**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 128 OF 2005**

**RICHARD GITAU NJOGU**

**GEORGE KIRONJI KINYANJUI .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Nairobi***

***(Makhandia & Kimaru, JJ) dated 18th March, 2004***

**in**

**H.C.Cr. A. No. 1074 of 2000)**

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**JUDGMENT OF THE COURT**

This appeal before us arises from the dismissal of an appeal to the superior court (Makhandia & Kimaru, JJ) from the decision of the Senior Principal Magistrate's Court at Kiambu (W. Karanja) wherein the appellants were convicted of the offence of robbery with violence contrary to *Section 296(2)* of the Penal Code. It was alleged in the charge before the Magistrate's Court that on 26th day of December 1998 at Godhas area in Kiambu District of the Central Province jointly with others not before the court and while armed with dangerous weapons, namely pistols and rungus they robbed John Francis Gitau of his motor vehicle registration number KAJ 017 Toyota Corolla, Kshs.900/=, two wrist watches and personal documents all to the value of Kshs.505,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said John Francis Gitau.

The case was initially heard by Mr. Olao, Senior Principal Magistrate but when he was transferred Mrs. W. Karanja, another Senior Principal Magistrate took it over and proceeded with the case from where Mr. Olao had left it. The facts of the case were that on the day of the incident the complainant John Francis Gitau (PW1) with a passenger Janet Waithera Kimani (PW2) was driving his said motor vehicle along Limuru-Banana Road when he was waved down by a group of three people who included the appellants. When the complainant stopped, he was ordered out of the vehicle by one of the attackers who was armed with a pistol. The complainant came out and struggled with the armed man for sometime before the other two attackers came to the rescue of their friend by hitting PW1 with stones and/or stabbing him with a knife.

The attackers are said to have asked for and taken from PW1 Kshs.900/= and two watches one from him and another from PW2. They then drove the complainant's motor vehicle away but by that time the complainant had already identified the appellants and another who was acquitted by the lower court.

The complainant and PW2 reported this incident to police on police hotline. The police visited the scene soon after and started investigations after the complainant and PW2 recorded their statements at Karuri Police Station. The appellants were arrested on 22nd February 1999, the 1st appellant in Nairobi while the 2nd appellant was arrested in Limuru. They were taken to Karuri Police Station where they were later charged with the offence subject to this appeal.

They denied the offence in the lower court in their sworn defences with each saying he knew nothing about the robbery and that it was being framed against them. In her judgment, the learned Senior Principal Magistrate said:-

"***In this case however, the identification of accused 1, accused 2 by PW1 is not dock identification. He identified them at the scene and also picked them out in the identification parades. That is very strong evidence in my view. The same is corroborated by that of PW2 and it therefore strengthens it even more.***

***I find that no doubt accused 1 and 2 were part of the persons who robbed the complainant of his motor vehicle and other items on the date in question. I may also mention that accused 3's C&C Statement though retracted did mention the names of accused 1 & 2 as some of the people who robbed the complainant.***

***The same therefore corroborates evidence. I find the charge against accused 1 and 2 proved beyond any shadow of doubt. I do subsequently find both of them guilty as charged and I convict them accordingly."***

She, however, acquitted the 3rd accused because the complainant did not pick him out in the identification parade and that he only pointed him out in court. Further that his identification by PW2 was sheer dock identification which had very little probative value.

When the appeal was lodged to the superior court and after evaluating the evidence on record, the learned Judges (Makhandia and Kimaru, JJ) had this to say:-

"***We find the learned trial Magistrate did not err in reaching the conclusion that PW1 properly identified the appellants. ...***

***We see no reason to disagree with the analysis of the evidence as relates to identification of the appellants by the complainant PW1.***

***We however do find that the conclusion reached by the learned trial Magistrate as regards the evidence of PW2 is not without fault. Although PW2 was able to identify the appellants at the dock during the hearing of the case before the trial Magistrate's Court, we are of the considered view that the identification was worthless. PW2 was not called to any identification parade to confirm the identity of the persons who allegedly attacked her when she was with PW1. We would therefore discount the evidence of PW2 as relates to identification as the same was dock identification which in law does not amount to much.***

***The appellants have complained that the identification parades conducted by PW4 IP. Rachael Wanjiru and PW7 IP. Lucy Gitau were conducted in an improper and illegal manner. We have had the opportunity of re-evaluating the evidence of the said witnesses as relates to the conduct of identification parade. We have also looked at exhibits P3 and Exhibit P5. We have noted that in both instances the members of the identification parade were 9. The appellants were given an opportunity to have someone present during the identification parades. They confirmed that they did not have anybody around who could witness the identification parade. The witness was accommodated at the***

***police canteen away from identification parade. The parades were held at enclosed places. The appellants chose the places where they were to stand in the identification parade. After the identification parade both appellants signed the identification parade form and confirmed that they were satisfied with the conduct of the parade. We are satisfied that the said parades were conducted in accordance with the Force Standing Order and therefore the said evidence was properly admitted by the trial court. We do find that PW1's evidence of identification was corroborated by the evidence of identification at the identification parade...***

***In the circumstances therefore and for reasons stated above we find that the appeals filed by the appellants lack merit. The same are dismissed. We hereby confirm the conviction and the sentence imposed by the trial Magistrate."***

The appeal before this Court is against that decision and is grounded upon the following grounds:-

***1. That the trial court and the superior court erred in law by failing to resolve that the constitutional rights of the appellants under*** *sections 70(a), 72(2), 72(3)(b), 74(1), 77(1)* ***as read with*** *sections 33, 36* ***and*** *37* ***of the Criminal Procedure Code had been, are being and are likely to be violated.***

***2. That the trial court and the superior court erred in law by convicting the appellant on the basis of evidence of identification that did not meet the required legal standards.***

***3. That the trial court and the superior court erred in law by convicting the appellant on the evidence*** *(sic)* ***of circumstantial evidence that did not meet the required legal standards.***

***4. That the prosecutions*** *(sic)* ***erred in law by failing to call critical witnesses to prove their case beyond reasonable doubt as required by law.***

***5. That the trial court erred in law by failing to comply with*** *section 77(2)(f)* ***of the Constitution as read with*** *section 198* ***of the Criminal Procedure Code (Cap. 75) Laws of Kenya.***

***6. That the trial court erred in law by failing to consider the alibi defence and the plausible defence given by the appellants.***

***7. That the superior court erred in law by confirming the conviction on the basis of suspicion without cogent evidence.***

***8. That the trial court erred in law by convicting on single identifying witness without warming itself on the dangers.***

***9. That the trial court misapprehended the facts and applied wrong legal principles therefore drawing wrong inferences to the prejudice of the appellants.***

***10. That the trial court erred in law by convicting on evidence of co-accused which was retracted and lacked corroboration.***

***11. The trial court erred in law by convicting on the basis of exhibits that were never produced in accordance to the law.***

***12. That the superior court erred in law by failing to analyse and reevaluate the entitle evidence and draw their own.***

***13. That the trial court erred in law by relying on uncorroborated evidence to corroborate contrary to the law to the prejudice of the appellants.***

***14. That the trial court erred in law by admitting the evidence of PW7 which was contrary to the law.***

Being a second appeal we can only consider matters of law and not matters of fact. – see ***section 361(1)(a)*** of the Criminal Procedure Code. We cannot interfere with concurrent findings of the trial court and first appellate court on matters of fact unless it is demonstrated that these concurrent findings were so erroneous that no court of law, properly exercising its mind could have made such findings – ***Okeno v. Republic [1972] E.A 32***.

The section quoted above also militates against this Court hearing a second appeal on sentence as severity of sentence is a matter of fact.

It states:-

***"****361(1)* ***a party to an appeal from a subordinate court may, subject to*** *subsection 8,* ***appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this Section***

***(a) On a matter of fact and severity of sentence is a matter of fact"***

***(underlining supplied***).

One of the most important issues to be determined in the judgment subject to the appeal before us and on which counsel for the appellant dwelt most in his submissions was that of identification. On this aspect, though PW2 stated before the trial court that she could identify the robbers, she only did so in respect to the appellants while they were in the dock. The trial court said this about her identification evidence:-

***"PW2 said she was able to identify the robbers clearly. She was however not called to identify them in identification parade. Her identification of accused person includes:*** *merely dock identification. The same has been held to be of the weakest kind."*

Then she continued:

***"In this case however, I note that it corroborates PW1's evidence".***

We have already set out what the superior court said on this aspect of the evidence and given these circumstances, we hold the view that the superior court was right in declaring that evidence worthless.

Then the trial court and the superior court relied on the identification evidence of PW1 both at the scene of the robbery and the identification parade to hold the appellants guilty of the offence. But the identification parade relied upon was conducted three months after the incident, too long a period in the circumstances of the case for its results to be relied upon.

Moreover conviction of an accused person on the evidence of only one identifying witness as was the case herein requires the exercise of great caution due to the dangers involved in relying on such evidence. In ***Roria v. Republic [1967] E.A. 583*** it was stated as follows:-

***"Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that conditions favarouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

The learned trial magistrate did not warn herself on the dangers inherent on acting on the evidence of a single identifying witness. The superior court held that the identification of the appellants at the two identification parades corroborated the evidence of identification by PW1 but the superior court did not at all refer to the fact that the parades had been held some three months after the robbery. Nor could the fact

that the third accused person had mentioned the names of the two appellants in his charge and caution statement corroborate the purported identification by PW1.

The learned judges of the superior court appear to have concurred with the magistrate when they said in part of their judgment as follows:-

***"We further find that the retracted statement of Paul Kinyanjui Kuria a co-accused of the appellants who was later acquitted corroborated the evidence of identification by PW1. The said statement was detailed in the explanation of the events of the material day of the robbery. It clearly indicated the roles that the appellants played in the robbery and the events that took place subsequent to the said robbery. We have no doubt that the learned trial Magistrate reached a proper conclusion in her findings."***

In our view a retracted charge and cautionary statement cannot corroborate any other evidence because such statement itself also requires corroboration.

In view of our conclusions on the issue of identification we do not wish to determine the other grounds of appeal listed. We allow this appeal, quash the appellants' conviction and set aside the sentence imposed upon them. Unless they are otherwise lawfully held we order they be set at liberty forthwith.

***Dated and delivered at NAIROBI this 31st day of July, 2008***

**R. S. C. OMOLO**

**.....**

**JUDGE OF APPEAL**

**P. K. TUNOI**

**.....**

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

**.....**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**