IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 60 OF 2013

BETWEEN

BONIFACE KIVUTI MUTHEE ..... 1ST APPELLANT

JOSEPH MUCHANGI NYAGA ..... 2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from Judgment of the High Court at Embu

(Khaminwa & Makhandia, JJ.*) delivered on 29th June, 2007*

in

H.C.CR. Appeal Nos. 138 & 139 OF 2005)

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JUDGMENT OF THE COURT

1. Joseph Muchangi Nyaga and Boniface Kavuti Muthee were jointly charged with the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code, Chapter 63*** of the ***Laws of Kenya***. The Information is that on the 15th day of September, 2004 at Kakambura village Kirigi Sub-location Nganderi Location in Embu District within Eastern Province jointly with others not before Court while armed with dangerous weapons namely pangas, iron bars and rungus, robbed Silas Kiondo Kimotho cash Ksh. 16,000/=, 2 power saws and a mobile phone all valued at Ksh. 112,000/= and immediately before or immediately after such robbery used actual violence to the said Silas Kiondo Kimotho. The appellants faced an alternative charge of handling stolen goods contrary to ***Section 322 (1)*** of the Penal Code.

2. The appellants were tried, convicted and sentenced to death as by law prescribed. Aggrieved by the conviction and sentence by the trial magistrate, the appellants lodged a first appeal before the High Court. Their appeal was dismissed and hence this second appeal to this Court.

3. The appellants lodged a consolidated memorandum of appeal listing 10 grounds of appeal which can aptly be condensed to:

1. ***The learned judges of the High Court failed in their legal duty to adequately evaluate the evidence of identification of both the appellants and they made an error in holding that either or both appellants were positively identified either visually or by voice.***

2. ***The learned judges of the High Court erred in relying on the testimony of a single indentifying witness without testing the evidence for material corroboration.***

3. ***The learned Judges of the High Court failed to come to their own independent conclusions after evaluation of the evidence on record and merely perused and confirmed the decision of the trial magistrate.***

4. ***The learned Judges erred in law in failing to find that the conditions prevailing at the alleged time of identification were not favourable to a positive identification that is free from error.***

5. ***The learned judges misdirected themselves in treating the cash transaction between the 1st appellant and PW 1 and PW 2 as the motive for robbery.***

6. ***The learned judges erred in law and fact in failing to consider the defence of the appellants.***

4. The background to the offence was given in the testimony of PW 1 Silas Kiondo Kimotho, a timber merchant who narrated the events of the night as follows:

> ***"I can remember the night of 14th/15th September 2004. At 1.30 am, Muchangi and Kivuti and others came to my home. I was asleep. I heard Muchangi ordering me to open and if not he was going to fire a gun shot. At the same time they broke the door to my house with a stone. We started screaming. I then decided to start one of my power saw. I then went and put the power saw under the door. They dispersed. They started hitting window glasses shattering them. The power saw caught a curtain and stalled. The men went round to the other door and hit it three times with a stone and it opened. The thugs entered the house and were armed with dangerous weapons like pistol, iron bars, pangas and axes. When I saw the weapons they had, I knelt down raising my hands in surrender. I was at the corridor. They started beating me with axes and iron bars. They ordered me to lie down. One man came and hit my head with his leg and placed a panga on my neck. I lay down facing upwards. They took the power saw then ordered me to give them all the money that I had sold timber. I told my wife Janet to take the trouser I was wearing during the day and she gave them Ksh. 16,000/=. That is the time I identified Muchangi because my wife was using a torch to remove the money. I also saw Kivuti with the light of a torch. Musangi demanded to be given the mobile phone Motorolla T 190 and the other power saw which was in the other room. They continued to beat me. I pleaded with them not to kill me. The police came and asked me whether I was able to identify anybody and I told Muchangi and Kivuti. In the morning, police from Manyatta came and asked if I could identify anybody and I gave the same names. Police went ahead and arrested them on the night of 15th. On 16th, the police called me. I went and found two power saws and I was told to identify them. I was able to identify the ones which were dismantled. I was able to identify the two power saws as one had numbers. I knew Musangi and the other because they used to buy timber from me".***

5. In cross-examination, PW 1 stated that he took the police to the house of the appellants where the power saws and its dismantled parts were recovered and he testified that the house where they recovered the items belonged to Benson Nyaga Muthee (*deceased co-accused*). He reiterated that nothing was recovered from the 1st or 2nd appellant's house and that his mobile phone was never recovered.

6. PW 2 Janet Muthoni testified that PW 1 is her husband and on the night of 14th/15th September, 2004, they were asleep at home. At about 1.30 am, she heard people outside ordering them to open the door. She heard a sound like a gunshot and she started screaming. The intruders hit the rear door and entered. About nine people entered the house armed with pangas, rungus and iron bars and one had a pistol. There was no light in the house and one of them asked PW 1 to produce all the money he had. PW 1 asked her to remove money from the trouser pocket he wore during the day. That one of the intruders followed her with a torch and she gave him Ksh. 16,000/=. They continued beating her husband. That it was Muchangi, the 2nd appellant who followed her and she gave him a Motorrolla T 190 mobile phone. She testified she gave the police the names of the 1st appellant whom she was able to identify because she had a torch and the 1st appellant also had a torch. That she was able to identify only the 1st appellant who used to buy timber from PW 1.

7. At the hearing of the appeal, learned counsel ***Mr. M.G. Njage*** appeared for the appellant while the Assistant Director of Public Prosecution ***Mr. Job Kaigai*** appeared for the State.

8. Counsel for the appellant elaborated on the grounds of appeal and emphasized that the appeal is premised on the issue of identification. It was submitted that the learned judges of the High Court erred in failing to properly evaluate the evidence of the two identifying witnesses PW 1 Silas Kiondo Kimotho and PW 2 Janet Muthoni. The alleged offence took place at 1.30 am and there was no electric lighting in the house where the robbery took place. The only available light at the scene of crime was torch light carried by PW 2 and allegedly the 1st appellant. Counsel submitted that neither of the two alleged torches was produced in court as exhibits nor the intensity of their brightness analysed or evaluated. Counsel submitted that PW 1 testified that he was beaten by the attackers to the extent that he was unable to identify the clothing of the attackers. PW 1 testified that he was filled with fear and shock as he knelt down begging his life to be spared. Counsel submitted that the prevailing condition of fear and shock made it difficult for PW 1 to positively identify the appellants as his attackers. Counsel pointed out that the complainants never gave any description or names of the attackers to the police at the first and earliest opportunity. It was submitted that the police record as per the Occurrence Book did not show that the complainants gave the names or description of the attackers. It was submitted that failure to give or record the names of the suspected attackers was fatal. On voice recognition, it was submitted that the learned Judges erred in failing to evaluate the evidence on voice recognition and to subject the same to the legal test and requirement before relying on voice identification to convict the appellants.

9. Counsel reiterated that under the prevailing circumstances, it was not possible to identify any voice considering that the complainants had testified that about 9 or 10 intruders had entered their house. Counsel posed the question that out of the so many intruders, whose voice was it and what words were spoken and in what language were the words uttered. It was submitted that there were three languages spoken at the scene of crime namely Kikuyu, Kiembu and English and the language spoken by the attacker should have been stated in evidence and recorded. Counsel submitted that the evidence on voice recognition did not meet the standards set up in the case of ***Choge – v- R, (1985) KLR,*** where it was stated that:

> ***"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it"***.

10. On the issue of motive for robbery, counsel for the appellants submitted that the Honourable Judges erred by treating the Ksh. 16,000/= paid by the appellant to PW 1 as the motive for robbery. It was submitted that the 1st appellant was a regular customer to the complainant and he was paying money to the complainant in the course of his timber trade. The fact that the 1st appellant had paid the complainant a sum of Ksh. 16,400/= should not be considered a motive as this was not the first time the appellants had

paid money to the complainant.

11. Counsel for the appellants urged this Court to find that nothing was recovered from the appellants and the exhibits produced before the Court was not incriminating to the appellants. It was submitted that the Honourable Judges erred in finding that the 1st appellant led the police to the house of the third co-accused (now deceased) where the power saws were recovered. It was submitted that this finding was contrary to the evidence on record which clearly show that it was the complainant (PW 1) who led the police to the house of the third co-accused. Further, it was submitted that the power saw recovered from the house of the deceased co-accused did not match the serial number on the receipt produced by PW 1 for the allegedly stolen power saw. The serial number on the receipt produced by PW 1 was totally different from the serial number on the recovered power saw. Counsel submitted that the both the power saw produced in court as a recovered exhibit and the receipt produced by PW1 were of no evidential value towards incriminating the appellants. That the exhibits produced in court did not corroborate that the two appellants were present at the scene of crime. Counsel also submitted that the Honourable Judges did not address their mind to the alibi raised by the appellants.

12. The State opposed the appeal stating that the prosecution evidence was overwhelming and to the required standard. It was submitted that PW 1 was able to clearly identify the appellants using the torch light that was in possession of PW 2 Janet Muthoni. Emphasis was placed on the fact that the complainants were able to succinctly state the role that each of the appellants played during the robbery and that the evidence on lighting that was available at the scene was not shaken. The State urged this Court to note that the two appellants did not cover their faces during the robbery. On the issue that the Occurrence Book did not have the names of the attackers reported to the police, it was submitted that PW 5 Police Constable George Kiringa testified that the complainants gave him the names of the two appellants as the attackers but he did not record them. The State submitted that the reasons for this were the quick succession of events between the attack and the arrest of the appellants. It was submitted that Police Constable Hillary Limo (PW 7) testified that although he did not record in their statements, the two complainants were able to identify the appellants. It was submitted that the P 3 Forms tendered in evidence was proof that violence was used during the robbery. The State noted that although no goods were recovered from the appellants, the appellants were in constructive possession of the power saw considering that the recovered parts were identified as belonging to the complainants. In reply to the submission by the State, counsel for the appellant observed that the fact that the attackers were not masked made it more necessary and critical that the trial court and the High Court should have warned themselves and exercised caution and tested the evidence of visual identification of the appellants.

13. We have examined the record of appeal and the judgment of the High Court. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214,*** a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in ***Chemagong vs. Republic, (1984) KLR 213*** at page 219 where 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. The main ground of appeal relates to the evidence on identification and whether the Honourable Judges of the High Court properly evaluated the testimony of PW 1 and PW 2 in so far as visual and voice recognition of the appellants was concerned. Evidence of visual identification should always be approached with great care and caution (see ***Waithaka Chege – v- R {1979} KLR 271).*** Greater care should be exercised where the conditions for a favourable identification are poor. (***Gikonyo Karume & Another – v – R {1900} KLR 23)***. Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See ***Abdalla bin Wendo & Another – v- R, {195} 20 EACA 166; Wamunga – v- R, {1989} KLR 42; and Maitanyi – v- R, 1986 KLR 198***). Before acting on such evidence, the trial court must make inquiries as to the

presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.

15. In the present appeal, the Honourable Judges simply expressed themselves stating that "there was other evidence of identification at the scene. The complainant and his wife were able to visually identify the first appellant inside the house. For the 2nd appellant, the wife (PW2) was not able to identify him but the complainant was positive that the second appellant was present and he could see him with torchlight."

16. Our evaluation of the record and Judgment of the High Court reveals that the prevailing circumstances were not conducive for an identification that is free from the possibility of error. The offence was committed at 1.30 am and both PW 1 and PW 2 admitted that there was no electricity in the house. The only source of light at the scene and time of the offence was a torch light. PW 2 testified that despite the torch light, she was not able to identify the 2nd appellant. She also testified that she was followed by the 1st appellant to a room where she was able to retrieve the trouser of PW 1 and she gave the 1st appellant Ksh. 16,000/=. On the other hand, PW 1 testified that he was along the corridor lying down facing upwards. We pose the question that if the source of light for PW 1 to identify or recognize the 1st and 2nd appellant was from the torch which PW 2 had, and PW 2 had moved to the other room to get the trouser, is it plausible that the light from the torch could illuminate the corridor where PW 1 was lying down to enable him see, recognize and identify the 1st appellant? This aspect of the evidence was not tested and considered by the Honourable Judges. The relative position of PW 2 who was carrying the torch in comparison to where PW 1 was lying down was not considered by the Honourable Judges and we are of the considered view that the purported recognition and identification of the 1st appellant by PW 1 was not free from error.

17. As regards identification of the 2nd appellant, PW 2 testified she did not identify the 2nd appellant. What evidence is on record to connect the 2nd appellant to the crime? The testimony of PW 1 is the evidence that allegedly connects the 2nd appellant to the crime. PW 1 testified that using the light from the torch that PW 2 was carrying; he was able to identify the 2nd appellant. We have stated that the ability of the torch to illuminate the corridor where PW 1 was lying down was not tested and we find that the visual identification of the 2nd appellant by PW 1 is not free from error.

18. On voice recognition, in ***Karani vs. Republic, (1985) KLR 290*** this Court held at page 293:

> ***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."***

19. The complainant, PW 1, testified that he recognized the voice of the 1st appellant as he was his customer in the timber business. PW 2 testified that there were between 9 and 10 intruders who entered the house. The Judgment of the High Court does not contain the exact words spoken by the 1st appellant which words led the complainant to recognize his voice. It is also not clear in what language the words were spoken. Failure to subject the voice identification to test and analysis casts some doubt as to the veracity of voice identification. In addition, the fear and shock as stated by PW 1 make the prevailing conditions at the scene of crime unfavourable for safe voice identification. It is our considered view that the Honourable Judges erred in giving undue weight to the testimony on voice recognition.

20. We now consider the evidence relating to recovery of the stolen power saws. PW 1 in his evidence-in-chief testified that two power saws were stolen from his house and the same were recovered from the appellants. He admitted that the recovery was made from the house of a one Benson Nyaga Muthee. The State contended that the said Benson Nyaga Muthee was a co-accused to the appellants and consequently the appellants were in constructive possession of the recovered stolen power saws. Both

PW 1 and PW 5 admit that nothing was recovered from the house of the 1st and 2nd appellant. PW 1 testified that he is the one who led the police to the house of Benson Nyaga Muthee where the power saws were recovered. It is our considered view that the learned judges erred in law and fact in making a finding that it was the appellants who led the police to where the items were recovered. This finding is not supported by the testimony of PW 1. The fundamental issue that arises is whether the 1st and 2nd appellants can be said to have been in constructive possession of what was recovered in the house of Benson Nyaga Muthee. What evidence is on record to demonstrate that the house of Benson Nyaga Muthee was also used by the 1st or 2nd appellants? Is there any evidence on record to demonstrate any relationship between the appellants and Benson Nyaga Muthee in relation to the use and occupation of the house where the stolen items were recovered? We have examined the judgment of the Honourable Judges, the aspect of constructive possession by the appellants was not considered in light of the evidence that it was PW 1 who led the police to where the stolen items were recovered and that the house was not in occupation by the appellants. We are of the considered view that it was a misdirection on the part of the Honourable Judges to invoke the doctrine of recent possession on the facts disclosed by this case. There is a further misdirection in law and fact wherein the learned Judges did not appreciate the difference in serial numbers between the power saws recovered and the purchase receipt tendered in evidence by PW 1.

21. The totality of our consideration of the grounds of appeal and the Judgment of the High Court reveals that the prosecution did not prove its case beyond reasonable doubt. The visual identification of the appellants by PW 1 and PW 2 was not free from error; the voice identification does not meet the legal criteria where the language and exact words uttered by the accused person should be stated; the conditions prevailing for a positive voice identification were lacking; the doctrine of recent possession is inapplicable to the facts of the case; the finding by the Honourable Judges that the 1st appellant led the police to where the stolen items were recovered is not supported by evidence; the concept of constructive possession was not legally evaluated. All these gaps cast doubt on the criminal culpability of the appellants for the alleged offence. The benefit of doubt goes to the appellants. We allow the appeal and order 1st appellant, Boniface Kivuti Muthee and the 2nd appellant, Joseph Muchangi Nyaga be and are hereby set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 10th day of December, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR