3rd appellants was not proper. He argued that the only evidence against the 2nd appellant was from a minor, PW5 (Daniel) who was 14 years old; no *voire dire* was conducted upon the said minor; hence conviction of the appellant could not stand. He submitted that PW1 (Robert), said he knew the 2nd appellant after his arrest which amounted to dock identification and had no evidential value. Mr. Bichanga argued that identification of an assailant ought to be given at the initial report which was not done in this case. According to him, PW4 (Janet) also gave description of the assailants after the appellants were brought to court. Mr. Bichanga submitted that the High Court erred by not taking into consideration that the prosecution's evidence was full of contradictions. He urged us to allow the appeal.
11. Mr. Mutai, Senior Public Prosecuting Counsel, in conceding the appeal, submitted that there was no proper identification of the 1st and 3rd appellants; an identification parade ought to have been conducted in respect of the said appellants. According to him, the PW4's identification amounted to dock identification. In respect of the 2nd appellant, Mr. Mutai submitted that the evidence on recognition was not sufficient.
12. We have considered the record of appeal, the grounds of appeal, submissions by counsel and the law. This being a 2nd appeal and by dint of ***Section 361*** of the ***Criminal Procedure Code***, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Mwita –vs- R (2004) 2 KLR 60***. In ***Kaingo -vs- R (1982) KLR 213*** at p. 219 this Court said:-

"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 any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"

13. From the record it is clear that none of the stolen items were recovered from the appellants and the prosecution's case was based on identification. Both lower courts made concurrent findings of fact that the appellants were positively identified as some of the assailants. Therefore, the issue that falls for our determination is whether the identification was proper and safe to warrant the conviction of the appellants. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested**.** In ***Kariuki Njiru & 7 others –vs- R- Criminal Appeal No. 6 of 2001***, this Court stated:-

> ***"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."***

See also ***Wamunga -vs- Republic (1989) KLR 424***

14. The only evidence in respect of the identification of the 1st appellant was given by PW4 (Janet). She testified that she was able to identify the 1st appellant with the aid of the light from the torches which the assailants had. She testified that she was able to see that the 1st appellant had a missing upper tooth; it is that description that enabled members of the public to arrest the 1st appellant. In ***Maitanyi -vs- R(1986) KLR 198*** 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… If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description..***

From the record, it is not clear what kind of description Janet gave of the 1st appellant to her neighbours. In her evidence she described the 1st appellant as a person who has a missing upper tooth. While PW8 (Keturet) ,who participated in the arrest of the 1st appellant, testified that he identified the 1st appellant following the description given by Janet; that the description given by Janet of the assailant was that he had a missing upper tooth, brown teeth and big eyes. The two descriptions are different in that the one given by Keturet is more detailed compared to the one given by Janet in her evidence. Further, in ***Stephen Kiberenge alias Zakayo Muriithi & Another –vs- R- Criminal Appeal No. 483 of 2010,*** this Court held,

> ***"We find that in identification of a stranger, the witness ought to give the description of the attacker to the police to enable the court to test whether his/her observation skills are accurate and whether the evidence on identification is consistent with the description that was given."***

See also ***Mohamed Elibite Hibuy & Another -vs- R – Criminal Appeal No. 22 of 1996.*** The purpose of giving the description of an assailant in the initial report is to test the accuracy of the identification evidence of a witness. In this case, PW11, PC Simon Ihaji (PC Simon), testified that Janet had not specifically described the 1st appellant to the police prior to his arrest by members of the public but had stated she could identify him. On cross examination, PC Simon further testified that Janet only indicated that the 1st appellant had an upper missing tooth in her further statement which was recorded on 31st August, 2006 after the 1st appellant was arrested. Janet also in her evidence confirmed that the statement she recorded did not indicate the

description of the 1st appellant. Doubt arises as to whether Janet was able to get the physical impression of the said assailant during the robbery or was her description based on what she observed of the 1st appellant after he was arrested. We find that there was no way of testing the accuracy of Janet's identification of the 1st appellant. In ***James Tinega Omwenga –vs- R- 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 as worthless."***

We find that the identification of the 1st appellant was not proper and safe to justify his conviction.

15. PW5 (Daniel) testified that when he went to open the shop he recognized the 2nd appellant with the aid of the moonlight. It was the appellant's contention that the evidence of Daniel should not have been considered because the trial court failed to conduct *voire dire* in respect of the said witness. ***Section 19*** of the ***Oaths and Statutory Declarations Act*** provides that before the reception of the evidence of a child, the court is required to conduct *voire dire* examination to determine whether or not the child understood the nature of the oath or if not, whether he/she was possessed of sufficient intelligence to justify the reception of the evidence. In this case it is not in dispute that Daniel was 14 years when he gave his evidence. We note from the record that the trial court did not conduct a *voire dire* examination. In ***Cleophas Ochieng Otieno –vs- R- Criminal Appeal No. 328 of 2009*** this Court while considering voire dire examination expressed itself as follows:-

> ***"The record shows that the child gave unsworn evidence. In our view, in absence of an inquiry and a finding that the child was possessed of sufficient intelligence and understood the duty of speaking the truth, it cannot be said that the child was a competent witness or that her statement had an evidentiary value."***

See also ***Kinyua –vs- R (2002) 1 KLR 256.*** In the circumstances, we find that Daniel's evidence had no evidential value since his ability to tell the truth was not tested. Therefore, we find that there was no positive recognition and/or identification of the 2nd appellant to justify his conviction.

16. It was the evidence of both PW3 (James) and PW 4(Janet) that they had identified the 3rd appellant during the robberies. James testified that he was able to identify the 3rd appellant when he opened the door to answer a call of nature; the 3rd appellant was a regular customer in his hotel and had known him for a period of one year prior to the incident; he used to live nearby. He further testified that he did not know the 3rd appellant's name but knew him physically. We cannot help but note that James admitted that he never gave a description of the 3rd appellant to the police in his initial report and further he did not lead the police to the 3rd appellant's arrest. The question that arises is why didn't James give the description of the 3rd appellant if he was well known to him in his initial report?; Why didn't he lead the police to the arrest of the 3rd appellant who he had alleged lived close to his hotel?; Did James recognize the 3rd appellant after his arrest? Based on these questions we find that the recognition of the 3rd appellant by James was not positive. See ***Maitanyi -vs- R (supra)***.
17. On the other hand, Janet testified that the 3rd appellant was arrested by members of the public pursuant to the description she had given of him. The assailant was well built, brown in complexion and had one dark tooth. It was her evidence that she did not participate in his arrest. We note that PC Simon, the investigating officer, testified that the said description of the 3rd appellant was not recorded in Janet's initial report. We also note that PW9 (Sempoi), testified that

the 3rd appellant was arrested following the description given by Janet. However, Sempoi did not give details of the description relied on to arrest the 3rd appellant. In ***Simiyu & Another –vs- R (2005) 1 KLR 193***, it was held,

> ***"In every case in which there is a question as to the identity of an accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of and by the person or persons to whom the description was given."***

18. Janet gave evidence that after his arrest, she saw the 3rd appellant waiting to be picked up by the police. Doubt arises as to whether Janet was able to positively get the impression of the 3rd appellant's physical attributes during the incident or was her identification based on what she saw after the 3rd appellant was arrested. Taking note of the foregoing, we find that the identification of the 3rd appellant was not positive to warrant his conviction.
19. The upshot of the foregoing is that we find that the identification of the appellants was not positive to warrant their conviction. Consequently, we allow the appeal, quash their conviction and set aside the sentence meted out against them. We order the appellants to be set at liberty unless otherwise lawfully held.

Dated and delivered at Nakuru this 23rd day of October, 2014.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR