IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CRIMINAL APPEAL NO 154 OF 2014

BETWEEN

GEOFFREY KIPKEMOI TUIYA ……………….………….1ST APPELLANT

BENARD TANUI …………………………….…………..2ND APPELLANT

HILLARY KIPNGENO ……………………………………3RD APPELLANT

AND

REPUBLIC ……………………………………………………. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Ouko & Wendo, JJ.) dated 28th March, 2013

in

H. C. CR. A No 234 of 2007)

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JUDGMENT OF THE COURT

1. The appellants jointly with David Kipkorir Kimalel (who was acquitted) were charged with the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code*** at the Chief Magistrate's Court at Nakuru. The particulars of the offence were that on the 10th day of October, 2006 at Njokerio Estate-Njoro in Nakuru District within the then Rift Valley Province, the appellants and their co-accused, jointly with others not before the court robbed Peter Waweru Mbuthia of cash Kshs. 9, 000/= and a Nokia Mobile Phone (2650) valued at Kshs. 7,000/= all valued at Kshs. 16, 000/= and at or immediately before or immediately after such robbery used actual violence to the said Peter Waweru Mbuthia.
2. The appellants and their co-accused pleaded not guilty to the charge. The prosecution called a total of four witnesses. It was the prosecution's case that on 10th October, 2006 at 6.45pm PW1, PWM (P) had closed his Wines and Spirits Shop at Egerton, and was headed home accompanied by his wife, PW2, JWW(J) and their child SN (S) aged 6 years old. P was riding a bicycle on which he carried S with J following him on foot closely from behind. From a distance of about 30 meters, P

saw a group of boys who had gathered on the road he and his family were using. As they drew nearer, P recognized the boys as:- the 1st appellant who once worked for him at his shop, the 2nd appellant who was a brother to the 1st appellant and the 3rd appellant who was a cousin to the 1st and 2nd appellants. The boys used to live together. To avoid leaving J far behind P rode his bicycle slowly as he approached the boys on the stretch of murram road with a Kaifer (sic) fence by the side. A man who P recognized as another cousin to the 1st appellant was leaning on the fence but as P and J came closer to where the group was, he began to move closer to the road. At this juncture P's wife informed him that she suspected that the assembled group had bad intentions; whereupon he told her not to worry as they would be home in a short while. P kept going while his wife came to a halt.

3. Upon reaching the group which had assembled on the road, the cousin to the 1st appellant had now moved to the middle of the road and blocked P's path as he held the handle bars of P's bicycle effectively barring him from moving any further. It also became apparent that the group which had blocked the road comprised of 8 young men. According to P he and the cousin to the 1st appellant then faced each other with neither of them talking to the other. Moments later, P was punched on the face by the cousin to the 1st appellant sending him sprawling towards the Kaipha (sic) fence. The rest of the group remained unmoved by the unfolding events even as the complainant screamed and asked the 1st appellant who was 5 meters away what was wrong. The 1st appellant did not respond, instead his cousin shouted in the Kalenjin language prompting the 1st, 2nd and 3rd appellants to start moving towards P.
4. Four other assailants went after P's wife who by this time was just about to get to the couple's home. In the meantime, the first group comprised of four assailants who wore jackets kept speaking in the Kalenjin language as they moved towards P. Suddenly, they all removed *rungus* (Clubs) from underneath their jackets and began to hit P at will with their primary target being his head. To shield himself from the blows which were directed at his head, P covered his head with his left hand albeit without success. P sustained deep cuts to his head. At some point he managed to run away from his assailants but only for a short while, as they pursued him relentlessly and continued to hit him with their *rungus* (Clubs). As he approached his gate in his bid to run to safety, the 1st and 3rd appellants and the cousin to the 1st appellant retreated, while the 2nd appellant gave chase only for him to slide on a sandy patch. Upon arrival at his gate, P tried to open it, but could not do so fast enough, giving the 2nd appellant time to regain his footing and catch up with him.
5. The 2nd appellant continued to inflict blows upon the complainant's head with his *rungu* (Club). P received a hard blow to the right side of his head near the ear and fell down as a result. Not one to be deterred, the assailant continued with the assault until P became unconscious. P regained his consciousness at Egerton Hospital where he was taken for treatment. The entire ordeal took 3-4 minutes during which time P was able to see his assailants even as dusk approached. Upon regaining consciousness, he found his head bandaged, whereupon he touched his pockets and realized that he had lost several items namely:- Kshs. 9,000/= in cash which was in his pocket at the time he left his shop and a Nokia Mobile Phone (2650).
6. Subsequently, P was transferred to the War Memorial Hospital Nakuru for further treatment for a period of 3 days. His condition did not improve and he was transferred to Kijabe Hospital. Upon discharge, P reported to Njoro Police Station where he recorded a statement and was issued with a duly filled P3 form. His parents had reported the robbery to the police on the night he was attacked. Prior to the attack, P had lodged a complaint with the police with regard to the 1st appellant who had stolen Kshs. 40,000/= from him by virtue of being his servant leading to his arrest and arraignment in court. Thereafter, the 1st appellant's parents intervened on behalf of their son and urged P to forgive him. He agreed to the proposal made by the 1st appellant's parents and entered into negotiations with them culminating into an agreement dated 15th September 2005 whose tenor and effect was that P would withdraw the case against the 1st appellant namely:- **(Nakuru CR 1302/06-Republic vs. Geoffrey Kipkemoi Tuiya)**; while the 1st appellant in turn would return to work at P's Wines and Spirits shop with part of his monthly salary being deducted until such time that he had repaid the money he had stolen from his employer. P was scheduled to

withdraw the case in question on 19th September, 2006.

7. On 18th September, 2006 the 1st appellant stole a further sum of

Kshs. 18, 000/= from P and absconded from work. On 19th September, 2006 when P and the 1st appellant appeared in court, the 1st appellant informed him that he would refund the monies he had stolen from him but would not work for him anymore. P then requested the prosecutor to give him and the 1st appellant time to iron out their differences. The 1st appellant did not refund the complainant's money as he kept asking his former employer to wait. Tired of the foregoing state of affairs, P reported at Njoro Police Station in a bid to compel the 1st appellant to abide by the terms of their agreement. He visited the 1st appellant's home shortly thereafter accompanied by police, only for the 1st appellant to escape.

8. Thereafter, the 1st appellant called P vide his number namely: - 0722-456617 and relayed a threatening message to the effect that he would finish P if he had decided that they fight it out (*"wapambane").* The 1st appellant told him that he would finish him before the case (supra) was over. It was also P's testimony that he recognized the 1st appellant's voice as he had worked for him for over 1 year. P duly reported the threats directed at him to the Investigating Officer. Things went quiet thereafter until 10th October, 2006 when he was attacked. P and the 1st appellant were expected back in court on 11th October, 2006 for purposes of informing the court whether they had arrived at a settlement with regard to their earlier case (supra). The 1st appellant made it to court on the said date and was promptly arrested, while P was unable to attend on account of the injuries he had sustained the day before.
9. Upon discharge from hospital, P and his wife started to receive threatening calls vide 0727-591710 which belonged to P's wife. The callers informed J that they had not finalized the job they had come to do. P instructed his wife not to receive any calls from strange numbers, and that the same should be passed on to him. It was also P's testimony that he could not recognize the voices behind the threatening calls. Later, P reported the threats to the police leading to the arrest of the 3rd appellant and his accomplice at Kericho.
10. The evidence of PW2 (J), PW3 (PC Hillary Kimutai) and that of PW4 (Jonathan Momocho) a Clinical Officer was in tandem with P's evidence that he had been robbed of Kshs. 9, 000/= in cash and his Mobile Phone (Nokia 2650), violence had been visited upon him in the process by persons known and unknown to him and that he had sustained serious injuries. It also came to light that Peter had lodged a case against the 1st appellant on account of theft of money, and that the same was yet to be conclusively determined or settled out of court for that matter.
11. Upon consideration of the facts, the evidence adduced by the prosecution and the law, the trial magistrate convicted the 1st, 2nd and 3rd appellants for the offence of robbery with violence and subsequently sentenced them to death as required by law. A co-accused to the appellants herein was acquitted on account of lack of sufficient evidence linking him to the offence. Aggrieved by the decision of the trial magistrate, the appellants lodged an appeal at the High Court against their conviction and sentence. The High Court upheld the conviction and sentence vide a judgement dated 28th March, 2013(Ouko &Wendo, JJ.) hence this second appeal based on the following grounds:-

- ***THAT the learned Appellate Judges erred in law and in fact in failing to note that the proceedings as regards PW3 and PW4 were a nullity as their evidence was led by a police officer below the rank of an inspector as was then provided under Section 85 (2) of the Criminal Procedure Code-Cap 75.***

- ***THAT the learned Appellate Judges erred in law in arriving at a finding that the appellants were properly recognized at the scene by the complainant (PW1) and by PW2 irrespective of the glaring evidence that the circumstances obtaining were difficult and not conducive for any recognition and identification.***

- ***THAT the learned Appellate Judges erred in law and in finding that PW2 knew the 1st and 4th***

Appellants Geoffrey Kipkemoi Tuiya and Benard Tanui the then 1st and Accused respectively whereas the testimony of the said witness was that she did not know the 2nd Appellant.

- ***THAT the learned Appellate Judges erred in law in holding that PW2 personally made a report attack as regards the case, to PW3 whereas the evidence by the said PW2 was to the contrary.***

- ***THAT the learned Appellate Judges erred in law in failing to note that the OB form produced revealed that the age of injuries on PW1 that the age of injuries as PW1 was 12 days (from the date the said P3 form was filed, that is 29/10/2006) thus corroborating evidence that the said injuries were not occasioned on 10/10/2006 as alleged and report but on 18/10/2006 when he was referred to hospital.***

- ***THAT the learned Appellate Judges erred in law in arriving at a finding that a proper report that linked the Appellants to the offence was made vide OB 27 / 10 /10 /2006 despite the fact that neither the reportee (sic), one DAVID GITAU KINYANJUI was called as a witness nor PC Gituathi who took the said report now that is the only report disclosing the existence of the robbery incident.***

- ***THAT the learned Appellate Judges erred in law in finding that the said report was sufficient to tie the Appellants to the offence irrespective of its failure to mention the Appellants as the perpetrators.***

- ***THAT the learned Appellate Judges erred in failing to note that the reportee (sic) of OB NO 27 of 10th October, 2006 never disclosed the relationship of the attackers and the victim or whether he knew them as to be sufficient enough, to the exclusion of any other, other than the Appellants.***

- ***THAT the learned Appellate Judges erred in law in failing to note that PW3 never identified and / or recognized one DAVID GITAU KINYANJUI as the person who reported incidence.***

- ***THAT the learned Appellate Judges erred in law and in failing to note that (sic) 1st appellant was greatly prejudiced with investigations carried out by PW3 as he had previously acted against them and in favour of PW1 and PW2 and this affected the 2nd and 3rd appellants.***

- ***THAT the learned Appellate Judges erred in law and in failing to analyze salient factual issues as mandated by law and thus the concurrent finding of fact was erroneous and as such this Honorable Court is invited and urged to upset those findings of fact and quash the conviction.***

12. At the hearing of this appeal, Mr. Maragia, learned counsel for the appellants, submitted that the prosecution of the appellants in the trial court was done by a Police Corporal contrary to the provisions of ***Section 85(2)*** of the ***Criminal Procedure Code***. It was also his submission that the proceedings at the trial court were conducted before the enactment of ***Statute Law (Miscellaneous Amendments) Act-No 7 of 2007*** which subsequently amended the section in question, and were therefore a nullity. Counsel placed reliance on the case of ***Joseph Kamau Gichuki –vs- R-Criminal Appeal No 523 of 2010 (Nairobi)*** and urged the court to expunge the testimony of PW3 (PC Hillary Kimutai) and PW4(Jonathan Momocho). According to learned counsel, if the evidence of PW3 (PC Hillary Kimutai) and PW4 (Jonathan Momocho) were expunged then the evidence of PW1 (Peter) and PW2 (Josphine) could not stand.
13. Counsel for the appellants also submitted on the issue of identification. It was his submission that the robbery took place in 3-4 minutes and this period was insufficient for the victims to see the attackers and visualize them adequately. The Court's attention was also drawn to the failure of the complainant to disclose the source of light which made it possible for him to identify the appellants. According to counsel for appellants, there was no credible evidence on identification to warrant the conviction of the appellants.
14. Counsel for the appellants also submitted on bias on the part of PW 3 (PC Hillary Kimutai) who

was the investigating officer. It was his submission that having acted as the arresting officer in a previous case (supra) involving the 1st appellant, he was unlikely to remain objective in the present case where he was now the investigating officer. It was also submitted that PW3 only mentioned the 1st appellant in his testimony. No mention was made of the 2nd and 3rd appellants. The appellant's counsel also faulted PW3 for failing to call two witnesses namely: - PC Gituathi and David Gitau Kinyanjui thereby causing prejudice to the appellants. Finally, counsel submitted that the High Court did not re-evaluate the facts whereas it was allowed to do so by dint of ***Section 361*** of the ***Criminal Procedure Code***. According to counsel, this Section would apply even where there were concurrent findings by the two courts below. He urged us to allow the appeal.

15. Mr. Omutelema, Senior Assistant Director of Public Prosecutions, appeared for the state and opposed the appeal. He submitted that the record of the trial court showed that the prosecutor was C.I.P. that is a Chief Inspector of Police. According to him, the typed proceedings of the trial court's record contained a typographical error to the effect that the prosecutor was a corporal, which was not the case. Counsel also submitted that although PW1 (P) and PW2 (J) were a couple, that did not vitiate their independence as they were credible eye-witnesses. It was also submitted that there was no fabrication of the events of the material date as PW1 (P) had reported the threats issued by the 1st appellant to PW3 (PC Hillary Kimutai).The threats in question came to pass in form of the attack on PW1 (P) prompting PW3 (PC Hillary Kimutai) to investigate. Counsel further submitted that the attackers were well known to PW1 (P), and that there was no possibility of error in recognizing the appellants. Failure to call the reportee (sic) was not fatal as what the reportee (sic) would have said was contained in the OB. Finally, learned counsel submitted on the subject of bias by stating that there was no scintilla of evidence on record to show that the Investigating Officer was biased. In the same vein, it was also learned counsel's submission that the question of a grudge between the Investigating Officer and the appellants was considered by the trial court, and was found to lack merit. He urged us to dismiss the appeal.

16. We have considered the record of appeal, the grounds of appeal, submissions by counsel and the law. We remain alive to the fact that this is a 2nd appeal, and by dint of ***Section 361*** of the ***Criminal Procedure Code***, this Court's jurisdiction is confined to matters of law only. In the same vein, we reiterate as this Court has stated severally, that 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 to have demonstrably to have acted on wrong principles in making the findings. See ***Daniel Kabiru Thiong'o –vs- R-Nyeri Criminal Appeal No 131 of 2002(unreported)*** where this court stated that:-

> ***"An invitation to this court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so"***.
>
> See also ***Christopher Nyoike Kang'ethe –vs- R-Nairobi Criminal Appeal No 306 of 2005 [2010] Eklr***.

17. From the record two key issues emerge for determination namely:-

a. ***Whether the 1st, 2nd and 3rd appellants were positively identified as the persons who violently robbed PW1;***

b. ***Whether the prosecutor who led PW3 and PW4 as they tendered their evidence was properly qualified in terms of Section 85(2) of the Criminal Procedure Code (as then enacted).***

18. Identification remains an indispensable part of the process of ascertaining the identity of persons who are culpable of the commission of an offence.

In ***Cleophas Otieno Wamunga –vs- R-Kisumu Cr App No 20 of 1982***, this court stated as

follows:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification".***

We are also persuaded by the words of Lord Widgery C.J. in ***R-vs-Turnbull (1976) 3ALLER 549*** in the following terms:-

> ***"Recognition may be more reliable than identification of a stranger but even when the witness in purporting to recognize someone which he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made…..***

19. Applied to the present appeal, and having perused the record of the trial court and that of the 1st appellate court, it becomes manifestly clear that PW1 recognized all the appellants herein as the persons who violently robbed and assaulted him on the material date. In his evidence PW1 testified that the 1st appellant once worked for him at his Wines and Spirits shop and that their employer-employee relationship only came to an end when the 1st appellant stole the sum of Kshs. 40,000/= from him. PW1 also testified that he knew the 2nd appellant as a brother to the 1st appellant, and the 3rd appellant as a cousin to the 1st and 2nd appellants. According to PW1's testimony, the three appellants lived together. PW2's testimony as to the identity of the persons who attacked her husband (PW1) is vivid and emphatic, and remained unshaken during cross-examination. PW2 positively identified the 1st, 2nd and 3rd appellants as the persons who violently robbed and assaulted her husband. That said we now turn to the precise date and time which the robbery in question took place namely 10th October, 2006 at dusk (6.45pm-7.00pm). In ***Maitanyi –vs- R (1986) KLR 198*** this court held:-

> ***"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, are all important matters helping to test the evidence with the greatest care"***.

It also held that:-

> ***"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."***

20. We note and find that both the trial court and the 1st appellate court were mindful of the requirement of identification and properly applied their minds to the subject before coming to the conclusion that the appellants had been positively identified by the complainant. Whereas the conditions under which PW1 (P) was attacked is ordinarily characterized by diminishing light on account of the time, he was able to positively identify the appellants as his assailants on the fateful day. PW2 (J) not only corroborates but also lends credence to PW1's (P) account as her evidence confirms in no uncertain terms that the appellants attacked her husband. We also agree with the holding of this court in ***Anjononi&Another –vs- R (1976-80) KLR 1566***, which was cited by the 1st appellate court, and whose holding is to the effect that:-

> ***"The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case where no stolen property is found in the possession of***

> ***the accused………… Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”***

In view of the foregoing, and from the record of the trial court and the 1st appellate court, we find and hold that PW1 (P) and PW2 (J) managed to identify their assailants because of they were known to them prior to the incident.

21. On the subject of whether the prosecutor who led PW3 (PC Hillary Kimutai) and PW4 (Jonathan Momocho) in evidence was properly qualified as per the provisions of ***Section 85(2)*** of the ***Criminal Procedure Code***, we note that the testimony for the witnesses in question was recorded by the trial court on 13th June, 2007, 10th July, 2007 and 4th September, 2007. We are cognizant of the legal requirement to have criminal trials conducted by properly qualified prosecutors. We have had the benefit of examining the trial court's original record on the said dates and accordingly find and agree with the submission by the learned counsel for the State that PW3(PC Hillary Kimutai) and PW4(Jonathan Momocho) were led by a Chief Inspector of Police in evidence. Therefore, the indication on the record that the prosecutor was a corporal was a typographical error.
22. We are not convinced that PW3 (PC Hillary Kimutai) was biased on account of his involvement as the investigating officer in a case (supra) where the 1st appellant was the accused. In law, he who alleges must prove. No tangible evidence was tendered before the two courts below in support of this allegation. This ground therefore fails for want of proof.
23. In conclusion, we find the present appeal to be unmeritorious. Consequently, we dismiss the appeal and affirm the conviction and sentence of the appellants.

Dated and delivered at Nakuru this 27th day of November, 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