IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 333 & 335 OF 2009

BETWEEN

MOSES KINOTI NKOROI .... 1ST APPELLANT

MISHECK MBOGO MURIITHI ………...….......…………… 2ND APPELLANT

BERNARD KARANJA MWANGI ……...……………….. ….. 3RD APPELLANT

AND

REPUBLIC..RESPONDENT

(An appeal from Judgment of the High Court at Embu

(Makhandia & W. Karanja JJ.) delivered on 28th October 2009

in

H.C.CR. Appeal Nos. 128,129 and 130 of 2008)

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JUDGMENT OF THE COURT

1. The complainant PW 1, **Stella Wagatu Ngare**, on 16th February 2005 was with other members of Kimunye Self Help Group. They met outside her shop at Kimunye to contribute money as was the normal practice every Wednesday. She was the group treasurer and on the material day they raised Ksh. 92,157/= and was tasked to take the money to Kenya Commercial Bank, Kerugoya Branch for banking. While en-route in a matatu, the complainant was robbed of the money.
2. The three appellants were charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal code**. The Information against the appellants is that on the 16th day of February 2005 at Kimunye Trading Centre in Kirinyaga District within Central Province, jointly while armed with dangerous weapons namely a rifle and a pistol robbed **Stella Wagatu Ngare** of cash Ksh. 92,157/= and that immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Stella Wagatu Ngare**.
3. Upon hearing the case, the trial magistrate convicted the appellants for the offence and sentenced them to death as by law prescribed. On appeal to the High Court, the conviction and sentence was upheld. Aggrieved by the decision, this second appeal has been lodged.

4. The appellants have raised 4 grounds of appeal in their Supplementary Memorandum of Appeal. The grounds are:

i. ***The learned Judges erred in law in disregarding the provisions of Section 72 (3) (b) of the then constitution while the record is very clear as to the 1st appellant having been held in custody illegally before being arraigned in court.***

ii. ***The learned Judges erred in law in finding that the 2nd appellant was properly identified while no identification parade was conducted in his respect and he was convicted through dock identification.***

iii. ***The learned Judges erred in law in finding that the apparent contradiction between the witnesses was immaterial and thus failing to accord the appellants the benefit of doubt as required by law.***

iv. ***The learned Judges erred in law in failing to find that the 2nd appellant was not accorded an opportunity to mitigate or his mitigation if at all, was not recorded, thus occasioning a miscarriage of justice.***

5. At the hearing of the appeal, the appellants were represented by learned counsel **Mr. Kimunya** while the state was represented by the Senior Public Prosecution Counsel **Mr. Lugadiru.**
6. This is a second appeal and we are only concerned with points of law based on the authority of a myriad of cases such as ***David Njoroge Macharia – v- R*** ***[2011]e KLR*** wherein it was stated that under **section 361 of the Criminal Procedure Code:**

> ***Only matters of law fall for consideration and the court 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.***

7. What are the points of law raised by the appellants? The 1st ground of appeal relates to the 1st appellant. That the 1st appellant was arrested and brought to court after 33 days contrary to the constitutional provisions which required that he be brought before court within 14 days; that the police never explained why they held the 1st appellant for the 33 days before arraigning him to court.
8. The 2nd ground of appeal relates to the 2nd appellant. The contention is that the 2nd appellant was not properly identified as one of the perpetrators of the crime. It was submitted that there was no identification parade for the 2nd appellant; that dock identification was used and this was unreliable. That the 1st and 3rd appellants were identified in a police identification parade and there are no police parade forms on record in relation to identification of the 2nd appellant. That the 2nd appellant was identified through the testimony of PW 1, PW 3 and PW 6 which testimonies had no probative value in the absence of an identification parade. Counsel relied on the case *of* ***Kiarie –v- R Criminal Appeal No 93 of 1983*** in support of the submission that dock identification is worthless. It was submitted that it was possible for a witness to be honest but mistaken, and an identification parade could have removed any doubt as to the identity of the 2nd appellant as one of the perpetrators of the crime. Counsel submitted that failure to conduct an identification parade for the 2nd appellant amounted to an error of law and it was reasonably probable that if the parade were held, the trial magistrate could not have convicted the 2nd appellant.
9. In the third ground of appeal, it is contended that there were contradictions in the testimony of the prosecution witnesses and the learned Judges erred in holding that the contradictions were immaterial. The final ground of appeal is that the 2nd appellant was not accorded an opportunity to mitigate before sentence and this was a miscarriage of justice.
10. The state through the Senior Public Prosecution Counsel **Mr. Lugadiru** opposed the appeal and

urged this court to find that the two courts below concurrently arrived at the finding that the appellants were guilty as charged and the prosecution had proved its case to the required standard. The state submitted that the constitutional ground of appeal raised by the 1st appellant ought to have been raised at the earliest opportunity; that this ground was not raised before the trial court to enable the police explain the reasons for delay; the ground was also not raised before the High Court. In any event, it was submitted that a violation of the constitutional right under **Section72 (3)** of the old constitution does not lead to an automatic acquittal; the trial court must look at the evidence in totality and determine if there was other adequate evidence connecting the appellant to the crime.

11. Pertaining to the contention that no identification parade was conducted for the 2nd appellant, the state submitted that PW 9 police officer Francis Marimba testified that the 2nd appellant was named by the 1st appellant. That prior to the arrest of the 2nd appellant for the present charge, a report had been made to the police against the 2nd appellant who had earlier been arrested by PW9 for another offence. When the instant report was made and the description and name of the 2nd appellant given by the 1st appellant, the police knew who the appellant was. That on 17th March 2005 at Kerugoya law courts, PW9 a police office who knew the appellant saw him and arrested him and as such there was no need for an identification parade. It was submitted that due to the prior report and having previously been arrested by PW 9 for another offence, the name and description and physical appearance of the 2nd appellant was already known to the police.
12. On the alleged contradictions in evidence of the prosecution witnesses, the state submitted that the two courts below analysed the evidence on record and correctly found that the contradictions did not affect the totality of the evidence adduced; that the two courts below were satisfied that the prosecution had proved its case beyond reasonable doubt. On the contention that the 2nd appellant was not given an opportunity to mitigate, the state submitted that it is true the record did not reflect mitigation on the part of the 2nd appellant and this court was urged to remit the case to the High Court for purposes of mitigation.
13. We have considered the rival submissions by counsel; we have examined the record of appeal and the judgement of the High Court. The first ground of appeal is that the appellant contends that his fundamental rights under ***Section 72 (3) (b)*** of the old constitution were violated in that he was held for 33 days before being arraigned in a court of law. This is not a novel point taken in appeal and we find it has no merit. A delay in arraigning a suspect in court does not necessarily entitle the suspect to an acquittal**. (See *Domimic Mutie Mwalimu - v- R*, *Crim. Appeal No. 217 of 2005*; and *Evanson K. Chege - v – R*, *Crim. Appeal No. 722 of 2007*)**. If any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In ***Julius Kamau Mbugua – v- R*, *Criminal Appeal No. 50 of 2008***, this Court stated that***"the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, and Section 72 (6) expressly provides that such breach is compensatable by damages.***
14. The second ground of appeal relates to dock identification and the allegation that no identification parade was held to indentify the 2nd appellant as the perpetrator of the crime. There is no evidence on record to show that an identification parade was held for the 2nd appellant. The available record shows that the 2nd appellant was identified in the dock by PW1 **(Stella Wagatu),** PW5 (**Robert Kinyua Mwangi**) and PW 6 (**Danson Mundia**). This court has on many occasions reiterated that dock identification without an earlier identification parade is almost worthless. **(See *Njoroge – v- R, 1987 KLR 19; John Wachira Wandia & another – v- R {2006{ eKLR)*;** see also ***Ajode – v- R, {2004] 2KLR 81).***
15. However, this Court in ***Muiruri & 2 others – v- R {2002} KLR 274,277*** at **paragraphs 25-35** stated that not all dock identification is worthless. In the present case, upon our re-evaluation of evidence, we are satisfied that the absence of an identification parade did not prejudice the 2nd appellant. There is credible, cogent and reliable evidence from PW 6 as corroborated by PW 1 and PW 5 that identified the 2nd appellant. As was stated in ***John Njagi Kadogo & 2 others – v- R, {2006} eKLR,*** "***a court might base conviction on the evidence of dock identification if it is satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto, the court warns itself of possible dangers of mistaken identity***". We have perused

the record of appeal and are satisfied that the two courts below considered the totality of the evidence and found that all the appellants had positively been identified. We are satisfied that there was no error in the dock identification of the 2nd appellant.

16. The other ground of appeal relates to identification of the 2nd appellant by an accomplice. The evidence identifying the 2nd appellant was given by PW 6, **Danson Mundia Nyamu alias Mbanya.** PW 6 had jointly been charged with the appellants but the charge against him was withdrawn and he became a prosecution witness. PW 6 testified as follows:

> ***That on 16th February 2005 he was operating his taxi registration no. KAD 377W and while at the taxi bay he was approached by the 3rd appellant at about 7.00 am. The 3rd appellant came with the 1st appellant whom he knew to be a police officer based in Kerugoya. The duo told him they wanted to go and arrest somebody peddling bhang in Kimunye area. The 1st appellant promised to pay Ksh. 1,000/= for the taxi. They left Kerugoya for Kimunye at 8.30 am. At Miringa-iri, the duo told him to pass through a place known as block where they picked the 2nd appellant. They then proceeded to Kimunye. On reaching mugumo area, he was suddenly ordered to stop and park the taxi. The 1st appellant was armed with a gun. The 2nd and 3rd appellants then got outside and he stayed in the taxi with the 1st appellant for about 30 minutes waiting for the 2nd and 3rd appellants. The 2nd appellant then resurfaced carrying a pistol and told him to obey orders. He was ordered to drive towards Kimunye and as they drove, they encountered the 3rd appellant who told the 1st and 2nd appellants that the lady they were waiting for was about to arrive in a matatu. They drove to Kibao area where he was ordered to park the taxi by the road side. The 3rd appellant left the taxi and when the matatu arrived he stopped it. The 1st appellant got out with his gun and confronted the driver. The 2nd appellant remained in the taxi and ordered him (PW6) to obey instructions. After a short exchange, he saw the 1st and 3rd appellants emerge with a black handbag. When they entered the taxi, he was ordered to drive off at high speed. He drove towards Gitumbe; at Gitumbe the motor vehicle ran out of fuel and the 2nd appellant left with a jerrican to buy fuel which he did. After re-fuelling, he saw the matatu approaching them at high speed. The appellants ordered him to drive off very fast. As he drove away, the 2nd appellant jumped out of the taxi. The rest ordered him to speed towards Baricho; on reaching Baricho the 1st and 3rd appellants fled on foot and abandoned him. He reported the incident at Kagio police station.***

17. The learned Judges in evaluating the evidence of identification of the 2nd appellant expressed themselves as follows:

> ***"According to PW3, she saw him seated in the taxi parked nearby as the 1st and 3rd appellants went about their business. She even described him to the police as having overgrown beards. PW2 & PW3 too saw him in the taxi. The same goes for PW5. Besides these witnesses, PW 6 the driver of the taxi, Danson Mundia Nyamu alias Mbanya who had been with the appellants over a long period of time as they waited to commit the robbery also identified him. The totality of the foregoing is that all these witnesses could not have mistakenly identified the 2nd appellant in such broad daylight. In particular, PW 6 could not have mistaken the identity of the 2nd appellant for someone else considering the length of time that they were together in the taxi….. We are of the firm view that the appellants were properly identified by witnesses at the scene of crime. The offence was after all committed in broad day light. PW6 had been with the appellants in his motor vehicle for a long time. Indeed he had been with them between 8.30 am when he picked them up until about 11.30 am when the offence was committed. This is a period in excess of 3 hours. There is nothing on record to suggest that the appellants had disguised themselves as to make it difficult to be identified. There is also nothing on record to suggest that PW 6 was so harassed during the period***

so that his capacity to observe the appellants was impaired."

18. Our evaluation of the evidence on record shows that the evidence linking the 2nd appellant to the crime is the testimony of PW6, PW1 and PW2 and PW5. It is our duty to consider whether in evaluating the evidence of these witnesses, the two courts below erred in law. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances, it is safe to act on such identification. In ***Wamunga vs. Republic*** **(1989) KLR 424** it was stated 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.'***

19. In the present case, both courts below concluded that the evidence of PW 6 was credible to sustain the appellants' conviction when corroborated with the evidence of PW 1, PW 2 and PW 5. The issue for this court to determine is whether the two courts below properly evaluated the evidence of PW 6. In the case of ***Charles O. Maitanyi vs. Republic*** ***(1986) KLR 198,*** this Court held that:-

    "Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification"

20. The evidence of PW 6 when taken in totality with the testimony of PW1, PW2 and PW5 identifies the 2nd appellant and is watertight. We find that the two courts below did not err in evaluating the evidence and finding that the 2nd appellant was properly identified as one of the perpetrators of the crime.

21. The other contention by the appellants is that the evidence of PW6 should not have been relied upon by the trial court and the learned Judges as he was an accomplice. We have considered this submission. The learned Judges correctly warned themselves that PW6 had initially been charged with the offence and the charge was later withdrawn. The learned Judges stated "***we are of course not oblivious of the fact that the said witness had initially been treated as a suspect and in fact charged alongside the appellants. Accordingly, his evidence has to be treated with a lot of circumspection. We have done so and looked for corroboration."*** In ***Rex v Ndara s/o Kariuki and six Others*** ***[1945] 12 EACA 84,*** the Court at page 86 enunciated the correct approach to accomplice evidence thus:

> ***A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence; and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief". (See also Kinyua v Republic [2002] 1 KLR 256).***

22. In the instant case, we have evaluated the evidence on record and it is our considered view that the evidence of PW6 is credible as it is corroborated by the testimony of other prosecution witnesses. There was independent evidence of identification of the 2nd appellant as corroborated by the testimony of PW1, PW2 and PW5.

23. The other ground of appeal is that there were contradictions in the testimony of PW3 and PW5

in that that there is apparent contradiction as to whom between the 1st and 2nd appellant had jumped out of the speeding taxi. The learned Judges observed that the contradiction in the light of the evidence on record was actually immaterial. We too agree with the learned Judges. The evidence as to who jumped out of the taxi is not relevant in determining the guilt of the any of the appellants; the appellants were beyond reasonable doubt identified as the perpetrators of the crime and the apparent contradiction does not dent the evidence adduced against the appellants. The inconsistency neither weakens nor destroys the inference of guilt of the appellants.

24. The 4th and final ground of appeal is legitimate. The complaint is that sentence was pronounced against the 2nd appellant without him being allowed an opportunity to mitigate and or without any such mitigation being recorded and considered before passing of the sentence. We have perused the record and this is a valid complaint; we are of the view that the trial magistrate and the learned Judges erred on this aspect. This Court has stated in several judgments such as in ***Dorcas Jebet Ketter and another - v- R*, Criminal Appeal No. 10 of 2012** that after pronouncing the judgment, the trial court is duty bound even in offences that attract capital punishment to allow the accused an opportunity to mitigate and such mitigation must be recorded. Thereafter the court proceeds to sentence the accused. In the ***Dorcas Jebet Ketter*** case (supra), it is stated:-

> ***The opportunity that is required to be given to an accused person to address the court in mitigation is not only to enable the court to consider an appropriate sentence in the circumstances of the case but also to have the mitigation on record in cases of any further appeal where the accused's conviction might be set aside and substituted by a conviction for a lesser offence, for example of manslaughter instead of murder. In such a case, it becomes easier for the appellate court to decide on the sentence if mitigating factors are on record. Mitigation is also necessary in cases for example where clemency committee is considering a convict's case. We state that under no circumstances should a court dispense with mitigation for whatever reason.***

25. In this case, there is no record of mitigation in relation to the 2nd appellant. However, we find that the error has not occasioned any prejudice to the 2nd appellant who in addition to all the other appellants, we understand, has had their sentences commuted to life imprisonment. (See *Jacob Muthee & 8 others – v- R, Criminal Appeal Nos. 259, 255-257, 261 & 275 of 2008 {2013 eKLR)*.

26. The upshot of our analysis is that the appeals by the 1st appellant, Moses Kinoti; the 2nd appellant, Mishek Mbogo Muriithi; and the 3rd appellant, Bernard Karanja Mwangi; have no merit and are all hereby dismissed. Their conviction and sentence as passed by the trial court and confirmed by the High Court are hereby upheld.

Dated and delivered at Nyeri this 18th day of September, 2013.

ALNASHIR VISRAM

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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