IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 68 & 98 OF 2008

BETWEEN

JOHN KAMAU WAMATU…….. 1ST APPELLANT

DAVID MURIUKI KAROBIA ……. 2ND APPELLANT

AND

REPUBLIC……..…….. RESPONDENT

(Appeal from a conviction, judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia JJ.)dated 15th May 2008

in

H.C.CR.A. NO. 146, 176 & 205 OF 2005)
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JUDGMENT OF THE COURT

Following their conviction and sentence on two counts of the offence of robbery with violence contrary to **section 296(2**) of the Penal Code **John Kamau Wamatu** and **David Muriuki Karobia**, the 1st and 2nd appellant respectively, appealed against conviction and sentence to the superior court. That court (*Kasango and Makhandia JJ.)* dismissed their respective appeals and thus provoked the appeals before us. Three main grounds have been raised as can be discerned from home made memoranda of appeal and supplementary memoranda of appeal. These are:

(1) Identification evidence was not sufficient to show the appellants committed the offence.

(2) The first appellate court did not analyse and re-evaluate the evidence as required of it.

(3) The appellants' respective alibi defences were not sufficiently considered.

The robberies complained of were committed on 12th June 2004, at Nyeri Glass Mart at about 12 noon. Three men armed with, among other weapons, a pistol, walked into the shop owned by one Fazal Hussein, closed the shop door and pointed a gun at those who were in the shop. They included **Fazal Hussein** (PW1), his wife and one customer. They ordered the three to lie down, which they did. Thereafter the three men demanded mobile phones. PW1 surrendered to them a **Nokia 2100,** the customer likewise surrendered money and a phone. Thereafter the three men opened the cash

box and took Kshs.5000 among other items, before they opened the shop door and walked out. P.W.1 his wife and the customer were not able to identify any of their attackers. The robbers entered a waiting car, a Toyota, white in colour, but which did not have any registration plate. It had a red spoiler at the back.

Peter Kavile Njau (PW3) was a shop attendant at the aforesaid shop. At the time of the robbery he was standing outside an African Retail Traders (ART) shop, which was nearby. He was talking to a relative who had come to see him. As PW1's shop door was being closed he was in a position to see, and he testified that he witnessed the re-opening of the shop. It was his evidence that the shop remained closed for an interval of about 5 minutes, but he could not make out why the shop was closed. He further testified that he saw three men leave his employer's shop and walk towards a white Toyota Corolla E 90 car with a spoiler at the back, but the car did not have any registration marks. Another person walked from a nearby restaurant and joined the three. He was the person who drove the car away with the three men from his employer's shop as passenger. The witness said he could identify the driver, and he pointed him out in court as the third accused, namely **Joseph Ng'ang'a Njenga** but who was acquitted by the trial court. He also said that he identified the appellants, but he was only able to observe their facial appearance momentarily at the time they turned to enter the above car. In that regard he is recorded as having said:

> " I saw people come out. I saw their backside when they reached the motor vehicle, I saw their faces. When I saw them come out of the shop I went into the shop."

The witness also testified that he pursued the robbers as they escaped in their car. He was using his employer's motor vehicle. They headed towards King'ong'o area, but when he could not catch up with them he returned.

The appellants were arrested by a team of police officers under the command of Inspector **Charles Marangu** (PW5). He was under a special assignment to fight crime in Nyeri area. In the course of that assignment he went with his officers to attend to a report of a robbery in the Endarasha area. Near Mweiga they stopped a Saloon car with 6 occupants, and among them was the second appellant. They were interrogated, and upon information received in the course of that interrogation, the 1st appellant and another person whose appeal is not before us were arrested.

The 1st appellant was a military man with the Engineering Battalion, Nanyuki. From there a motor vehicle, Toyota Corolla E 90, with a red spoiler, was recovered. It was at the residence of Joseph Nganga Njenga, who was later jointly charged with these appellants and another person who was acquitted by the trial court. Joseph Nganga Njenga was the third accused, and at the close of the trial he was convicted along with both the appellants but as we stated earlier, his conviction was quashed on first appeal. PW3 identified the car as the one he saw outside Fazals's shop on the material day of the robbery, and which he pursued towards King'o ng'o area.

At the time the appellants were arrested mobile phones were taken away from them. PW5 testified that he got a mobile phone No. 0720 732518 from the 1st appellant, and others from some of the other accused. He did not get the telephone No. of the 2nd appellant immediately. With the assistance of Safaricom Mobile Phone Company the witness was able to

establish that the appellants and their co-accused had made phone calls to each other between 14th and 15th June 2004, which was two or so days after the aforesaid robbery, clearly showing that they knew each other and were not strangers to each other notwithstanding their different standings in life. A data printout was given in evidence to show the calls made by each of them and the dates and times of the calls. Objection was raised by the defence to its production by PW5 on the ground that it should have been produced by an officer from the mobile phone company, but the trial magistrate overruled the objection on the ground that if the defence wanted to cross-examine the maker of the printout they were at liberty to make the necessary request to do so.

While the appellants were in police custody both appellants participated in identification parades with PW3 as the identifying witness. The witness picked both of them as having been among the people he had seen on the material date of the robberies complained of leaving PW1's shop. It was contended by the appellants that the witness was able to pick them because their photographs had appeared in the local press and that the suspects' photographs which had allegedly been taken from their houses were shown to the identifying witness, a fact the witness and the parade officer denied. The trial magistrate believed the parade officer and therefore accepted and acted on the identification parade evidence.

Both appellants raised alibi defences at the trial. The 1st appellant's case was that on 12th June 2004, the date when the robberies were allegedly committed, he was on duty throughout the day. The second appellant on the other hand stated that he was arrested as he travelled to go and meet the 1st appellant for whom he was constructing a house. It was his case that he is a Mason and had been engaged by the 1st appellant to build a house for him, a story which the 1st appellant confirmed. He, like the 1st appellant stated that he was away in Nyahururu on the date the robberies were committed. Both of them admitted they had earlier spoken on phone to organize a meeting. The second appellant attacked the manner the identification parade in which he was picked was conducted. He complained that he has a lump above one of his eyes, and prior to the parade he had asked the parade officer to get parade members with a similar deformity but he did not. He also complained that his picture appeared both in the local dailies and on T.V. and that the witness might have seen it. He denied he knew the other co-accused before the material date of his arrest.

The trial magistrate believed PW3 that he identified both appellants. She rejected their alibi defences and accepted and acted upon the evidence of PW4 to support PW3's identification of the appellants. She therefore convicted them and sentenced them to the mandatory death sentence for the offence. She however, acquitted Joseph Nganga Njenga (3rd accused) and Julius Kimathi Mwiti (5th accused) arguing that the 3rd accused's alibi was corroborated by his 12 year old daughter and the evidence of identification against the 5th accused was doubtful.

In their 1st appeals the appellants generally raised identifical grounds in support of their appeals. The grounds were: the evidence against them was fabricated, contradictory, flimsy, and uncorroborated and was therefore insufficient to support

their conviction. They also complained that their alibi defences were not considered adequately.

At the hearing of their appeals Mr. C.O. Orinda, for the state did not support the appellants' respective convictions. In his view there was no proper basis for the identification parade conducted by PW4 and he said he was unable to see the basis upon which they were held. It was his view that a letter from Safaricom which gave calls data which appellants and their co-accused had made having not been a government document, was improperly admitted in evidence, and was therefore prejudicial to the appellants. It was his view that its author should have been called to produce it in evidence.

The superior court agreed with Mr. Orinda that the production of the letter from Safaricom, was prejudicial to the appellants, and it was improperly produced under **section 77(1)** of the Evidence Act. It held that at best it was in the nature of hearsay evidence. That court however, was of the view that there was ample evidence, excluding that letter, to support the appellant's conviction. It was their view that PW3 was able to observe his employer's shop, was able to identify the two appellants and two other people as they walked from there to a waiting car. He was able later to pick them at identification parades held for purposes of identifying them. That court dismissed the complaint that their pictures had been exposed to PW3 and held that had that been so PW3 would have been cross-examined on the matter, moreso because the 1st appellant was represented by counsel at the trial. The court was satisfied that the identification parades for both appellants were properly conducted. In the end that court dismissed the appellants' respective appeals but allowed the appeal by John Gitonga Muriithi who was the first accused on the basis that his conviction was mainly based on the contents of the letter from Safaricom whose admission in evidence was held to be improper. That court said nothing about Mr. Orinda's submission that he did not support the appellants' respective convictions. Both the appellants herein were aggrieved and hence this appeal.

We earlier set out the main grounds upon which their respective appeals are based, the main one being identification. That ground and the remaining two raise matters of law, and by dint of the provisions of **section 361(1)** of the Criminal Procedure Code (CPC) they fall for consideration, this being a second and last appeal. The main issue in the appeal is identification. The key witness thereof was PW3. As we stated earlier he was an employee at the shop where both robberies were committed. He was not inside the shop at the time of the robberies complained of, but was at the material time standing about 3 shop blocks away and he estimated the distance as being about 200 metres. It could have been shorter or longer, it being an estimate, but considering what we shall state later it was shorter.

PW3 testified that the time of the robbery was about 10.20 a.m. It was broad daylight and there were no obstructions to his visibility of the employer's shop. He saw a person acting as though he was taking measurements of the shop door. If he was able to see that he must have been near enough. He was able to see the person carrying a tape measure, he said. When he saw the shop door being closed he took keener interest, and five or so minutes after it was closed, it was opened. He saw 3 men walk away. He said he followed the three people and saw them enter a motor vehicle which had no number plates. As they walked away he could not see their faces, but they turned before they entered the said motor

vehicle and he was therefore able to see their faces. The three people walked away from the shop and passed near where the witness was standing. The car was about 100 metres away from where he was and the distance was short enough to enable him observe the three men and a fourth one whom the witness described as the driver of that car. It is also noteworthy that from where the witness was standing he could hear commotion in the shop. That is evidence that he was not 200 metres away, but a much shorter distance as we reckon that it might not have been possible to clearly discern that certain noise is coming from a particular shop if one is 200 metres away. Shops are lined together and unless a person is close enough it might not have been easy to identify the particular one from which the noise of commotion was coming from. PW3 was quite properly believed by the two courts below. The circumstances favoured a correct identification.

Besides, PW3 picked both appellants in well conducted identification parades. Identification parades are meant to test the correctness of a witness' identification of a suspect.

Mr. Orinda, for the state submitted before the superior court that there was no proper basis laid for holding the identification parades. As stated earlier the superior court did not make any comments on this aspect of the matter. There was clearly a basis laid for the identification parades. PW3 testified that he was able to identify some of the robbers. It was his evidence that he was near enough that it was possible to identify them. The police were right in holding the identification parades to confirm PW3's testimony.

An issue was raised at the trial as also before the superior court and before us regarding the propriety of a police officer producing in evidence a letter he had received from Safaricom on telephone calls made from the appellants' respective mobile phones. The argument presented to the court was that the letter should have been produced by its author. We agree with the superior court that the document could not properly be produced under **section 77** of the Evidence Act Cap 80 Laws of Kenya as the documents referred to under that section do not include letters or documents, not amounting to reports by a Government Analyst, Geologist, Medical practitioner, a Ballistic Expert, document examiner or any other report of the nature talked about in the section. The relevant provisions for the production of such a letter is **sections 67** and **68** of the Evidence Act. The document in question was a primary document and we see nothing wrong with a recipient of the letter producing it in evidence. The authenticity of the letter was not challenged. **Section 67**, above provides that such a letter, if it is in original form, is proof of its content and the trial Magistrate was right in admitting it in evidence and acting upon it. The letter made reference to telephone calls which had been made by the appellants and clearly showed that the appellants and their co-accused knew each other, contrary to denials by some of them. Both appellants herein, however, admitted have talked to each other through their respective phones. That being our view of the matter we think that the superior court improperly rejected the document.

As regards the appellants respective alibi defences, these were displaced by PW3's evidence. It is regrettable that the trial court acquitted Joseph Nganga Njenga (3rd accused) as the escape vehicle was found at his house and he in any case

admitted in court, it was his. PW3 described the vehicle he saw being driven away by the people who robbed his employer and a customer at his shop. The vehicle which was found at the residence of 3rd accused, answered the description the witness gave. As there is no appeal by the Republic against the acquittal, we say no more on the matter. Suffice it to state that 2nd appellant led the police to the homes of the 3rd accused and 1st appellant. The 3rd accused had the evidential burden of explaining the presence of the car near PW1's shop, and who it is that used it to escape from the scene. Having been acquitted the issue is now an academic one. The 1st appellant explained that the 2nd appellant was his mason, but both courts below having rejected that explanation, we cannot but accept that finding. We have no basis for holding otherwise.

In the result, we dismiss the appellant's respective appeals.

It is so ordered.

Dated and delivered at Nyeri this 25th day of June 2010

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR