IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 84 OF 2017

BETWEEN

ERICK OUMA ONDUTU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgement of the High Court of Kenya (F. N Muchemi & Odunga, JJ.) delivered on 16th December, 2013

in

HC. CR.A. No. 571 of 2017)

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JUDGMENT OF THE COURT

In this second appeal, **Eric Ouma Ondutu** (the appellant) challenges the upholding by the High Court of his conviction and sentence by the Chief Magistrate's Court, Nairobi for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the charge were that on 28th October, 2006, along Landhies Road within Nairobi, the appellant jointly with others not before Court, armed with a toy pistol robbed Mary Nzisa Mutua of one hand bag containing two Barclays Bank Cheque books, Insurance Cover Notes, Lukenya Schools receipts, copy of logbook for Motor Vehicle Registration No. KAL 653P, a purse, two ATM cards, one pair of earrings and other personal effects all valued at Kshs. 6,140 and immediately before or immediately after the time of that robbery they used actual violence to the said Mary Nzisa Mutua.

The appellant appealed to the High Court but his appeal was dismissed and hence this second appeal.

Section 361 (1) of the Criminal Procedure Code provides that this Court's jurisdiction is confined to matters of law only. Looking through the appellant's memorandum of appeal and the submissions of learned counsel for the appellant, Mr. Oyalo, the following broad issues of law have been raised:

(1) failure of the High Court to re-evaluate the evidence;

(2) weak evidence of identification or identification which was not positive;

(3) the charge was defective;

(4) prosecution evidence has contradictions and inconsistencies;

(5) none of the members of the public were called as a witness;

(6) the particulars of the offence as set out in the charge sheet did not amount to the offence of robbery with violence

The background facts are that the complainant, Mary Nzisa Mutua (PW5) and her driver Tom Ndolo (PW2) were on 28th October, 2006 driving along Landies road in Nairobi in motor vehicle registration number KAS 608A. Near BP petrol station they slowed down due to a traffic jam. Four men surrounded the motor vehicle, two were on the left side while two were on the driver's side. As one man held the

window down on the side where Mary Nzisa was seated, the other man snatched her handbag which was in the car and started running away. A police officer, Corporal Dishon Angaya of Kamukunji Police Station (PW3) who was on patrol in the area shot in the air and the members of the public started to run in different directions. Two of the men who were running towards Gikomba were shot dead while the appellant was arrested by members of the public and brought back to the scene, the police officers arrested him and took him to Kamukunji Police Station. The fourth man disappeared.

The appellant was then charged with the offence stated herein above.

The appellant, in a sworn statement, denied committing the offence. He testified that on the said day he was heading to work along Landhies road when he heard gunshots. People started running in different directions and he also ran and entered a house where people thought that he was a thief and he was arrested.

In her judgment, the learned Senior Principal Magistrate ***(M. Murage)*** set out the evidence which was before her and stated as follows;

> ***"From the evidence before Court, it is clear that PW. 2 and PW. 5 positively identified accused person as part of the gang that robbed PW. 5***
>
> ***The offence occurred during the day and both witnesses saw accused before and after the commission of the offence. The circumstances were conducive for positive identification PW. 3 Police officer also saw the accused during the commission of the offence and a few minutes later when the accused was arrested. A toy pistol was recovered from the robbers who were shot".***

With regard to the appellant's defence, the trial court stated as follows:

> ***"The defence of accused that he was arrested on his way to work is not convincing it has no supportive evidence. I dismiss it as a lie"***

The learned trial magistrate in the end found the appellant guilty as charged, convicted him and sentenced him to death.

The findings of the trial magistrate became the subject of the first appeal before the High Court which considered the entire evidence and in dismissing the appeal stated as follows:

> ***"The trial Magistrate in analyzing the evidence did not take cognization of the fact that three witnesses saw the appellant as he was being chased which further boosts the evidence of identity. We do agree that the defence was not plausible. We also find that there was no possibility of error or mistake by the three witnesses. The appellant was positively identified as one of the gang (sic) which robbed the complainant of her hand bag and other items at the material time. The conditions were conducive to positive identification".***

The appeal was dismissed by the High Court.

During the hearing of this appeal, **Mr. Oyalo**, in support of the appeal submitted that the appellant was not properly identified. Counsel further submitted that there was no fair trial as the appellant was denied the right to recall a witness.

Mr. O'mirera for the Respondent submitted that the appellant was positively identified by the driver Ndolo, the complainant Nzisa and the police officer Angaya.

In regard to the witness PW 2 being recalled, counsel submitted that the appellant was not in any way prejudiced by failure to recall that witness.

The law as to the duty of this court when considering a case such as is before us which depends wholly or largely on the correctness of the identification of an accused person is settled. The court has a duty to ensure that the evidence of identification is water-tight before basing a conviction on it. There is a plethora of cases on this principle including the case of ***Roria -Vs- R*** **[1967] EA 583**, where the predecessor of this Court stated **(as per Sir Clement De Lestang V.P.),** *inter alia*, as follows:

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L. C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:***
>
> ***"There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten if there are as many as ten it is in a question of identity."***

Those sentiments found favour in our jurisdiction in the case *of* ***Kamau -Vs- Republic [1975] EA139*** where it was stated:

> ***"The most honest of witnesses can be mistaken when it comes to identification."***

It is therefore clear that the evidence of identification needs to be examined carefully before a court can enter a conviction against an accused person based on identification. In the case of **Cleophas Otieno Wamunga -vs - Republic - Criminal Appeal No. 20 of 1989 (UR),** this Court held:

"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 known case of R -Vs- Turnbull [1876] 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 sometime made."***

In the appeal before us, the prosecution's case is that the appellant was identified by the complainant Nzisa, her driver Ndolo and the police officer Angaya who was at the scene during the commission of the offence. The appellant on the other hand maintains that he was not part of the gang but he was on his way to work.

The appellant maintained that he was on his way to work when, because of gun shots that rendered the air at Landhies road, he ran as did other members of the public and he entered a house to hide but he was then arrested. It was the prosecution case that the complainant, Nzisa, was sitting in a car in a traffic jam when her hand bag was snatched from the open window. Her driver, Ndolo, maintained that he saw the appellant snatch the hand bag from the rear view mirror. The trial magistrate found:

> ***"Now the witnesses knew him before that day. They had no reason to lie about him. PW5 clearly identified the marks she noted on his body …."***

We have carefully gone through the record but did not find where the trial magistrate found any evidence that the said witnesses knew the appellant before. In any event if indeed Nzisa noted any marks on the appellant's body she should have stated so when she made a report to the police.

The appellant stated that he ran to a house because there were gun shots. The police officer testified that there were gun shots and 2 of the robbers were shot dead. It is not clear from the record why the prosecution did not call any witness to testify why the appellant was found in the house he stated he was hiding in. Although there is no requirement to call any number of witnesses to prove a particular fact in a criminal trial, it was important in the case before the trial court that the prosecution disprove the allegation by the appellant that he was hiding in a house because there were gun shots that rendered the air along Landhies road, Nairobi, on that day, a fact which was proved by the evidence of the prosecution witnesses that police fired gun shots where 2 people were killed. The defence offered by the appellant was that he ran to a house in the nearby Muthurwa estate to hide because of the gun shots was a plausible defence that required better examination than was given by the trial court and the High Court on first appeal. That defence should not have been dismissed the way it was by the two courts and we think that the appellant gave a reasonable explanation for being found in the house in Muthurwa estate. The prosecution should have given an explanation from a witness in Muthurwa estate how the appellant happened to be in the house he was found in. The defence offered by the appellant created a doubt on whether he was one of the robbers and he was entitled to a benefit of doubt in the circumstances of the case. We think that the two courts below were wrong in the conclusions reached and we are persuaded that this appeal has merit and it succeeds. We hereby quash the conviction and set aside the sentence. The appellant will be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 7th day of February, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

…….……..

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR