



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CRIMINAL APPEAL (APPLICATION) NO. 233 OF 2012**

**BETWEEN**

**DANIEL MWATHI NJARAMBA ..... 1<sup>ST</sup> APPELLANT/APPLICANT**

**JOHN NGUNJIRI GICHINE ..... 2<sup>ND</sup> APPELLANT**

**PETER NDERITU MWANGI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nyeri ( Sergon &*

*Wakiaga, JJ.) dated 8<sup>th</sup> June, 2012*

**in**

**H.C.CR.A NO. 47 OF 2010)**

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**RULING OF THE COURT**

1. Before us is a Notice of Motion application filed by **Daniel Mwathi Njaramba**, the 1<sup>st</sup> appellant, brought pursuant to **Rules 31 and 42** of the **Court of Appeal Rules** (the Rules). The 1<sup>st</sup> appellant seeks the following orders:-

- ***The Honourable Court be pleased to call for and receive the Occurrence Book No. 62 of 8<sup>th</sup> February, 2008 from Nyeri Police Station, and admit the same as part of the record of appeal herein.***
2. The grounds upon which the 1<sup>st</sup> appellant relies on in support of his application are that firstly, the trial magistrate's court and the superior court (High Court) came to a concurrent finding that the applicant (1<sup>st</sup> appellant) was guilty of the offence of robbery after agreeing with the prosecution's case that the applicant had robbed PW1 and PW2 yet PW1 did not tell the police the names of his attackers and PW2 did not report the robbery to the Nyeri Police station. Secondly, that this is the applicant's last opportunity to argue his appeal and he ought to be granted the order sought.
  3. Without delving into the appeal which is currently not before us we think it is important at this stage to set out the brief facts of this case. ***Daniel Mwathi Njaramba***, the 1<sup>st</sup> appellant, ***John Ngunjiri Gichine***, the 2<sup>nd</sup> appellant, ***Peter Nderitu Mwangi***, the 3<sup>rd</sup> appellant and one William Gitau Mwaniki (Gitau) were jointly charged with two counts of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***, Chapter 63, Laws of Kenya. The particulars of the first count were that on 8<sup>th</sup> February, 2008 at Nyeri Township in Nyeri District within the then Central Province, the appellants and their co-accused jointly with others not before court, robbed Martin Muriithi Gachanja of cash Kshs. 20,000/= and one mobile phone make Nokia 6070 Serial Number 353627018336688 all valued at Kshs. 27, 700/= and at or immediately after the time of such robbery used actual violence to the said Martin Mureithi Gachanja The particulars of the second count were that on the above mentioned date and place the appellants and Gitau jointly with others not before the court, robbed Douglas Mwangi Gachanja *alias* Kibocha of one mobile phone make Siemens SL 55 valued at Kshs. 3,999/= the property of Douglas Mwangi Gachanja *alias* Kibocha.
  4. It was the prosecution's case that on the material day PW1, Martin Mureithi Gachanja (Martin), PW2, Douglas Mwangi Gachanja (Douglas) and PW3, Robert Kiriru Kinyua (Robert) being crew members of a bus registration number KAN 857B plying Karatina- Nyeri- Nyahururu road stopped at Nyeri stage to pick up passengers. While Douglas was standing at the stage a person who he claimed to be the 1<sup>st</sup> appellant approached him and demanded Kshs. 300/= from him. It was Douglas's testimony that the 1<sup>st</sup> appellant was a member of the outlawed *mungiki sect* which used to demand money from the public service vehicles at the Nyeri stage. Douglas told the appellant he did not have money and promised to give him the same the following day. The 1<sup>st</sup> appellant left and returned after a few minutes in the company of other men. Douglas ran into the bus and the 1<sup>st</sup> appellant together with the other men followed him into the bus. The 1<sup>st</sup> appellant slapped Douglas. Martin who was by then inside the bus went to Douglas's rescue and inquired what happened. The group of people turned against him and started beating him. The assailants robbed Douglas of his mobile phone make Siemens and Martin of cash Kshs. 20,000/= and his mobile phone make Nokia. Robert was nearby and witnessed the whole incident. Douglas and Robert testified that they had recognized the appellants and Gitau as some of the robbers during the incident and that they were all known to them prior to the incident. The appellants and their co-accused were subsequently charged and arraigned in court; they denied committing the offence.
  5. The trial court being satisfied that the prosecution had proved its case to the required standard convicted the appellants and their co-accused and sentenced them to death. On an appeal to the High Court and vide a judgment dated 8<sup>th</sup> June, 2012 the High Court (Sergon & Wakiaga, JJ.) confirmed the appellants' conviction and sentence and quashed Gitau's conviction for lack of evidence. The appellants have since filed a second appeal to this Court which as we pointed out earlier is not before us.
  6. The 1<sup>st</sup> appellant in further support of his application filed written submissions. He argued that the jurisdiction of this Court on a second appeal is limited to points of law only. The evidence which he seeks to introduce is in respect of identification which is a point of law. He relied on this Court's decision in ***Henry Kimathi -vs- Republic- Criminal Appeal No. 24 of 2002*** in urging us to allow the application. M/s Lucy Mwai, learned counsel for the 1<sup>st</sup> appellant, submitted that this Court has powers under ***Rule 31*** of the Rules to receive new evidence which is based on a point of law. She argued that the charge in question was serious.
  7. On the other hand, Mr. E.W. Makunja, Senior Prosecution Counsel, argued that this Court only

has power to admit additional evidence under **Rule 29** of the Rules and that **Rule 31** and **Rule 29** are distinct. He submitted that the 1<sup>st</sup> appellant did not give any sufficient reason to warrant the admission of new evidence. Mr. Makunja argued that the 1<sup>st</sup> appellant was guilty of laches because he did not apply for the said Occurrence Book to be produced both at the trial court and in the High Court. He urged us to dismiss the application.

8. We have considered the application, the grounds in support thereof, able submissions by counsel and the law. At this point we find it necessary to consider the provisions of **Rule 29** and **31** of the Rules. **Rule 29** partly provides:-

**“29 (1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—**

**(a) to re-appraise the evidence and to draw inferences of fact; and**

**(b) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.”**

Based on the foregoing it is clear that this Court can only exercise its power under the said provision to admit additional evidence where it is sitting as a first appellate court from the decision of the High Court in exercise of its original jurisdiction. See this Court's decision in **Eluid Olembaria -vs- Republic- Criminal Appeal No. 300 of 2005**. We are of the considered view that **Rule 29** is not applicable in this instant application because this Court is sitting as the second appellate court in the appeal herein.

9. **Rule 31** of the Rules provides,

**“ On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.”**

This provision grants this Court the powers to issue orders which are within its jurisdiction as an appellate court.

10. Can this Court admit additional evidence on a second appeal? The answer to this issue we believe depends on the scope of the Court's jurisdiction on a second appeal. By dint of **Section 361** of the **Criminal Procedure Code**, Chapter 75, Laws of Kenya this Court's jurisdiction on a second appeal is limited to points of law. Further, 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**)”**

See **Chemangong -vs- Republic[1984] KLR 611**.

11. In this application it's the 1<sup>st</sup> appellant's contention that the purpose of seeking the admission of the occurrence book into evidence is to enable the Court test the issue of identification which the two lower courts made concurrent findings on and that the issue of identification is a point of law. It is not in dispute that none of the stolen items were recovered on the appellants and the only evidence against them was based on recognition. This Court is barred from interfering with concurrent findings of fact by the two lower courts unless it is established there was no evidence to justify the said concurrent findings. The issue of identification has been raised by the 1<sup>st</sup>

appellant in his memorandum of appeal. In **Kelvin Kimathi Nyaga -vs- Republic- Criminal Appeal No. 109 & 116 of 2012** this Court expressed itself as follows:-

***“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..”***

We are of the considered view that in order to test whether the concurrent findings on recognition were safe to warrant the conviction of the appellants it is necessary for us to admit the above mentioned Occurrence Book into evidence.

12. Further, having perused the record, we cannot help but note that the 1<sup>st</sup> appellant's counsel in his submissions before the trial court pointed out discrepancies in the identification evidence both in the said Occurrence Book and the prosecution's witnesses. We find that the circumstances in this case are similar to the circumstances in the case of **Henry Kimathi -vs- Republic (supra)** wherein this Court on a second appeal admitted the Occurrence Book as additional evidence. In **Eluid Olembaria -vs- Republic (supra)** this Court in considering the **Henry** case expressed itself as follows:-

***“In that case, this Court did entertain such an application. It must be noted first, that was an application made in the course of hearing an appeal, and secondly, that in that case, the applicant had made the omission to consider the Occurrence Book of Tigania Police Station his main defence at all stages of his case.”***

We find that by virtue of **Rule 31** of the Rules and the overriding objectives of this Court we have the jurisdiction to admit the Occurrence Book as additional evidence.

13. The upshot of the foregoing is that we allow the said application with no orders as to costs. Accordingly, we direct the Deputy Registrar of this Court to ensure the availability of Occurrence Book No. 62 of 8<sup>th</sup> February, 2008 or a certified true copy thereof from Nyeri Police Station at the hearing of the appeal herein.

***Dated and delivered this 10<sup>th</sup> day of December, 2013***

***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**