REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 102 OF 2009

ABDI RIZACK FARAH ALI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the judgment of Hon. R.K. Mibei SRM in Mandera Criminal Case No. 88 of 2007 delivered on 19th July 2007)

JUDGMENT

The appellant was charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code and one count of escaping from lawful custody contrary to section 123 of the Penal Code. He pleaded not guilty to all the counts. He was convicted as charged and was sentenced to death on both counts of robbery with violence and was sentenced to six months imprisonment on the count of escaping from lawful custody. Being aggrieved by the said conviction and sentence, he has preferred this appeal. This is the first appellate court. The principles that should guide this court in considering this appeal were set out in the case **Okeno vs. Republic** [1972] E.A. 32 where it was stated as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs. R. [1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

The evidence in support of the 1st count of robbery with violence, related to the robbery against Ibrahim Hassan Jillow, PW1. On 25th February 2007 at 9.30pm he stated that he escorted PW3 Fatuma Adan Isaack at Bulla border between Kenya and Somalia. As he returned to his home when he was at the gate he was approached by two men. They were next to his gate. One of them had a Somali sword. The one

with the sword ordered him to sit down. He refused to sit. The one with the gun ordered him to sit while placing the gun on his shoulder. He obeyed and sat down. Although he had earlier said that he had escorted Fatuma PW3 he later stated that Fatuma was also ordered to lie down. The robbers stole from PW1 his national identity card, voters card, quarter sugar, Kshs. 250 and *miraa* (khat). The robbers also stole Kshs. 200/= from Fatuma. PW1 then stated:-

"There were (sic) bright moonlight which I used to identified (sic) them"

Later PW2 Sahara Adan Ibrahim informed them that she knew the attackers. They together with Sahara went to Bulla Hawa in Somalia to trace the attackers. They went to the appellant's home and on informing the appellant's family why they were there, the appellant was beaten in their presence by his father. The appellant produced a knife which was blood stained. PW1 in evidence stated:-

"The blood was mine because the accused person (appellant) had stabbed me on the left thumb."

He continued to state that on being beaten, the appellant informed them that PW1's ID and voter's card, were with his accomplice. PW1 said that the appellant admitted that he had robbed him. On cross examination, PW1 stated that he first saw the appellant during the robbery and that during the robbery the appellant had covered his face with his shirt. PW3 Fatuma Adan Isaack said that on 25th February 2007 she was at Bulla Custom area. The robbery she suffered is the one which relates to count three. She said that she was walking towards home when two men approached her. They were armed with a knife and gun. They robbed her of Kshs. 200/=. She did not identify her attackers but later was informed that one of them had been arrested and was in the police station. PW2 Sahara's evidence does not relate to any count which the appellant faced in the lower court. She stated that while she was at her house with her daughter on the night in question two men entered her home. One was armed with a gun whilst the other was armed with a Somali sword. She said that she had seen them before they entered her home. When she saw them, she hid her mobile phone to avoid it being stolen. She said that prior to the incident, she had known the appellant. It is her who later assisted to identify the appellant when they arrested him at his home in Somalia. The evidence of PW7 and 8, the police officer, was to the effect that the appellant was under their lawful custody when he attempted to escape but they apprehended him before he run away. The appellant in his defence stated that he was arrested at the border point and was informed that an identity card and a wallet had been recovered in his house. He denied the offences. The learned senior state counsel Mr. Musau conceded to this appeal in respect of the counts of robbery with violence on the basis that the appellant was not satisfactorily identified during the robbery. In our view, he quite rightly conceded. The state informed us that the appellant had already served sentence of six months on count 2. In going through the evidence, we find that the only witness who might have identified the appellant was Sahara. There was however no charge preferred against the appellant which related to Sahara. In view of the fact that there was no evidence that the person identified by Sahara, that is the appellant, was the same person who robbed PW1 and 3 then there is no evidence connecting the appellant to the robbery of PW1 and 3. We find that the identification of the appellant was not safe in this case. The identification of the appellant by Sahara does not assist the prosecution case in respect of the two counts of robbery with violence. PW1 did not participate in an identification parade to identify the appellant. He could not have in any case been asked to participate in such a parade because it was he and Sahara who went to Somalia and arrested the appellant at his home. To have then asked PW1 to participate in an identification parade would have been an exercise in futility. It will be recalled that PW1 in evidence said that the appellant was hiding his face with the shirt. On the dangers of relying wholly on visual identification, in the case of **Cleophas Otieno Wamunga vs. Republic** [1989] KLR 424 the Court of Appeal had this to say:-

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of

vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well know case of R. vs. Turnbull [1976] 3 ALL ER 549 at page 552 where he said:-

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

There was no recovery of stolen goods made at the home of the appellant. The fact that he had a knife which was blood stained was insufficient to place the appellant at the scene of the robbery. There is, in our view, doubt of guilt of the appellant in respect of the two counts of robbery with violence. The prosecution in our view failed to prove its case beyond reasonable doubt. We therefore allow the appellant's appeal against conviction and sentence in respect of count number 1 and 3. He has already served his sentence in respect of count number 2 and we find no need of interfering with it. We therefore hereby quash the appellant's conviction and count 1 and 3 and set aside his sentence on those two counts. We order the appellant to be set free unless he is otherwise lawfully held.

Dated, signed and delivered at Meru this 31st day of March 2011.

LESIIT, J.

JUDGE

KASANGO, M.

JUDGE

Read, signed and delivered at Meru this 31st day of March 2011.
In The Presence Of:
Kirimi/Mwonjaru .....……. Court Clerks
Appellant …….... Present
Mr. Kimathi …….....…… For the State

LESIIT, J.

JUDGE

KASANGO, M.

JUDGE