IN THE COURT OF APPEAL

AT NAIROBI

(CORAM GITHINJI, KOOME & OKWENGU JJ.A)

CRIMINAL APPEAL NO. 214 OF 2007

BETWEEN

JULIUS OLE KOIKAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Makhandia & Kimaru, JJ.) dated 11th March 2004 in HC.CR.A NO 649 OF 1997)

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JUDGMENT OF THE COURT

[1] This appeal has had a chequered history and it will perhaps go down in the history of this Court as having taken the longest time to dispose. The memorandum of appeal was filed on 19th March 2004, it has come up for hearing so many times and in more than a dozen times, it was adjourned for one reason or another but principally on the instance of the appellant or his counsel. Before the hearing took place on 15th February 2016, this Bench had to endure a barrage of no less than three applications for adjournment by the appellant and his counsel. It was imperative, and this was restated in the said Rulings that once an appeal is filed under the Rules of this Court, the Court has a duty to hear and determine the appeal unless otherwise withdrawn as per the Rules. Finally the appeal was argued by Mr. Ondieki, learned counsel for the appellant, while Mr. Kivihya, learned Assistant Director of Public Prosecution appeared for the respondent.

[2] Julius Ole Koikai, the appellant was charged, tried and convicted of three offences of robbery with violence contrary to **section 296 (2)** of the Penal Code and a fourth count of unlawful wounding contrary to **section 237** of the Penal Code respectively, before the Principal Magistrate court at Kibera on 5th June 1997. The particulars of the robbery charges were that on 2nd September 1995, jointly with others while armed with a pistol, the appellant robbed Dominic Nuthiani of various items and cash amounting to Ksh 3,500/=; the second count was that he robbed Esther Wangui of Ksh 1,500/= and immediately before or after such robbery he threatened to use actual violence against the two victims. On appeal, the appellant was acquitted of the third charge and rightly so as Peter Kinyua Mwangi the alleged victim of the robbery did not give evidence. In regard to the fourth count, the particulars were that the appellant wounded Peter Nyangaro.

[3] The events which led to the charge and conviction of Julius Ole Koikai the appellant herein happened

21 years ago on the 2nd September 1995, in Ongata Rongai within Kajiado county. Dominic Nuthiani PW2 testified that on the material day, at about 10pm, he was inside the bar counter when he was confronted by five men. They ordered him to lie down and surrender all he had in his pockets. He gave Ksh 3,500/= to the robbers who frog matched him from the counter to his room where he used to stay, removed his pair of trousers and ordered him to sleep. The thugs then locked his door from outside, and it was not until the following morning when his door was opened for him and he reported the matter at Ongata Rongai police station. As regards the identification this is what PW2 stated in his own words;-

> **"During the robbery, the bar was well lit with electricity light. I identified that man (1st accused). He is the one who had a firearm. It was a pistol. He is the one who ordered me to lie down. He looked me straight in the face and ordered me to lie down…on 21· 2. 95 at about 2;45 p.m. I was called to the police post to attend an identification parade. I was taken to a place where some men were in a queue. I identified that man (1st accused)"**

During cross-examination this witness went on to state;-

> **"…I identified you by your face. You are light skinned but with peculiar bat ears. Your face was imprinted in my mind."**

[4] The appellant was also identified by Esther Wangui Kihara PW3, a victim of the same robbery. On 2nd September 1995, Esther was in her room at Ongata Rongai and at about 10 pm she heard people ordering her neighbours to open their houses as they were police officers. She heard her neighbour scream, as soon as she started screaming, her door was broken open. Her lantern was on as the thugs ransacked the room looking for money, they stole Ksh 1,500/=. According to Esther, she was able to identify the appellant as the one who was armed with a pistol and the one who beat her until he was restrained by his companions. Another thug was armed with an iron bar. They locked her room from outside and immediately the thugs left, she heard gun shots at Masai Gate bar, she went there and found one of the thugs who was armed with an iron bar had been shot dead. She reported the matter to the police and was called on 21st September 1995 where she identified the appellant.

[5] Lucy Wambui PW4 and Joyce Njambi PW5 were both working as waitresses at Masai Gate bar on the material day and at about 11.30pm two men came into the bar and said they wanted to buy cigarettes. They were immediately followed by another man armed with a gun, Lucy described the man with a pistol as light skinned, slim and wearing a green track suit. He entered the bar and ordered everybody to lie down and to hold their money, Lucy and all the customers laid down, and when the thugs left, she discovered a customer by the name Peter had been shot on the head. When Lucy reported the matter to the police she gave a description of the robber who was armed with a pistol. Both Lucy and Joyce said the bar area was lit by pressure lamps as the electricity was off on that day. Both witnesses identified the appellant at a parade, and during cross-examination this is what Lucy said about the appellant;-

> **"I identified you mainly because of your face and more so by your peculiar ears. You were not any dirtier than other members of the parade. Your clothes were not blood stained"**

[6] After the shooting, Inspector Peter Nyangaro, the police officer who shot at the robbers and who also sustained gunshot injuries was rushed to Ongata Rongai police post where he made a report to PC Joshua Awino, PW7 and PC Raphael Makumi PW 13. The police rushed to the scene and found a body of a dead man inside the bar. They set out to pursue the other robbers; at a distant of about 500 metres from the scene, they saw a man (appellant) writhing in pain on the middle of the road with blood stained clothes. On examining him he had a gunshot wound on the chest which was gushing with blood, they took him to hospital for treatment and upon discharge he was taken to the police station where he was identified as one of the robbers. He was consequently charged with the offence of robbery with violence. Further investigations that were conducted in this matter included forensic examination of the blood stained clothes the appellant was wearing, and an identification parade that was carried out by Inspector Willie Kavoo on 21st September 1995, where Lucy, Joyce and Dominic identified the appellant.

[7] On being put on his defence, the appellant gave unsworn evidence in which he denied the offence. He gave a chronology of the events that occurred on 2nd September 1995. He used to work in Nairobi as a matatu conductor, and when he closed his work at about 9pm, and as he was walking home, he saw a motor vehicle driving towards him with the lights off, somebody alighted and shot him. He became unconscious but police arrived immediately and took him to hospital. A bullet was removed from his chest and that is when he realized he had been shot.

[8] By a fairly reasoned judgement, the learned trial magistrate convicted the appellant and sentenced him to death on the robbery counts and an imprisonment term of 3 years for unlawful wounding. Being dissatisfied with the conviction and sentence, he appealed before the High Court, (Makhandia & Kimaru JJ.) who dismissed the appellant's appeal in respect of the 1st, 2nd and 4th count. In dismissing the appeal, this is what the learned judges had to say in a pertinent part of the judgement;-

> "**We have re-evaluated the evidence and find that the appellant was properly identified by PW2 Dominic Nuthiani, PW 3 Esther Wangui and PW4 Lucy Wambui. The witnesses were no doubt helped by the fact that the appellant has peculiar physical features. Even though the robbery took place at night, we find that in the three instances where the complainants were robbed, there was sufficient light to enable them properly identify their assailants. The evidence of PW4 Lucy Wambui, the waiter at Masai Gate bar was crucial. She was able to give a detailed description of the appellant including the clothes he was wearing. She was later able to identify the appellant in an identification parade conducted by PW9 Inspector Willie Kavoo. The appellant was further identified in the said identification parade by PW2 Dominic Nuthiani and PW3 Ester Wangui. We find no fault in the finding by the learned trial magistrate that the appellant was properly identified. We find that the appellant was identified in three instances by three different individuals where there was sufficient light conducive for positive identification."**

[9] Based on the above conclusions, the appellant's conviction in respect to the 1st and 2nd count was affirmed, and the death sentence meted out on the appellant was upheld and so was the three years sentence in respect of the 4th count which was to run concurrently. The instant appeal is predicated on the grounds of appeal stipulated in a supplementary memorandum of appeal dated 21st September 2014, which raises some 13 grounds of appeal. In order to avoid repetition and obvious proliferation of spelling mistakes, we will summarize the grounds as follows;-

The Superior Court erred in law by;-

- Failing to appreciate that that **sections 70, 72** and **77** of the former constitution were breached and this prejudiced the appellant;
- Confirming the conviction on the basis of a defective charge sheet
- Failing to find that the charges of robbery with violence were never proved beyond reasonable doubt as required by law
- Failing to appreciate that the evidence of PW1 and PW13 was not credible and ought not to have been believed
- Confirming the conviction on the basis of identification that did not meet the required legal standards; and failing to call critical witnesses at the prejudice of the appellant.
- Relying on circumstantial evidence; placing reliance on the already compromised records whose authenticity cannot be established.
- The appellant's fundamental right to be presumed innocent was not respected as the court concluded that he had something to do with the tampering of the trial court's records

- The conviction was based on conflicting and uncorroborated evidence; the judges failed to re-evaluate the entire evidence and to draw its own conclusions

- Failing to comply with the requirements of a fair trial and section 211 of the Criminal Procedure Code

[10] The above grounds were elaborated by Mr. Ondieki learned counsel for the appellant; he also relied on a list of authorities;

i. **Yongo v Republic** Criminal Appeal No. 1 of 1983 **(Defective charge sheet)**

ii. **Wanjohi& Others vs Republic** (1989) KLR 415 **(The question of accuracy of evidence of identification through recognition of the assailant)**

iii. **Kiarie v Republic** Criminal Appeal No 93 of 1983 **(Evidence of identification must be water tight to justify a conviction)**

iv. **Michael Owour Ogada vs Republic** Cri APP No 7 of 2004 **(Evidence of a sole identifying witness must be treated with care).**

[11] By way of further arguments, Mr Ondieki submitted that the constitutional rights of the appellant as provided for under **sections 70, 72,** and **77** of the former Constitution were breached and thus he was denied a fair hearing; there is no proper record of proceedings, the records were tampered with, and this is confirmed by an affidavit sworn by a judicial officer; the law requires an applicant be served with the record of appeal, and the record contemplated is one that can stand the scrutiny of integrity; it is the duty of the court to keep the records and since the records were tampered with while in the custody of the court the appellant should be accorded the benefit of doubt, and the trial declared a nullity; and that since the offence occurred 21 years ago, it will not be in the interest of justice to order a re-trial.

[12] On the issue of identification, counsel submitted there was no cogent evidence due to material contradictions by the eye witnesses. For example PW2 said the scene of robbery was lit with electricity while the other witnesses said it was lit with pressure lamps; that the witnesses contradicted themselves on the time when the offence occurred; that the ballistic report was never produced to prove the assailant was armed with a pistol; and that crucial witnesses who were allegedly sitting in the bar with PW1 were never called to testify. The learned judges were faulted for failing to subject the evidence of the trial court to a thorough re-evaluation as required of them in a first appeal; and that in particular they failed to analyse the defence by the appellant. Counsel urged us to allow the appeal.

[13] On the part of the state Mr. Kivihya learned ADPP opposed the appeal. On the issue of the record of appeal, he submitted that the appellant's conviction and also the 1st appeal before the High Court were not predicated on the record of appeal that was allegedly tampered with; that the two courts below were concurrent in their findings of fact that the case against the appellant was proved to the required standard; that apart from merely stating the appellant was not accorded a fair hearing, counsel for the appellant did not point out any particular part of the record that is missing and affects the weight of the evidence of identification of the appellant; moreover, the issue of missing records was not raised before the High Court and this court noted in its Ruling of 11th November 2011, that it was the appellant who pointed out on the 30th January 2009 that he had noted variances between the typed and original trial court's record, regarding the non-swearing of some witnesses.

[14] On identification, counsel for the state submitted that the evidence by 4 prosecution witnesses who were victims of the violence was cogent, as they described the physical features of the appellant which were distinct, and they were able to identify him in an identification parade; that this evidence was subjected to further evaluation by the judges of the High Court and they were in concurrence with the trial court; that all the eye witnesses placed the appellant on the scene of crime and further the fact that he was arrested 500 metres from the scene with gunshot injuries went further to confirm the evidence. It was argued that the small discrepancies on whether the lighting on the scene was by pressure lamps or

electricity were immaterial as both emit lights; moreover the appellant was identified during the identification parade, he signed the parade forms and no issue was raised. Lastly, counsel submitted that it was not necessary to call a ballistic expert or any other witness as the prosecution's case was proved to the required standard.

[15] We have considered the submissions by both counsel for the appellant and the State, the grounds and record of appeal. This being a second appeal, its determination must be confined to only 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. In ***David Njoroge Macharia – v- R, [2011] eKLR*** it was stated that under ***Section 361*** of the ***Criminal Procedure Code:***

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic (1984) KLR 213."***

[16] The points of law that are discernable from the instant appeal are threefold. Was the appellant accorded a fair trial; was the evidence of identification of the appellant safe to sustain a conviction; did the High Court judges properly re-evaluate the evidence as required by law. According to counsel for the appellant, the constitutional provisions that were allegedly breached during the appellant's trial were **sections 70, 72** and **77** of the old Constitution. No particular specificities were cited but we shall look at those broad provisions in the context of a fair trial which was the appellant's main contention.

[17] Section 70 provided for fundamental rights of an individual; however these were subject to limitation such that in the cause of exercising those freedoms they would not prejudice the rights and freedoms of others or the public. **Section 72** provided for protection to personal liberty. This is also with a caveat as it is provided that;-

> **"No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases-**
>
> a. ***In execution of the sentence or order of a court, whether established in Kenya or some other country, in respect of a criminal offence of which he has been convicted...***
> b. **....**
>
> ***e) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya."***

A person who is of course arrested and detained in lawful custody is supposed to be informed of the reasons of his arrest as soon as practicable in a language that he understands; and in this case the appellant was supposed to be produced in court within fourteen days from the date of the arrest. The appellant did not raise any issue regarding his arrest and production in court, his main contention was that the records of appeal were tampered with, to show that some witnesses were not sworn before testifying and that the provisions of **section 211** of the criminal procedure code was not complied with.

[18] The issue of record was a subject of this Court's determination in a Ruling dated 11th November 2011, where it was concluded;

> **"It is noteworthy that neither side challenges the accuracy of the typed record. Nor has either side said that it does not reflect the record which the High Court used in coming to its decision. If anything the record when looked at vis a –vis what the trial magistrate has deponed to in her affidavit which we referred to earlier, do reflect what took place at the trial. The record shows that each witness was sworn before testifying, and at the close of the prosecution case there was reasonable compliance with the provisions of section 211**

of the criminal procedure code."

The court further noted that there were concurrent findings of facts in regard to the appellants appeal by the two courts below. They drew a parallel with the case of **Pius Mukaba Mulewa & Another –vs- Republic ,** CA Criminal Appeal No. 103 of 2001 where the court rendered itself thus:

> **"What we can take from ZAVER'S (Haiderali Lakhoo & Zaver -v- R. [1952] 19 EACA (2464) case is that the court must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss occurred. Who stands to gain from the loss?**
>
> **Is it merely coincident that both the magistrate's file and that of the police are lost? Does the available evidence point to anyone as being responsible for the loss? And if so, can such a party be allowed to benefit from a situation of his own making?**
>
> **In the final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interests of justice. We reject any proposition that in cases where a file has disappeared, and it is not reasonably feasible to order a retrial, an acquittal must follow as a matter of course."**

[19] We have looked at the record of appeal and we too are unable to see the prejudice the appellant suffered. It is only the records in regard to the evidence of Esther Wangui Kihara PW3 which is not indicated that she was sworn, nonetheless this witness gave evidence in open court, and she was thoroughly cross-examined by the appellant. Moreover the trial magistrate indicated in her sworn affidavit that all the witnesses were sworn and this, in our view explains why the issue was not raised before the High Court.

Similarly, we have examined the provisions of **section 77** of former Constitution that makes provisions for securing protection of the law to a person charged with a criminal offence and are unable to find any infraction of the appellant's rights.

[20] On the issue of re-evaluation of the evidence of identification, the judgment by the learned judges of the High Court they duly appreciated their mandate as a first appellate court and in that regard, they covered every aspect of the case, there was a summary of the evidence before the trial court and an analysis of the same against the backdrop of the grounds of appeal which challenged the evidence of identification. They examined the key elements of the evidence of identification from each of the three eye witnesses. This is what the judges stated in their own words;-

> **"The High Court as the first appellate court is mandated to re-assess the evidence adduced before the trial court afresh and reach its own conclusion on the finding as to guilt or otherwise of the appellant. The High Court has to put into consideration the fact that it did not have an opportunity of seeing the witnesses and therefore assessing their demeanour. We have looked into the entire evidence adduced before the trial magistrate's court. We have also considered the written submissions presented by the appellant and the oral submissions made by Miss Okumu for the State. The appellant in his petition of Appeal has state (sic) that he was not properly identified by the witnesses who adduced evidence in court in support of prosecution's case. We have re-evaluated the evidence and find that the appellant was properly identified by PW2 Dominic Nuthiani, PW3 Ester Wangui and PW4 Lucy Wambui. The witnesses, were no doubt, helped by the fact that the appellant had peculiar physical features. Even though the robbery took place at night, we find that in the three instances where the complainants were robbed, there was sufficient light to enable them properly identify their assailants,. The evidence of PW4 Lucy Wambui, the waiter at Masai Gate Bar is crucial. She was able to give a detailed description of the appellant including the clothes that he was wearing. She was later able to identify the appellant in an identification parade conducted by PW9, Inspector Willie Kavoo. The appellant was further identified in the said identification parade by PW2 Dominic Nuthiani and PW3 Ester Wangui. We find**

no fault in the finding by the learned trial magistrate that the appellant was properly identified. We find that the appellant was identified in three instances by three different individuals where there was sufficient light conducive for positive identification. The appellant has further complained that he was identified in an identification parade which was not properly conducted according to the established rules. We have analysed the evidence of PW9 the police inspector who conducted the identification parade and we find no rule breached in the conduct of the said indirection parade. We further find that the learned trial magistrate was correct in her finding that the appellant was properly identified in the identification parade."

[21] On the issue of identification, the two courts below made concurrent findings that the identification of the appellant was proper and free from error. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In ***Kariuki Njiru & 7 others –vs- R- Criminal Appeal No. 6 of 2001***, this Court stated:-

> ***"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."***

See also ***Kiarie v. Republic Criminal Appeal No. 93 of 1983.***

The appellant was identified by Dominic, Esther, and Joyce. They were all consistent in their evidence that the appellant had unique physical features, he was light in complexion, and he was armed with a pistol. They gave this description to the police when they reported the matter to the police. An identification parade was subsequently conducted by Chief Inspector Kavoo where the same witnesses identified the appellant. All the witnesses said the scene of the robbery was lit by pressure lamps although Dominic said it was lit by electricity. We agree with the submission by the State that this was a minor discrepancy that did not affect the weight of the evidence as both pressure lamps and electricity emit bright lights. Besides, apart from the physical description, the appellant was arrested near the scene of the incident with a gunshot wound which fitted the circumstances of the robbery where one of the robbers escaped with a gunshot.

[22] Lastly, on the issue of the appellant's defence that he was shot and wounded by unknown people while going about his business, the learned trial magistrate who had an opportunity of examining the witness's demeanor formed the opinion that the defence was not credible in the face of the prosecution's case. There are no reasons or grounds for interfering concurrent findings of the two courts below on all the issues as discussed above.

For the foregoing reasons, we think we have said enough to demonstrate this appeal lacks merit; it is dismissed with the result that the conviction and sentence imposed on the appellant shall stand. As the appellant was convicted and sentenced to suffer death for both count 1 and 2, we hereby order the sentence to be served is only in respect to count 1 while count 2 shall remain in abeyance.

Dated and delivered at Nairobi this 19th day of May, 2016.

E.M. GITHINJI

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JUDGE OF APPEAL

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M. K. KOOME

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR