IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 230 OF 2008

BETWEEN

FRANCIS MBIJIWE ITERE

JOSHUA KINYUA MANYARA

SILAS JOMAL IBWATHU

RICHARD MAINA KIMOTHO ….....APPELLANTS

LABAN KINOTI NTIRITU

ISAAC MUTUMA TOROCHO

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyeri (Makhandia & Kasango, JJ.) dated 1st October, 2008

in

H.C. CR. A. No. 74, 75, 76, 77 & 79 of 2006)

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JUDGMENT OF THE COURT

[1] On the night of 29th March, 2005, there was a spate of robberies at Mwireri and the neighboring Silent area within Laikipia District. Several houses were broken into by a gang of robbers. The robbers terrorized the residents of several houses where they broke in, through beatings, threats of death or serious bodily injuries and stole from them several items that are listed in the charge sheet. A total of

nine suspects were arrested and they were jointly charged before the Senior Resident Magistrates' Court at Nanyuki with three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

[2] They all pleaded not guilty. After trial, 4 of the suspects who were charged as the 1st, 4th 6th and 8th accused persons before the trial court were acquitted of the charges under the provisions of **Section 215** of the **Penal Code**. The remaining 2nd, 3rd, 5th, 6th 7th and 9th accused persons were found guilty of the main counts of robbery with violence and sentenced to death.

[3] In convicting the appellants, the **Senior Resident Magistrate at Nanyuki, Mr E.G. Mbaya**, relied on the evidence of visual identification by five witnesses and also the evidence of police officers who arrested the 2nd appellant at the scene to arrive at the conclusion that the case against the appellants was proved to the required standard. The trial magistrate was satisfied that the prosecution witnesses who were victims of the robberies had ample opportunity to see the appellants and there was ample light from moonlight which enabled them to identify the appellants. He also relied on the evidence of police officers who shot the 2nd appellant while he was trying to escape from the scene of robbery. The 2nd appellant gave the police the names of the other assailants who were allegedly with him during the robbery.

[4] The 2nd appellant was arrested outside the gate of Titus Wachira Gituku (PW2) with a bag, a radio and clothes that were identified by PW1 as his items that were stolen from him during the robbery. Being dissatisfied with the conviction and sentence, the six appellants appealed before the High Court. The High Court, on first appeal correctly applied the decision in ***Okeno v R, [1972], EA 32***, in which the predecessor of this Court authoritatively set out what the duty of a court on first appeal is. By citing that case, the High Court reminded itself of the duty which was on it to re-evaluate the evidence and draw its own conclusion on the case.

[5] The principal issue that was for determination and has remained even before this Court is one of identification. In determining this issue, the High Court also cited ***Roria v Republic, (1967) EA 583.*** After reevaluating the evidence, in the end, the learned Judges of the High Court concluded that the appellants were properly identified and concurred with the findings of the learned trial magistrate by upholding the conviction and sentence.

[6] Being aggrieved by that judgment, the six appellants have appealed in this second appeal. All the six were represented by Mr. Muhoro, learned counsel. Although each one of them had filed their individual homegrown memorandums of appeal, in addition, Mr. Muhhoro filed some supplementary grounds which distilled the issues of law into the following:-

v. ***That the learned Judge of the High Court failed to subject the evidence to a fresh and exhaustive examination.***

v. ***Failure to consider that the evidence of recognition of the appellants was not supported by evidence especially the witnesses did not name the appellants in the first report.***

v. ***Relying on insufficient evidence of identification that fell short of the established standards.***

[7] In further arguments to support the above grounds, Mr. Muhoro submitted on behalf of each appellant while pointing out the gaps regarding the evidence of identification in each case. In respect to Richard Maina Kimotho, the 4th appellant, he was convicted on the second count of robbery with violence. According to Mr. Muhoro, this conviction was based on the evidence of **Samuel Muiruri Mungai (PW2).** This witness said in his evidence that he recognized the voice of the 4th appellant when he called him "*Mzee*". However, this evidence was not tested at all; the 4th appellant was arrested based on information from one of the co-accused persons; this evidence of an accomplice was not supported by any evidence that his name was given to the police by the complainants. The co-accused person who gave the name of the 4th appellant was not present during the arrest to point him out and ensure there was no mistake made during the arrest; the arresting officer confirmed in his evidence that he arrested the 4th appellant during a police swoop. The arresting officer was merely given one name regarding the 4th appellant his full details and particulars of the details of where he could be found was not given to the

police thereby leaving room for a mistaken identity.

[8] In respect of Silas Jamal Ibwathu, the 3rd appellant, he was convicted on the basis of evidence by Samuel Mwiruri Mungai (PW2) who testified that he identified the 3rd appellant during an identification parade. According to Mr. Muhoro, the purported parade was worthless because the 3rd appellant indicated to the parade officer, that PW2 knew him before. In addition, the 3rd appellant was not named in the list of participants during the identification parade as per the parade forms that were adduced in evidence; his name was not among the 8 witnesses who took part in the parade. The 3rd appellant was casually mentioned by PW 2 who said, ***"I also identified the 1st accused***", no name or description of the 3rd appellant was given and in cross-examination, PW 2 stated that he failed to identify the 3rd appellant.

[9] In regard to the 5th appellant, Laban Kinoti Ntiritu, Mr. Muhoro submitted that he was convicted on the basis of the evidence of a single identifying witness to wit Gladwell Wanjiku Wachira, PW 3. The witness did not give the description of the appellant to the police. This is what this witness said in her own words regarding the 3rd appellant:

> ***"I saw you that day. My statement does not indicate I saw you. I did not give your description to police....."***.

Counsel urged us to consider the scanty evidence that linked the 3rd appellant to the offence and dismiss it as mere dock identification.

[10] As regards the evidence against Isaac Mutuma, the 6th appellant, Mr. Muhoro submitted that he was convicted based on the evidence by PW 1 and PW 3. PW 1, however, did not identify the 6th appellant at the identification parade; it was only PW 3 who said she pointed out the 6th appellant at an identification parade. This was also a conviction based on the evidence of a single identifying witness. Counsel drew our attention to the evidence by the arresting officer who confirmed that he was going to arrest other persons by the name of Kinyua and Muturi; he ended up arresting the 6th appellant because he was found in the same hotel with the person who was named. The 6th appellant did not participate in the parade.

[11] In respect to the conviction of the 1st appellant, Francis Mbijiwe Itere, Mr. Muhoro submitted that there was no identification parade; although some witnesses said they identified the 1st appellant during a parade, upon consideration of the evidence and the parade forms produced as evidence, the parade officer merely stated that the 1st appellant was at the parade. It was obvious the conviction of the 1st appellant was based on the evidence of PW 2 who said he recognized him as they used to do business together; however if this was the case, then it was not necessary for the 1st appellant to be taken through an identification parade.

[12] As regards the appeal by the 2nd appellant, Joshua Kinyua Manyara, Mr Muhoro submitted that he was arrested at the scene of robbery, outside the gate of PW1, but he gave a defence that explained the circumstances that led him to be near the scene of robbery when he was mistakenly shot by the police who were chasing robbers. According to Mr. Muhoro, the court failed to consider those circumstances; there was no identification parade carried out to identify the 2nd appellant and his details and particulars were not given to the police. Mr. Muhoro urged us to allow the appeal in respect of all the six appellants.

[13] On the part of the State, Mr. Kaigai the learned Assistant Director in Public Prosecutions readily conceded to the appeal in regard to the 1st, 3rd, 4th, 5th and 6th appellants. According to him, these appellants were convicted based on suspicion as they were arrested following a police swoop after a spate of robberies that occurred in Mwireri area and no items that were stolen during the robbery were recovered from them. There was no description given to the police by the complainants who merely indicated they identified the robbers through moonlight. The evidence of identification was not subjected to any testing. The 1st, 3rd, 4th, 5th, and 6th appellants refused to participate in an identification parade therefore they were convicted based on mere suspicion after they were arrested following a police swoop.

[14] Mr. Kaigai, however, supported the conviction in regard to Joshua Kinyua Manyara, the 2nd

appellant who he submitted was convicted on cogent evidence that met the entire threshold. The second appellant was arrested at the scene of robbery, he was spotted by the police officers who responded to the distress call during the robbery; he was shot while trying to escape near the gate of the house of PW 1 who had just been robbed. The 2nd appellant was arrested with several items that were robbed a short while ago and those items were positively identified by PW1. Mr. Kaigai urged us to uphold the conviction of the 2nd appellant and supported the concurrent findings by the two courts below.

[15] This being a 2nd appeal, this court is restricted to address itself on matters of law only. Also this court will not normally interfere with concurrent findings of fact by two courts below unless such findings are based on a misapprehension of the evidence or it is shown demonstrably the courts acted on wrong principles in making the findings. See ***Chemangong v R, [1984] KLR 611***. Also in ***M'Riungu v. Republic [1983] KLR 455*** this Court held:-

> ***"Where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v. Glyneed Distributors Limited (T/A MBS Fastenings – The Times of March 30, 1983)".***

[16] In dealing with the three issues of law aforementioned, we have considered the evidence adduced at the trial court, but regret to have to say that we have been completely unable to find any evidential basis for the concurrent findings regarding the convictions of the 1st, 3rd, 4th, 5th and 6th appellants. Mr. Kaigai for the respondent readily conceded and rightly so, that the evidence against the 1st, 3rd, 4th, 5th and 6th appellants was based on suspicion, and suspicion alone no matter how strong cannot form the basis of a conviction. See the case of ***Bhatt v Republican, 1957 EA page 334***.

[17] The prosecution's case against the 1st, 3rd, 4th, 5th and 6th appellants was presented as one of recognition or through voice identification. The conditions for seeing and recognizing the appellants were difficult and this evidence was not tested. The circumstances under which the identification by each witness was made were not given due consideration according to the well known principles. The robbery occurred at night, the attackers took off when a police motor vehicle arrived, the appellants except for the 2nd appellant, were arrested during a police swoop, even if they were named by the 2nd appellant, their proper details such as full names and their areas of abode were not given to the police they were merely mentioned as *' Kinoti, Mrefu. Mbaya, Mbijiwe and Maina'* thus we agree this mere mention of names without more could have given rise to a mistaken identity.

[18] There was also no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry of the sort of lighting, its size, and its position *vis a vis* each of the appellant, the evidence of recognition may not be free from error. See the case of ***Paul Etole & Another v R, Criminal Appeal No. 24 of 2000***, where this Court differently constituted held:

> ***"All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger. In the present case, neither of the two Courts below demonstrated any caution. This is a serious non- direction on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis a vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error".***

[19] In the result, in our judgment, we find the quality of evidence on identification in respect to 1st, 3rd, 4th, 5th and 6th appellants was poor. We find that both courts below misdirected themselves regarding the testing of evidence of identification. We agree with counsel for the appellant and the State that the convictions against the 1st, 3rd, 4th, 5th and 6th appellants are not safe, accordingly they are quashed and the death sentence is to be set aside.

[20] As regards the 2nd appellant the circumstances under which he was arrested were different. The 2nd appellant was arrested on the scene of robbery, he was shot by the police while he was trying to escape. By a twist of fate when the robbery took place, PW 3 managed to call the police and they responded almost immediately. The police vehicle came while the robbers were in the compound of PW 1, the robbers scattered but the police managed to shoot at 2nd appellant while he was fleeing. He was arrested with a bag and some other items that were robbed from PW 1.

[21] The 2nd appellant's conviction was based on the fact that he was arrested at the scene and items that were stolen from PW1 were positively identified during the trial and they were found in his actual possession. If a person is found in possession of recently stolen goods and does not account for how he came to be in its possession, there is a presumption of fact that he is either the thief or a receiver. (See ***ARODREA OBONYO V R., [1962], EA 542***. The 2nd appellant's defence was considered by the two courts below and it was found lacking in merit in view of the prosecution's evidence against the 2nd appellant.

[22] In our respectful view, the appeal by the 2nd appellant must fail. We are satisfied that the concurrent findings of facts and the law by the two courts below were based on overwhelming evidence. We are further satisfied that the two courts below drew the concurrent conclusions from the totality of the evidence of arrest at the scene and possession of stolen goods that proved to the required standard that the 2nd appellant was one of the robbers.

[23] We see no merit in the appeal by the 2nd appellant and it is dismissed. In regard to the appeal by the 1st, 3rd, 4th, 5th and 6th appellants the convictions are quashed and the death sentence is set aside unless otherwise lawfully held, they are to be set at liberty forthwith.

Dated and delivered at Nyeri this 13th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO – ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy to the original.

DEPUTY REGISTRAR