Case Number:	Criminal Appeal 389 of 2009
Date Delivered:	10 Oct 2013
Case Class:	Criminal
Court:	Court of Appeal at Nyeri
Case Action:	Judgment
Judge:	Alnashir Ramazanali Magan Visram, Martha Karambu Koome, James Otieno Odek
Citation:	Peter Maina Mwangi & another v Republic [2013] eKLR
Advocates:	M.K. Lugadiru for Respondent Muchiri wa Gathoni for the appellants
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	02 of 2008
Case Outcome:	Appeal Allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 389 OF 2009

BETWEEN

PETER MAINA MWANGI …..... 1ST APPELLANT

JACKSON KIMARU MAINA …..... 2ND APPELLANT

AND

REPUBLIC …..... 3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 11th May,2009

in

H.C.CR.A NO. 102 OF 2008)

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JUDGMENT OF THE COURT

1. ***Peter Maina Mwangi*****,** the 1st appellant, ***Jackson Kimaru Maina,*** the 2nd appellant and James Kinyua Ngima were jointly charged with two counts of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***, Chapter 63 of the Laws of Kenya in the Senior Resident Magistrate's Court at Karatina.

2. The particulars of the first count of robbery with violence were that on 23rd April, 2006 at Karatina Township in Nyeri District within the then Central Province, the appellants and James Kinyua jointly with others not before the court while armed with dangerous weapons namely rungus robbed JWM of a mobile phone make Motorola C116, wrist watch make Oris both valued at Kshs. 4,000/= and cash Kshs. 3,500/= all to the total value of Kshs. 7,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said JWM

3. The particulars of the second count of robbery with violence were that on the above mentioned date the appellants and James while armed with dangerous weapons jointly robbed Jackson Kibogo Ashanga of a mobile phone make Alcatel and personal documents worth Kshs. 6,000/= and cash Kshs. 3,500/= all at a total value of Kshs. 9,500/ = and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said JKA.

4. The 1st appellant was also charged with the offence of indecent assault contrary to ***Section 144*** of the ***Penal Code.*** The 2nd appellant was also charged with the offence of conveying suspected stolen property contrary to ***Section 323*** of the ***Penal Code.*** The particulars of the offence were that on the

above mentioned date in the aforesaid area, the 2nd appellant having been detained by police officers was found in possession of a mobile phone make Motorolla C113 reasonably suspected to have been stolen or unlawfully obtained.

5. The prosecution called a total of five witnesses in support of its case against the appellants and James Kinyua. It was the prosecution's case that on 23rd April, 2006 PW1, JWM (J), went to Karatina to visit her husband, PW2, JKA (JA). J and JA went to friends bar where they ended up staying up to midnight due to heavy rain. While JA and J were heading to Midland Hotel seven people emerged in front of them at Flamingo bar; and they demanded for money and their cell phones. When J asked what was going on she was slapped and thrown to the ground by some of the robbers. She was able to clearly see the 1st appellant using the security light that was on the corridor of Flamingo bar. She testified that the 1st appellant tore her clothes off her, removed her under wear and proceeded to indecently assault her by touching her private parts. The robbers stole her mobile phone make Motorolla C116 and cash Kshs. 3,500 from the bag she had.

6. JA testified that some of the robbers attacked him and pushed him to the ground and stole his cell phone and the money he had in his pocket. He was able to see James who had led the attack on him and also recognized the 2nd appellant who apparently studied in the same school with Jackson's children. JA was also able to see the appellants and James using the security lights that were on the corridor of the Flamingo bar.

7. PW3, Inspector Peter Kigen (Inspector Kigen) testified that on the material day at around 12:30p.m while on duty he received a report from one Kinyua who informed him that he had been robbed in Karatina. As Inspector Peter in the company of PW5, PC Kennedy Odongo (PC Kennedy) and another police officer were heading to Mbuni bar where the said Kinyua was, they saw J and JA being attacked by a group of people outside Flamingo bar.

8. When the robbers heard a vehicle approaching where they were and realizing it was a police land cruiser they ran in opposite directions. Inspector Peter and PC Kennedy pursued the appellants who ran in the same direction towards the railway go-down. After PC Kennedy fired a warning shot in the air, the 1st appellant hid on the go-down corridor behind charcoal bags that had been stored thereon. The 1st appellant was arrested by the driver of the land cruiser PC Wambugu; and the 2nd appellant was arrested by PC Kennedy at the railway line where he had fallen down while running away.

9. After searching the 2nd appellant, Inspector Peter found a cell phone make Motorolla C113 in is possession. The 2nd appellant was unable to give an explanation in respect of being in possession of the said cell phone. J and JA identified the appellants on the same day at the police station as some of the robbers who had attacked them.

10. The following morning as he was opening his workshop, JA saw James and recognized him as one of the robbers who had attacked him. He informed the police and James was arrested. JA and J maintained they were able to see the robbers clearly because the scene was well lit and the attack took a considerable length of period of about ten minutes. Subsequently, the appellants and James were charged and arraigned in court.

11. The 1st appellant in his defence gave a sworn statement. He testified that he worked as a watchman and that on 22nd April, 2006 he left his house at 5:30p.m to go to work. He found his employer, DW1, Michael Ndungu Kerito (Michael) who operated a business of selling charcoal. Michael left the 1st appellant and went home. At around midnight, a person who identified himself as a police officer went to where the 1st appellant worked and told him that the OCS of Karatina wanted to see him.

He was taken to the police station where he found J and JA claiming that they had been robbed. The 1st appellant was arrested. The following morning Michael went to the police station to inquire about the 1st appellant. He was informed that the 1st appellant was being held as a suspect over a robbery that had occurred. The police officer told Michael to pay Kshs. 5,000/= to secure the release of the 1st appellant. The 1st appellant objected to Michael paying the money requested. He was later charged and arraigned in court. The 1st appellant denied committing the offence.

12. The 2nd appellant in his defence gave sworn statement. He testified that he worked as a loader and that on 22nd April, 2006 he went to work at the market until 10:30p.m. As he was heading home he spotted two people at Mitumba place and then he saw seven other people walking towards him. He stopped and the people passed him and one of them who identified himself as a police officer remained and arrested him. The police officer searched him and removed the 2nd appellants cell phone make Motorolla and a wallet from his pockets. He inquired about the ownership of the phone and the 2nd appellant informed him that he owned it. Shortly thereafter, two other people came and started beating him. He was taken to the go-down and put in a police land cruiser. He was taken to the police station where Jemimah and Jackson claimed that he had robbed them. He denied committing the offence.

13. James Kinyua in his defence also gave a sworn statement. He testified that he was a hawker and sold sweets in Karatina. He stated that on 22nd April, 2006 after working he went home in the evening. The following day James went to Karatina Stadium to play soccer. While he was still there three people who identified themselves as police men arrested him and took him to Karatina police station. He testified that the person who pointed him to the police as a robber was not called as a witness; and that further the said person was Jackson's son who apparently was not involved in the robbery incident. He claimed that the charges against him were due to a grudge JA son bore against him.

14. The trial court being convinced that the prosecution had proved its case against the appellants and James convicted them on the two counts of robbery of violence and sentenced them to death. The 1st appellant was also convicted of the offence of indecent assault and the sentence in respect of the said offence was held in abeyance. The 2nd appellant was also convicted of the offence of handling and/or conveying stolen property and the sentence of the said offence was also held in abeyance. Being aggrieved with the decision of the trial court the appellants and James appealed to the High Court. The High Court (Kasango & Makhandia, JJ.) in the judgment dated 11th May, 2009 allowed James appeal and quashed his conviction and set aside the sentence issued against him. The High Court dismissed the appellants appeal and confirmed their conviction and set aside the sentence meted against them in respect of the second count of robbery with violence and ordered the said sentence to be held in abeyance.

15. It is against the said decision that the appellants have filed this current appeal based on the following summarised grounds:-

- ***The learned Judges erred in law by upholding the appellants conviction without considering that the conditions that were prevailing during the incident were difficult and hence not conducive for positive identification.***

- ***The learned Judges erred in law by upholding the 1st appellants conviction of the offence of indecent assault without considering that the said offence was not indicated in the charge sheet.***

16. Mr. Muchiri wa Gathoni, learned counsel for the appellants, submitted that the main ground of

appeal was on the issue of identification of the appellants. He stated that both the trial court and the High Court were convinced that the appellants were properly identified. He argued that James Kinyua was set free by the High Court on account that his identification was not satisfactory; and that in actual fact the same witness, JA, who had identified James is the same one who had identified the 2nd appellant.

17. Mr. Muchiri also argued that due to the prevailing circumstances of the attack, J could not properly identify her attackers. This is because she testified that every time she attempted to look up she was stopped by the robbers. According to him this meant that the witnesses therefore could not have properly identified the appellants. He argued that the appellants were not known to J and JA prior to the incident and therefore and identification parade ought to have been carried out to.

18. Mr. Muchiri submitted that the evidence of Inspector Peter and PC Kennedy was full of inconsistencies. This is because on one hand Inspector Peter testified that he had received a call from one Kinyua that he had been robbed; and that as they were heading to Mbuni bar where Kinyua was they saw J and JA being attacked at Flamingo bar. On the other hand PC Kennedy testified that they were on patrol when they saw Jemimah and Jackson being attacked.

19. Mr. Muchiri submitted that the learned Judges failed to properly re-evaluate the evidence that was tendered before the trial court. He urged that if the Judges had exercised their duty properly they would have been able to find that reasonable doubt as to the guilt of the appellants had been established.

20. He finally submitted that the charge sheet was defective because the count of indecent assault was not in the charge sheet. He urged us to allow the appeal.

21. Mr. M.K. Lugadiru, Senior Public Prosecuting Counsel, in opposing the appeal submitted that there was credible evidence from J and JA that they were brutally attacked by seven assailants. J testified that the incident took about ten minutes. He stated that J had enough time to identify the 1st appellant as he indecently assaulted her at close range. He emphasised that it was not so dark to hinder the visual identification of the attackers.

22. Mr. Lugadiru argued that immediately the police saw the robbers attacking J and JA they pursued the appellants and never lost sight of them during the pursuit. He submitted that the immediate arrest and production of the appellants at the police station negated the need for an identification parade. He contended that the prosecution's evidence was consistent on the events of the day; and that J and JA evidence was corroborated by Inspector Peter and PC Kennedy who were the arresting officers.

23. This being a second appeal and by dint of ***Section 361(1)*** of the ***Criminal Procedure Code,*** Chapter 75, Laws of Kenya, this Court's jurisdiction is limited to matters of law only. In ***Chemagong -vs- Republic (1984) KLR 213*** at page 219 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)'

24. We have considered the record, the grounds of appeal, able submissions by counsel and the law. This case involved both identification and recognition evidence. 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, particularly where the conditions favouring a correct identification are difficult. In ***Wamunga -vs- Republic (1989) KLR 424*** this Court held at page 426 that,

"...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

25. The appellants conviction on the two counts of robbery with violence and the 1st appellants conviction on indecent assault was based on the evidence of identification and recognition. Both the trial Court and the High Court were convinced that the identification of the appellants as some of the attackers was positive. Therefore, what falls for our consideration is whether based on the evidence on record the appellants' conviction which was based on identification was proper and safe.

26. In respect of the 1st appellant, J testified that she was able to identify him with the help of the security lights at the Flamingo bar. She stated that she saw him clearly and at close range while he was indecently assaulting her. She also gave evidence that she did not know the 1st appellant prior to the incident. However, we cannot help but note that J testified that during the incident, whenever she tried to look up she was hit by the robbers. She also testified that the attack occurred suddenly. Therefore, we are the considered view that the circumstances surrounding the incident were difficult. This brings to our minds the question of whether J was able to properly identify the 1st appellant.

27. We further note that she also testified during cross- examination that she did not point out any special marks or features of the 1st appellant to the police and that she was not the one who pointed out the 1st appellant to the police when they arrested him. Therefore, was J's evidence on identification proper and free from error" In order to answer the aforementioned question we have to consider whether J's evidence on identification was properly tested. In ***Maitanyi -vs- Republic (1986) KLR 198***,this Court held,

"...There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made....If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description."

In this case J admitted that she did not give the description of the 1st appellant to the police before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence on identification ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions. Her ability to identify the attackers then should have been tested by an identification parade. See this Court's decision in ***Njoroge -vs- Republic (1987) KLR 19.*** This is because it is quite possible for an identifying witness to be truthful but mistaken. See ***Roria -vs- Republic (1976) EA 583 & R-vs- Turnbull &***

others ***(1976) 3 ALL ER 549.*** We find that J's evidence was not properly tested. We cannot further rule out of our minds that the fact that the police officers upon arresting the 1st appellant on the same day asked J and JA to identify him before they made their initial report could have possibly prompted them to identify the 1st appellant as one of the attackers. JA in cross-examination stated that he did not give the description of the 1st appellant to the police but he recognized the 1st appellant immediately he was brought to the police station. We therefore, find that the evidence on identification of the 1st appellant was not safe and free from error.

28. In cross- examination Jackson testified that he had known the 2nd appellant prior to the incident because the 2nd appellant used to go to the same school with his children. JA admitted that he had not given the 2nd appellant's name to the police. From the record we cannot help but note that neither Inspector Peter nor PC Kennedy testified that JA had informed them that the 2nd appellant was known to him prior to the incident. Based on the foregoing we find that the evidence of recognition of the 2nd appellant by JA only emerged during cross-examination and we find the same to be suspect. See ***Maitanyi -vs- Republic*** ***(supra).***

29. Mr. Lugadiru argued that evidence by J and JA on identification of theappellants was corroborated by Inspector Peter and PC Kennedy who pursued he appellant from the scene until they were arrested. He maintained that the police men never lost sight of the appellants during the pursuit. We agree that the police officers corroborated J and JA's evidence to the extent that they were attacked by robbers at Flamingo bar. However we find that the police officers did not corroborate the evidence on identification. This is because firstly, Inspector Peter in his evidence states that he spoke to J and JA at the scene and they pointed to them the direction the robbers had ran to. On the other hand, PC Kennedy testified that they did not stop to talk to J and JA; and that they just pursued the attackers who ran towards the go-down direction. It is therefore, unclear how the police men were able to identify the attackers.

30. Secondly, PC Kennedy testified that he never lost sight of the 1st appellant who ran towards a corridor and hide behind bags of charcoal. However, from the record we note that it was also PC Kennedy's evidence that they stopped at the go-down where Inspector Peter, PC Wambugu and himself alighted from the vehicle and continued pursuit on foot. He also testfied that while they were alighting from the Land Cruiser, the 1st appellant disappeared down a corridor.Further, both Inspector Peter and PC Kennedy stated that it was PC Wambugu who pulled out the 1st appellant from behind the charcoal bags and arrested him. We cannot help but note that from the foregoing that it is highly likely that the police men lost sight of the assailant who ran to the go-down corridor and therefore, it is not possible to positively hold in the circumsances that 1st appellant was one of the attackers who were being pursued by the police.

31. Thirdly, based on the foregoing, we find that the 1st appellant's defence that on the day he was arrested he was at work guarding charcoal that belonged to his employer, Michael, raised reasonable doubt in his favour. This is because his evidence was corroborated by Michael who confirmed that he had left the 1st appellant on the material day to guard his charcoal business. Therefore, we cannot rule out that there is a possibility that he was arrested while on duty guarding the Charcoal. We therefore disagree with the following findings by the High Court:-

"When Michael Ndungu however gave evidence he stated that he was himself employed to off load charcoal. He did not in his evidence confirm that the 2nd appellant (1st appellant herein) was his employee. This alibi evidence considered alongside the prosecution's evidence we find

that the prosecution proved the case beyond reasonable doubt."

We are of the considered view that the evidence that was tendered by Michael was not one of alibi but explained the presence of the 1st appellant at the corridor of the go-down.

32. From the foregoing, we are convinced that there was no proper testing of the evidence of identification and recognition by the two lower courts. Had the evidence been thoroughly tested and analysed we cannot be sure that the lowers courts would still have come to the same conclusion. Therefore, we find that the appellants' conviction of the offence of robbery of violence and the 1st appellant's conviction of the offence of indecent assault which were based on identification and recognition cannot be safely supported.

33. In respect of the offence of handling and/or conveying stolen property, the 2nd appellant was convicted on the basis that he was unable to prove ownership of the cell phone make Motorola C113 that was found in his possession. ***Section 322 (1)*** of the ***Penal Code*** provides:-

"A person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes or assist in, their retention, removal, disposal or realisation by or he arranges to do so"

In ***Kalili –vs- Republic- Criminal Appeal No. 56 of 1981***, this Court held,

"Where person is charged with handling stolen goods, the necessary mens rea must exist at the time of receipt of goods, so that it must be established that the accused at the time of receipt of the goods knew or he had reason to believe they were stolen. Neither the lower courts had considered the question of mens rea on the charge of handling stolen property."

34. From the foregoing it is essential first for the prosecution to have proved that the cell phone found on the 2nd appellant was stolen in order for the second line of inquiry of whether the requisite *mens rea* of handling stolen property had been established can be considered by the court. From the record we note that Inspector Peter testified that neither Jemimah, Jackson nor any other person claimed ownership of the mobile phone. He simply stated that the 2nd appellant failed to prove ownership of the same hence he was charged with the offence. We find that the prosecution having failed to establish that the cell phone was stolen that the two lower courts shifted the burden of proof to the 2nd appellant contrary to the law. The 2nd appellant was only entitled to give an explanation of his possession after it was established that the cell phone was stolen. We therefore, find that the 2nd appellant's conviction of the offence of handling stolen property was without basis.

35. Having expressed ourselves as above we find that this appeal has merit and we accordingly allow the same. We quash the conviction of the appellants and set aside the sentence issued against them. The appellant are hereby set at liberty unless otherwise lawfully held.

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

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

*****.....*****

JUDGE OF APPEAL

J. OTIENO – ODEK

*****.....*****

JUDGE OF APPEAL

I certify that this is a

true copy to the original.

DEPUTY REGISTRAR