IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 109 &116 OF 2012

BETWEEN

KELVIN KIMATHI NYAGA …….. 1ST APPELLANT

JOHN MUTUKU MANZI ……..…….. 2ND APPELLANT

DANIEL KINYUA GITONGA ……..……. 3RD APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

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

in

H.C.CR.A NO. 157,159 & 162 OF 2008)

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JUDGMENT OF THE COURT

1. **Kelvin Kimathi Nyaga,** the 1st appellant, **John Mutuku Manzi,** the 2nd appellant, **Daniel Kinyua Gitonga,** 3rd appellant , **Tyrus Kariuki** and **Wilson Njuki Mugo** were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Chapter 63 Laws of Kenya in the Principal Magistrate's Court at Siakago. The particulars of the offence were that on 8th August, 2008 at Kauraciri Village within Mbeere District of the then Eastern Province they jointly robbed John Muriuki Muchiri of cash Kshs. 6,000/=, a cell phone make Nokia 1110, two note books, an Identity Card and three Equity ATM cards all valued at Kshs. 10,000/= and immediately before the time of such robbery they used personal violence on the said John Muriuki Muchiri.
2. The prosecution called a total of nine witnesses in support of its case. It was the prosecution's case that on 8th August, 2008 at around 6:00 p.m after closing his supermarket situated at Kiritiri, PW1, John Muriuki Muchiri (John) went to the stage to board a matatu to his home. He was in the company of his daughters PW3, Judith Mwendia Muriuki (Judith) and PW5, Charity Ndegi Muriuki (Charity). They boarded a matatu and John sat in the front cabin of the matatu while his

daughters sat in the back cabin. They later alighted at Kauraciri at around 7:30 p.m. John testified that five men also alighted with them. John was left paying the fare while his daughters walked ahead of him.

3. Just as John was about to enter his compound the five men attacked him from behind and the 3rd appellant hit him on the shoulder. John screamed for help. With the aid of the moonlight John was able to recognize the 2nd appellant. The 2nd appellant used to work in John's supermarket. John was also able to recognize the 2nd appellant using his voice when he shouted to the other robbers telling them 'wacha mzee'. The 2nd appellant took John's coat and ran away with it. Meanwhile, PW2, Albert Nyaga Muriuki (Albert), John's son, while untying cattle that had been tethered close to their home, heard his father's screams. He ran towards the direction of the screams and after about 200 metres he found his father lying on the ground and men surrounding him. When the robbers saw him they ran away and Albert decided to pursue one of them. Judith and Charity ran back to where their father was and they saw Albert pursuing one of the robbers. Albert managed to apprehend one of them, the 3rd appellant, just 100 meters from the scene. John identified the 3rd appellant as one of the robbers.
4. PW7, Stephen Nyaga Mwaniki (Stephen), who had heard screams got out of his house at Kauraciri and headed towards the direction of the screams. While on the way he saw the 1st appellant running from the direction of the screams and hide in a bush. He followed the 1st appellant to the bush and saw him removing the t-shirt he was wearing and changed into a vest. The 1st appellant was apprehended by members of the public. Thereafter, as the 3rd appellant was being escorted to the police station by John and other people they found the 1st appellant who had been arrested at Kauraciri. John identified the 1st appellant as one of the robbers.
5. Upon being questioned the 1st appellant revealed that the master mind of the robbery was the 2nd appellant and he led the police to his house. However, the police did not find the 2nd appellant in his house but instead found Tyrus Kariuki who was also identified as one of the robbers by John. PW8, Corporal Joshua Mwirichia (Corporal Joshua), testified that the said Tyrus confessed that Wilson Njuki Mugo was also involved in the robbery. Later on the same day the police recovered John's coat about 600 metres from the scene. They were able to retrieve the ATM cards, John's National Identity Card and the two notebooks.
6. PW4, PC Elphus Kinoti (PC Elphus), testified that on 12th August, 2008 while on patrol at Kiritiri in the company of PC Kithaka an informer informed them concerning the whereabouts of a suspect who had been reported as having committed a robbery. They accompanied the informer who took them where the 2nd appellant was. The 2nd appellant was arrested. Subsequently, the five accused persons were arraigned and charged in court.
7. In his defence the 1st appellant gave a sworn statement. He testified that on 8th August, 2008 after completing his chores he had lunch with his girlfriend and escorted her home. As he was heading back home he met a man armed with a rungu who inquired where he was coming from. The man also asked him about a robbery that had allegedly occurred. After a short while a group of people attacked him and he was arrested and taken to Kiritiri police station. He denied committing the offence and contended that he was merely arrested for being a stranger in the area.
8. The 2nd appellant in his defence gave a sworn statement. He denied committing the offence and he testified that on 8th August, 2008 he left Kiritiri and headed to his home town at Mwingi to attend a funeral. He stayed in Mwingi until the 11th August, 2008 and returned to Kiritiri on 12th August, 2008. While in his house he heard a knock on his door and upon opening he was arrested by a police officer. He was later charged with the offence of robbery with violence.
9. The 3rd appellant in his defence also gave a sworn statement. He stated that on 8th August, 2008 at around 2:00 p.m he went to visit his ailing grandmother at Karie. Thereafter, at around 6:00 p.m. he left his grandmother's house and decided to walk back to his home. On his way to Kiritiri he met a man who asked him if he had seen people running away. He stated that he told the man that he hadn't seen anyone running and they walked to town together. When they got to town they met a crowd of people and the man ordered him to sit down on the ground. He was interrogated for about 40 minutes and was subsequently arrested. He testified that he was later charged with an offence he had not committed.

10. Being convinced that the prosecution had proved its case against the appellants the trial court convicted and sentenced them to death. The trial court acquitted Wilson and Tyrus under **Section 215** of the **Criminal Procedure Code,** Chapter 75, Laws of Kenya for lack of evidence. Aggrieved with the trial court's decision, the appellants appealed to the High Court. The High Court (Apondi& Ogundi, JJ.) in its judgment dated 9th March, 2013 dismissed the said appeal. It is against that decision that the appellants have filed this appeal based on the following grounds:-

i. ***The learned Judges of the Superior Court erred in law in overlooking the crucial aspect of identification of the appellants in very difficult circumstances, thereby falling into error.***

ii. ***The learned Judges of the Superior Court erred in law in failing to find that the trial court shifted the burden of proof to the appellants therefore failing to accord them the benefit of doubt.***

iii. ***The learned Judges erred in law in failing to thoroughly re-evaluate the evidence, thereby generalizing their analysis and thus misdirecting themselves.***

iv. ***The learned Judges erred in law in failing to find that the trial magistrate misdirected himself by placing reliance on the evidence of recovery by the 1st accused whom he acquitted nevertheless.'***

11. Mr. Kimunya, learned counsel for the appellant, submitted that according to the prosecution's case the incident occurred at around 7:30p.m and that the identification of the appellants was through the moonlight. He urged that the prosecution having failed to tender evidence as to the intensity of the moonlight rendered the identification unsafe. He relied on this Court's decision in ***Stephen Mbondola & 2 others –vs- Republic- Criminal Appeal No. 162 of 2000.*** He argued that the identification of the appellants by John was suspect because he testified that he was attacked from behind with five robbers. He also submitted that recognition of the 2nd appellant by John was not free from error. He urged that had the High Court re-evaluated the evidence properly it would have found that the identification evidence was unsafe and that the appellants' conviction could not have been based on the same.
12. Mr. Edward W. Makunja, Senior Prosecuting Counsel, in opposing the appeal submitted that the case is based on both identification and recognition evidence. He argued that there was overwhelming evidence against the appellants; that immediately after the robbery PW2, Albert, pursued and arrested the 3rd appellant close to the scene; that the 1st appellant was also arrested by members of the public close to the scene. He urged that the case of ***Stephen Mbondola & 2 Others –vs- Republic (supra)*** is distinguishable from the current case because in the former the attack took place inside the house and the witnesses used the moonlight to identify the assailant. While in this case the attack took place outside.
13. This being a second appeal and by dint of **Section 361(1)** of the Criminal Procedure Code, this Court's jurisdiction is limited to matters of law only. 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)'***

14. We have considered the record, the grounds of appeal, able submissions by counsel and the law. As correctly pointed out by Mr. Makunja this case involved both identification and recognition evidence. 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. In ***Wamunga -vs- Republic (1989) KLR 424*** this Court held at page 426 that,

> ***'..it is trite law that where the only evidence against a defendant is evidence of 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.'***

15. In this case both lower courts made concurrent findings that the appellants were positively identified as some of the robbers who robbed John. On the issue of recognition of the 2nd appellant we find that the recognition evidence was free from error. This is because firstly, John testified that he recognized the 2nd appellant when he took his coat. The 2nd appellant was known to John by virtue of being his employee at the supermarket. Albert corroborated John's evidence on recognition as he testified that he heard his father shouting asking the 2nd appellant what he was up to. Both Judith and Charity testified that the 2nd appellant used to work in John's supermarket. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566***, this Court held at page 1568,

> ***'This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.'***

Secondly, John also testified that he was able to recognize the 2nd appellant by his voice when he uttered the words 'wacha mzee' to the other robbers. We find that the evidence of voice recognition was free from error because evidence was tendered as to the actual words uttered which enabled John to recognize the 2nd appellant. See ***Maghenda -vs- Republic [1988] KLR 255.***

Thirdly, John indicated in his initial report to the police that he had recognized the 2nd appellant as one of the robbers.

16. Judith & Charity who sat at the back of the matatu testified that they saw the appellants board the same vehicle they did and alight at Kauraciri behind them. They also testified that the 1st and 3rd appellants' used to visit the 2nd appellant in their father's supermarket. Albert on the other hand testified that when he arrived at the scene he found the robbers running away and he pursued and apprehended the 3rd appellant. Thereafter, Judith who had seen Albert running after the appellant followed him and identified the 3rd appellant as one of the men who alighted with them. The 1st appellant was also arrested by members of the public near the scene. From the foregoing coupled with the fact that John identified the 1st and 3rd appellants as some of the robbers, we are of the considered view that there was no possibility of mistaken identity. We find that the 1st, 2nd and 3rd appellants were positively identified as some of the robbers' who robbed John.
17. Having perused the record before us we find that the trial court did not shift the burden of proof to the appellants; and that the prosecution proved its case agains the appellant beyond resonable doubt. See this Court's decision in ***Charles Kiplangat Ngeno -vs- R - Criminal Appeal No. 77 of 2009.*** We also find that neither the trial court nor the High Court relied on the prosecution's evidence that Tyrus Kariuki (1st accused in the subordinate court) led them to where John's coat was abandoned to convict the appellants. In fact the trial court acquitted the said 1st accused on the grounds of insufficient evidence connecting him to the robbery. The trial court expressed itself on the issue as follows:-

> ***'PW8 and PW9 police officers who were involved in the recovery of the items which were stolen from the complianant merely stated that the 2nd and 3rd accused led them to the 1st accused who therafter took them to where the recovery was made. The officers, particulary, the investigating officer did not elaborate on how or what xplaination was given by the 1st accused regarding the recovered items. Furthermore, the complianant did not state as to whether he saw the 1st accused duriung the time of the attack."***

In any event the conviction of the appelalnts was based on the idependent evidence of identification. Both lower courts made concurrent findings of fact that the appellants were positively identified as some of the robbers who attacked John. From the High Court's judgment dated 9th March, 2012 we cannot help but note that quite contrary to the allegations by the appellant, that the High Court properly re-evaluated the evidence that was placed before the trial court and arrived at the right conclusion.

18. The upshot of the foregoing is that we see no reason of interfering with the concurrent findings of fact by the two lower courts. Accordingly, the appeal herein is dismissed.

Dated and delivered this 18th day of September, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO- ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR