IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 84 OF 2018

BETWEEN

NICHOLAS ODUOR ARON.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Ochieng & Achode, JJ.) dated 21st February 2012

in

HC. CR. A No. 519 of 2007)

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JUDGMENT OF THE COURT

1. This is a second appeal by the appellant, **Nicholas Oduor Aron,** arising from his conviction and sentence by the Magistrates Court **(Hon. Wasilwa, Principal Magistrate, (as she then was))** sitting in Nairobi, on a charge of robbery with violence contrary to **section 296(2)** of the Penal Code, which was upheld by the High Court on first appeal.

2. A brief background of this case is that on 19th September, 2006 the complainant, one **Edward Gumbo Alphonse**, was walking home from a funeral gathering in the company of two young boys when he was stopped by three boys who he recognized as from the estate where he lived; he recognized them by voice since it was at night; also, the moon shone brightly and there was no cloud cover. On seeing the panga one of them was carrying, he asked them what they were doing but they attacked him causing him serious bodily harm on his head and also robbed him of his valuables.

3. The complainant screamed for help and the three boys fled towards the same direction that he had come from. A neighbour who had rushed to the scene informed the claimant's two sons of the predicament and they rushed him to a nearby clinic for medical attention. After being attended to, he was referred to Kenyatta National Hospital where he underwent further treatment and was later discharged. Upon release, the complainant went to Kilimani Police Station where he recorded his statement with the police. He did not give the names or description of the assailants.

4. The appellant was arrested the following day in relation to another complaint and taken to Jamhuri Police Station where he was re-arrested and was later taken to Kilimani Police Station. He was later charged before the Magistrates Court with the offence of ***robbery with violence*** as stated earlier**.** The particulars of the offence were that on the 19th of September, 2011 at Kibera Kianda area in Nairobi jointly with another not before the Court, while armed with offensive weapons namely pangas, he robbed **Edward Gumbo Alphonce Odima** of cash Kshs. 200/=, a copy of National Identity card and two business cards and at or immediately after the time of such robbery used actually violence against the said **Edward Gumbo Alphonce Odima.**

5. He denied the charge and the trial proceeded with the prosecution calling 4 witnesses in support of its case. On his part, the appellant denied having committed the offence stating that he knew nothing about the case. He stated that he knew the complainant very well as they lived in the same estate. Further, sometime in October the claimant had visited him at Kamiti prisons where he was in custody and told him that he was disciplining him because of his love affair with his daughter, one Lillian, who was a former lover.

6. Upon analysis of the evidence presented before the trial Court, the appellant was convicted vide a judgment delivered on the 27th January,

2012. Being aggrieved, he lodged an appeal in the High Court.

7. The grounds of appeal included *inter alia* that; his rights were violated for being held for 20 days before being arraigned in court; there was no interpretation at the time of plea- taking in violation of **section 77(2)** of the constitution; there was no positive identification as the prosecution witnesses did not describe the assailants in the first report compiled by the initial investigation officer and that the initial investigation officer did not testify before the trial court. Further, that there was no indication as to how long the incident of robbery took or the length of time that the complainant observed his attackers and that the complainant submitted that he had been rendered unconscious; that the circumstances prevailing at the time of the robbery were not conducive for positive identification; and; that the charge was not proved to the standards required by law as none of the stolen items were recovered in his possession; the death penalty he was sentenced to was harsh, degrading and a violation of his rights under **section 74(1)** of the Constitution and; the trial magistrate failed to give due consideration to his defence.

8. Upon consideration of the appellant's grounds of appeal and the submissions made in that respect, the High Court upheld both the conviction and sentence. On the issue that there was no interpreter during plea-taking the learned Judge found that despite the fact that in the typed proceedings the language in which the plea was taken was not indicated, a perusal of the hand-written record clearly showed that there was interpretation. Further, that the complainant testified in the language in which the plea was taken hence no prejudice was occasioned to him.

9. On the issue of recognition, the High Court found that from his testimony, it was clear that the complainant recognized two of his attackers because they were well known to him as they lived in the same estate as he did. On the issue that the prosecution had failed to prove its case, it was evident that: the complainant had been assaulted and robbed; as per the medical report the complainant had suffered bodily harm; the complainant and PW2 had both seen three people with pangas running from the scene of crime on the material day. Such circumstantial evidence against the appellant was compelling. The learned Judges further found that under **section 296(2)** of the Penal Code the ingredients of an offence of robbery with violence are disjunctive and satisfaction of just one ingredient is enough to establish a case.

10. The Court further concluded that there was no doubt that the appellant had committed the offences in question. As regards the sentence meted out the High Court was equally convinced that the sentence was legal and appropriate in the circumstances and declined to interfere with the decision of the lower Court. The appeal was consequently dismissed.

11. It is the said decision that has prompted the instant appeal. The appeal is grounded on grounds, *inter alia,* that the learned Judges of the High Court erred in law: in finding that the appellant's identification through recognition was established; failing to properly carry out the duty of the court as a first appellate court; and "failing to inform the appellant his rights of defence in the trial court as provided for under **section 211 (sic)** of the Criminal Procedure Code".

12. The appeal was canvassed through written and oral submissions where parties were represented by learned counsel. Mr. Ondieki appeared for the appellant while Mr. Obiri, Assistant Director of Public Prosecutions appeared for the State.

13. While urging the grounds of appeal, counsel for the appellant submitted on identification stating that identification of the appellant was not free from error as he was allegedly identified by the use of moonlight by both PW1 and PW2 and that the distance from which they identified him was not indicated. Further, that none of the alleged stolen items were recovered from the appellant.

14. He contended that the circumstantial evidence relied on by the High Court was weak because it was disjointed. He specifically pointed out that the medical report relied on was as a result of a medical examination conducted 16 days after the material day and further, that the charges against the appellant were never proved because critical witnesses never testified.

15. Challenging the court's exercise of its duty he argued that the learned Judges failed to re-analyse and re-evaluate the evidence before them so as to come up with their own conclusions. He further argued that the judgment in its entirety was defective as the learned Judges failed to identify the issues for determination and reasons for their findings contrary to **section 169** of the Criminal Procedure Code and urged the Court to allow the appeal.

16. Opposing the appeal, Mr. Obiri for the respondent submitted that identification was proper as it was identification by recognition. Further, PW1 testified that the appellant was well- known to him and that they lived in the same estate hence this was not a case of mistaken identity.

17. On the issue of the medical examination counsel submitted that PW1 having been examined 16 days after the incident was not fatal to the prosecution's case as the purpose of such examination was to establish whether or not PW1 had been injured.

18. He maintained that the prosecution was able to prove its case through the evidence of the witnesses who testified beyond reasonable doubt. He ultimately urged the Court to dismiss the appeal.

19. We have considered the record, submissions by counsel and the law. By dint of ***Section 361*** of the ***Criminal Procedure Code***, our jurisdiction as the second appellate Court is restricted to matters of law only. In the discharge of our mandate, we bear in mind the cardinal principle of law that enjoins us not to interfere with the concurrent findings of fact by the two courts below. Be that as it may, we are not bound by such findings where they are not based on evidence, or are otherwise based on a misapprehension of the evidence. See ***Mwita vs. R*** **[2004] 2 KLR 60.**

20. From the grounds raised and the submissions by counsel, we identify the pertinent issues for determination as: -

a) Whether the High Court properly exercised its duty to re-evaluate and analyse the evidence presented before it, and

b) Whether the identification of the appellant was free from error.

21. On the first issue, this Court has on a number of occasions analysed the duty of the first appellate court to re-evaluate, analyse and make its own conclusions. In the case of **Irene Nduku v. Republic, (2014) eKLR**, the Court held as follows:-

> **"One common ground of appeal was that the superior court failed in its duty when it failed to re-evaluate the evidence so as to make its own findings. This, in our view, was important ground in this appeal. It is of course the duty of the first appellate court to re-evaluate the evidence and make its own conclusion. See also OKENO V. R [1972] E.A. 32.**

22. In the case of **Kiilu & Another v. Republic [2005]1 KLR 174,** this Court amplified this duty and went further to specify what the re-evaluation entails. This is what the Court stated:-

> **"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.** (Emphasis applied)
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> **2. 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."**

23. Did the High Court properly re-evaluate the evidence before it so as to make its own independent findings? We note that from the evidence of the complainant, although he said he knew *"the boys from the estate"*, he said he knew them "by voice". He did not specify how long he had known the boys, or what they said at the scene to make him recognise them by voice. The witness further stated "the *boys who rescued me later told me that they had met Fred running and they shone a light on him and he said he was chasing a thief."* There was no evidence adduced to establish that the appellant's name was Fred. The Fred who is mentioned as having been spotted running away from the scene is said to have been arrested but was released after he paid the complainant's hospital bill.

24. On cross examination, the complainant conceded that his daughter Lilian was the appellant's girlfriend. This would therefore give credence to the appellant's defence. The appellant also stated in his defence that the complainant had visited him in Kamiti prison, which the complainant admitted. The purpose of the visit was not clearly explained by the complainant. These issues were raised before the first the appellate court but the learned Judges said they should have been dealt with at the trial court.

25. As we have stated above, the first appellate court has a sacrosanct duty to re-evaluate afresh the evidence tendered before the trial court and arrive at its independent conclusion. The learned Judges should not have dismissively stated that those issues should have been dealt with by the trial court. They should have dealt with them. In this case, the court abdicated that duty and failed to do a proper re-evaluation of the evidence, including the appellant's statement of defence. Failure to re-evaluate evidence in our view was fatal and grossly prejudicial to the appellant. Failure to re-evaluate evidence led on the issue of identification, crucial as it was, was dealt with in a very perfunctory manner.

26. On the issue of identification by the witnesses, this Court has time and again considered identification evidence in respect of accused persons. In the case of **Wamunga v. Republic (1989) KLR 424** this court stated as follows;-

> **"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 more identifications 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."**

This position was reiterated by this court in its recent decision in **Robert Kariuki Wachiuri & Another v. Republic, (2016) eKLR** in the following words:-

> **"Some of the factors that a court of law should bear in mind when determining whether circumstances prevailing at the time and place of the incident favoured positive identification or otherwise of the assailant were set out by the court in the Maitanyi v Republic [1986] KLR 198. A court of law ought to be conscious of the fact that many witnesses do not properly identify another person even in day light and it is therefore prudent for such a court to ascertain the nature of the light available, the type of light, its size and its position in relation to the suspect when dealing with the issue of identification."**

27. In cases of identification by voice as was the case here, the Court has set the parameters as can be seen from the case of **Julius Waititu Muthuita v. Republic (2006) eKLR**, where the Court held as follows:-

> **"From the foregoing, the learned trial Judge accepted the evidence of recognition by voice. The appellant was an uncle to the witness (PW 1) who testified that she knew her uncle's voice. In Mbelle v. R [1984] KLR p. 626 this Court laid down guidelines as regards the evidence of voice recognition as follows: -**
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> **In dealing with evidence of identification by voice the court should ensure that –**
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> **(a) The voice was that of the Accused.**

(b) The witness was familiar with the voice and recognized it.

(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."

28. It is clear from the above analysis that identification of the appellant was not to the required standard and had the High Court done proper re-evaluation of the evidence before it, it could have arrived at a different conclusion. Before we conclude, it is important to note that although the complainant claimed to have identified the appellant, he did not give his name to the police and the appellant was arrested in respect of a totally different matter.

29. In view of the foregoing, we come to the conclusion that the first appellate Court failed to properly re-evaluate the evidence adduced during trial, thus misapprehended the evidence and arrived at the wrong conclusion. Had proper re-evaluation of the evidence been done, the first appellate court would have arrived at the conclusion that the appellant was entitled to the benefit of doubt and acquitted him accordingly. It was not safe to convict the appellant on the strength of the evidence on record. Ultimately therefore, this appeal succeeds. We allow it and set aside both conviction and sentence and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 6th day of March, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR